March 10, 2021

Via Email
The Honorable Alejandro Mayorkas
Secretary of Homeland Security
Department of Homeland Security
3801 Nebraska Ave., NW
Washington, DC 20016

Re: 85 Fed. Reg. 74162, Collection of Biometric Data from Aliens Upon Entry to and Departure from the United States

Dear Secretary Mayorkas:

The undersigned civil rights, civil liberties, immigrants' rights, technology, and privacy organizations write to urge the Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) to immediately rescind the above-referenced Notice of Proposed Rulemaking (NPRM), published on November 19, 2020, and to suspend the use of facial recognition technology on travelers.

During the public comment period on the NPRM, numerous civil society organizations submitted comments in opposition to the proposed regulations, which would massively expand the government's use of facial recognition technology and endanger the rights of tens of millions of immigrants and visitors to the United States.[1]

On February 9, 2021, the Biden-Harris administration announced that CBP would reopen the period for public comments on these controversial proposed regulations. Commentators have perceived this reopening of the comment period as a sign that DHS and CBP intend to proceed with the deployment of mandatory face recognition of non-U.S. citizens at U.S. airports and the border.[2]

For the reasons below, rather than allow the proposed regulations to advance to the next stage of the rulemaking process, DHS and CBP should immediately withdraw the NPRM and suspend their use of this dangerous technology.

---

[1] *See, e.g.*, Comment of Civil Society Organizations in Opposition to 85 Fed. Reg. 74162, Collection of Biometric Data from Aliens Upon Entry to and Departure from the United States (Dec. 21, 2020), *available at* https://www.aclu.org/comment-civil-society-organizations-opposition-cbp-nprm-expanding-biometric-data-collection-us.

[2] Shaun Courtney, *Biden's DHS Reopens Trump-Era Face Surveillance Rule for Comment*, Bloomberg Government (Feb. 9, 2021), https://about.bgov.com/news/bidens-dhs-reopens-trump-era-face-surveillance-rule-for-comment.

Face Surveillance Poses Grave Risks to Privacy by Enabling Systematic and Covert Tracking of Individuals

Under the text of the proposed regulations, *all* non-U.S. citizens—including children—may be required to be photographed upon both entry *and* departure from the United States.[3] U.S. citizens who do not opt out may be subject to being photographed as well. While this would represent a significant expansion of CBP's authority, the agency's immediate plans, as described in the NPRM, go even farther than the text of the proposed regulations would suggest.[4]

In practice, CBP will not merely photograph travelers. Instead, according to the NPRM, CBP intends to collect "faceprints"—precise measurements of the unique facial geometry of each photographed traveler.[5] These faceprints are mathematical representations of individuals' faces. CBP will collect and store non-U.S. citizens' faceprints in a DHS database for up to 75 years, where they may be used not only by DHS, but by foreign governments and federal, state, and local law enforcement to identify individuals for a variety of purposes, far removed from the reasons for CBP's initial collection. CBP also intends to apply a face-matching algorithm to travelers, which will compare a traveler's faceprint to a gallery of other images of that individual in the government's possession.

The face surveillance envisioned by the NPRM would pose grave risks to privacy and civil liberties. Facial geometry is biologically unique to each person and it is largely immutable. Unlike other forms of identity verification, faceprints can be collected covertly, at a distance, and without consent. And because people's faces are typically exposed, it is virtually impossible to insulate ourselves from unjustified surveillance and resulting harms. Once the government acquires a person's faceprint and associates that information with a name and other identifying details, it creates a risk of a unique and unprecedented form of persistent surveillance, one that allows the government to identify and track people without their knowledge. CBP's collection of faceprints could enable systematic government surveillance—not only by agencies in the United States, but also by foreign governments. It could expose where people go, whom they associate with, and even what they believe, based on the religious services, protests, or meetings they attend.

The Harms of Face Surveillance Under the Proposed Regulations Will Disproportionately Impact Immigrants and Communities of Color

Critically, the harms of this surveillance technology will disproportionately affect immigrants and communities of color. Several recent studies have shown that facial recognition technology results in a higher rate of false identifications for people of color. For example, in December 2019, the National Institute of Standards and Technology

[3] The sole exception is for non-citizen U.S. nationals, *i.e.*, individuals born in American Samoa or on Swains Island to parents who are not citizens of the United States. *See* 85 Fed. Reg. 74178.

[4] 85 Fed. Reg. 74163.

