

December 11, 2018

Senator Chuck Grassley, Chairman
Senator Dianne Feinstein, Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The Electronic Privacy Information Center (EPIC) writes to you with regard to your hearing, “Oversight of U.S. Customs and Border Protection.”¹ EPIC has long sought transparency and accountability from CBP and welcomes the committee’s attention to this critical issue. Founded in 1994, EPIC is focused on the protection of individual privacy rights, and we are particularly interested in the privacy problems associated with surveillance.² EPIC has consistently urged this Committee to ensure that law enforcement programs protect U.S. citizens’ privacy.³ And last week, EPIC submitted comments to DHS’ Data Privacy and Integrity Advisory Committee urging CBP to halt implementation of the biometric border program.⁴

Without legal authority or the opportunity for public comment, CBP has deployed facial recognition technology in U.S. airports, sea ports, and land ports of entry and collected biometric identifiers from American travelers.⁵ Further, the agency intends to “deploy biometric capabilities across all modes of travel — air, sea, and land — by fiscal year 2025.”⁶

This vast biometric collection program exposes Americans and other travelers to substantial privacy risks. The problem begins when the State Department, without legal authority, transfers facial images collected for passport applications to the CBP. This largely immutable biometric information is then used to conduct government surveillance unrelated to the purpose for which the photos were collected. The legislation this program purports to implement does not authorize this

¹ U.S. Senate Comm. on the Judiciary, *Oversight of U.S. Customs and Border Protection* (Dec. 11, 2018), <https://www.judiciary.senate.gov/meetings/oversight-of-us-customs-and-border-protection>.

² EPIC, *EPIC Domestic Surveillance Project*, <https://epic.org/privacy/surveillance/>.

³ See e.g. Statement of EPIC, *The FISA Amendments Act: Reauthorizing America’s Vital National Security Authority and Protecting Privacy and Civil Liberties*, Hearing before the Senate Committee on the Judiciary, U.S. Senate, June 23, 2017, <https://www.judiciary.senate.gov/meetings/oversight-of-us-customs-and-border-protection>; see also EPIC, *EPIC v. CBP (Biometric Entry/Exit Program)*, <https://www.epic.org/foia/dhs/cbp/biometric-entry-exit/>.

⁴ Comments of EPIC, *DHS Data Privacy and Integrity Advisory Committee; Committee Management; Notice of Federal Advisory Committee Meeting*, Docket No. DHS–2018–0066 (Dec. 6, 2018), <https://epic.org/apa/comments/EPIC-Comments-DHS-DPIAC-Face-Rec-Report-Dec-2018.pdf>.

⁵ U.S. Customs and Border Protection, *Biometrics*, <https://www.cbp.gov/travel/biometrics> (last visited Dec. 7, 2018).

⁶ Office of Inspector General, *Progress Made but CPB Faces Challenges Implementing a Biometric Capability to Track Air Passenger Departures Nationwide 2* (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-09/OIG-18-80-Sep18.pdf>.

activity,⁷ and there is currently no federal legislation to regulate the use of facial recognition or other biometric surveillance techniques in these circumstances.

Contrary to the agency's original representations, there is no practical way to opt-out of the CBP facial recognition program. EPIC knows for a fact that the original procedures described at the CBP website regarding alternative screening, "manual processing," is in fact not the agency's practice.⁸ Remarkably, the agency has repeatedly modified the FAQ for alternative procedures for U.S. citizens who do not wish to have a photo taken and no longer provides for a simple check of travel documents as an alternative. Today, the FAQ reads:

Are U.S. Citizens required to provide biometrics for the entry-exit system?

U.S. Citizens who are entering or exiting the country are generally required to be in possession of a valid U.S. passport. At this time, however, CBP does not require U.S. Citizens to have their photos captured when entering or exiting the country. U.S. Citizens who do not wish to participate in this biometric collection should notify a CBP Officer or an airline or airport representative in order to seek an alternative means of verifying their identity and documents. CBP discards all photos of U.S. Citizens, once their identities have been verified.⁹

But on March 6, 2018, the same FAQ stated:

Individuals seeking to travel internationally are subject to the laws and rules enforced by CBP and are subject to inspection. If a U.S. citizen, however, requests not to participate in the Traveler Verification System, specified agreements between CBP and the partner airline or airport authority will guide alternate procedures. For some participating airlines, a traveler may request not to participate in the TVS and, instead, present credentials to airline personnel before proceeding through the departure gate. In other cases of an opt-out, an available CBP Officer may use manual processing to verify the individual's identity.¹⁰

And on August 24, 2018 it read:

Individuals seeking to travel internationally are subject to the laws and rules enforced by CBP and are subject to inspection. However, if a U.S. Citizen does not wish to participate in the biometric entry or exit process, he or she must

⁷ Letter from Sens. Edward J. Markey and Mike Lee to Sec'y Kirstjen Nielsen, Dep't of Homeland Sec., 1-2 (Dec. 21, 2017), *available at*

<https://www.markey.senate.gov/imo/media/doc/DHS%20Biometrics%20Markey%20Lee%20.pdf>.

⁸ U.S. Customs and Border Protection, *Biometric Exit Frequently Asked Questions (FAQs)* (Sept. 7, 2018), <https://web.archive.org/web/20180907171042/https://www.cbp.gov/travel/biometrics/biometric-exit-faqs>.

⁹ U.S. Customs and Border Protection, *Biometric Exit Frequently Asked Questions (FAQs)* (Dec. 3, 2018), <https://www.cbp.gov/travel/biometrics/biometric-exit-faqs>.

¹⁰ U.S. Customs and Border Protection, *Biometric Exit Frequently Asked Questions (FAQs)* (Mar. 6, 2018), <https://web.archive.org/web/20180306164048/https://www.cbp.gov/travel/biometrics/biometric-exit-faqs>.

request to be processed using alternate procedures, such as presenting travel credentials to an available CBP Officer or authorized airline personnel.¹¹

Without legal authority or the opportunity for public comment, CBP is making up the rules as it rolls out the program.

And the underlying problem remains: personal data is automatically transferred from the State department to another agency without legal authority. By the time the passenger attempts to assert the right to “opt out,” the passenger’s photo has already been pulled from the State Department database into a gallery to be used by DHS for facial recognition.

Transparency about the entry/exit program is essential, particularly because the accuracy is questionable. In December 2017, a Freedom of Information Act lawsuit pursued by EPIC produced the public release of a CBP report on iris imaging and facial recognition scans for border control. The “Southwest Border Pedestrian Field Test” revealed that the CBP does not perform operational matching at a “satisfactory” level.¹² In a related FOIA lawsuit, EPIC obtained documents from the FBI concerning the Next Generation Identification database which contains facial scans, fingerprints, and other biometrics of millions of Americans.¹³ The documents obtained by EPIC revealed that biometric identification is often inaccurate.¹⁴ DHS itself acknowledges that facial recognition is inaccurate as implemented.¹⁵ Inaccurate biometric matches affect all travelers, and particularly U.S. citizens. According to the Inspector General’s report, “U.S. citizens accounted for the lowest biometric confirmation rate.”¹⁶

The involvement of private companies raises additional concerns. CBP has enlisted airlines such as JetBlue and Delta to implement face recognition technology in U.S. airports.¹⁷ Just last week, Delta opened the first “fully biometric terminal” in Atlanta.¹⁸ It is unclear whether use by private firms of biometric identifiers obtained from the State Dept. for passport applications will lead to other uses unrelated to traveler identification

Today airlines are promoting facial recognition as a convenience, but it’s clearly part of a larger effort by the government to expand biometric surveillance program of Americans. Just last

¹¹ U.S. Customs and Border Protection, *Biometric Exit Frequently Asked Questions (FAQs)* (Aug. 24, 2018), <https://web.archive.org/web/20180824202202/https://www.cbp.gov/travel/biometrics/biometric-exit-faqs>.

¹² U.S. Customs and Border Protection, *Southern Border Pedestrian Field Test Summary Report*, <https://epic.org/foia/dhs/cbp/biometric-entry-exit/Southern-Border-Pedestrian-Field-Test-Report.pdf> (December 2016).

¹³ *EPIC v. FBI – Next Generation Identification*, EPIC, <https://epic.org/foia/fbi/ngi/>.

¹⁴ DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, NEXT GENERATION IDENTIFICATION (NGI) SYSTEM REQUIREMENTS DOCUMENT VERSION 4.4 at 244 (Oct. 1, 2010), <https://epic.org/foia/fbi/ngi/NGI-System-Requirements.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Asma Khalid, *Facial Recognition May Boost Airport Security But Raises Privacy Worries*, NPR, June 26, 2017, <https://www.npr.org/sections/alltechconsidered/2017/06/26/534131967/facial-recognition-may-boost-airport-security-but-raises-privacy-worries>.

¹⁸ Thom Patterson, *US airport opens first fully biometric terminal*, CNN, Dec. 3, 2018, <http://www.cnn.com/travel/article/atlanta-airport-first-us-biometric-terminal-facial-recognition/>.

month we learned that the Secret Service is exploring the use of facial recognition at the White House.¹⁹

The committee should insist that CBP remove all facial-recognition technology from public use until proper regulatory safeguards to protect against the misuse of facial recognition and other biometric surveillance techniques are in place.

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

/s/ Jeramie D. Scott

Jeramie D. Scott
EPIC National Security Counsel

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¹⁹ DHS/USSS/PIA-024, Privacy Impact Assessment for the Facial Recognition Pilot (Nov. 26, 2018), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uss-frm-november2018.pdf>.