[5] *Id.*

(NIST) released results from a comprehensive study of facial recognition systems, concluding that Black and Asian people were up to 100 times more likely to be misidentified than white men, depending on the algorithm and other factors.[6] In the border context, face-matching errors could lead to lengthy interrogations, missed flights, and even wrongful deportations. And regardless of the accuracy of CBP's face-matching technology, DHS's retention and sharing of travelers' faceprints for up to 75 years will facilitate unjustified law enforcement scrutiny of immigrant and other communities subject to the proposed regulations.

Our concerns are heightened in light of CBP's record of systemic abuse, including the role it played in the family separation crisis, its well-documented mistreatment of the people it detains, its use of excessive force, and its ethnic and religious profiling. This history raises concerns that faulty facial recognition technology and face-matching errors could lead CBP agents to detain elderly and other vulnerable individuals at airports for hours without access to a lawyer, to subject people to extensive questioning about their political opinions in a discriminatory manner, and to conduct searches of individuals' devices in violation of the Fourth Amendment.

The NPRM Is Premature

The NPRM is also premature. Under an agreement with CBP, NIST is currently evaluating the accuracy of an algorithm similar to the one that CBP has been using in its face surveillance pilot programs. NIST's study will analyze the impacts of gender, ethnicity, and age on matching accuracy. Although NIST had anticipated that its work would be complete in the spring of 2020, its results have been delayed by the coronavirus pandemic. The proposed regulations should not be rushed forward before NIST completes its assessment of the potential discriminatory impact of CBP's face-matching algorithm.

The Proposed Regulations Exceed DHS's Authority Because Congress Never Intended to Authorize DHS to Collect Faceprints as Part of an Entry-Exit System

CBP officials have explained that one of the primary purposes behind the deployment of facial recognition technology is to comply with a congressional mandate to create a biometric entry-exit system.[7] However, Congress never intended to authorize DHS to collect *faceprints*, let alone mandate it. Although Congress has required DHS to establish an entry-exit system that uses "biometric" data, it has never defined "biometric" in this context to encompass the collection of faceprints. In fact, as part of the 2001 Patriot Act, Congress equated "biometric identifiers" with fingerprints. 115 Stat. 272, 395. Notably, the primary statute at issue, 8 U.S.C. § 1365b, was passed in 2004—more

[6] NIST, *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software* (Dec. 19, 2019), https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software; *see also* GAO, *Facial Recognition: CBP and TSA Are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues* 76 (Sept. 2020) ("GAO Report"), https://www.gao.gov/assets/710/709107.pdf.

[7] GAO Report 56.

than a decade before facial recognition technology was ready for CBP testing in the airport environment.[8] By requiring, in 2004, the creation of an entry-exit system that uses "biometric" data, Congress plainly did not intend to authorize DHS's collection of any and all biometrics in perpetuity, in known and unknown forms. Indeed, statutory reporting requirements that Congress established in 2018 make clear that CBP's deployment of face recognition would constitute an "expansion" of the biometrics collection authorized in 2004.[9]

Unlike the collection of fingerprints, the collection of faceprints grants the government extraordinary and unprecedented powers to conduct persistent, secret surveillance of public movements. For this reason alone, DHS and CBP should not deploy this technology without express authorization from Congress.

The Proposed Regulations' Grant of Authority to Collect Any Other Biometrics Raises Serious Privacy and Civil Liberties Concerns

DHS proposes to amend 8 C.F.R. §§ 215.8(a) and 235.1(f) to grant it open-ended authority to collect *any other form* of biometrics from foreign nationals entering and exiting the United States.[10] Currently, DHS's regulations provide that any foreign national may be required "to provide fingerprints, photograph(s) or other *specified* biometric identifiers" upon arrival into or departure from the United States.[11] Through the proposed regulations, DHS seeks to strike the reference to "specified" biometric identifiers, in an effort to broaden its authorization to collect *any* biometric identifiers from foreign nationals—potentially even encompassing DNA.

Given the profound privacy and civil liberties concerns associated with biometric collection, particularly collection by DHS,[12] any future form of biometric collection at the border must be specifically authorized by Congress and subject to the notice-and-comment rulemaking process.

Conclusion

DHS and CBP's proposed use of face surveillance at airports, sea ports, and the land border would put the United States on an extraordinarily dangerous path toward the normalization of this surveillance, and raises profound civil liberties concerns. Because the deployment of this society-changing technology is unnecessary and unjustified, we call on DHS and CBP to immediately withdraw the NPRM.

---

[8] *See* 85 Fed. Reg. 74164 (citing 8 U.S.C. § 1365b).

[9] 6 U.S.C. § 1118; *see also* Comment of Civil Society Organizations, *supra* note 1, at 4–6.

[10] 85 Fed. Reg. 74179.

[11] 8 C.F.R. §§ 215.8(a) & 235.1(f) (emphasis added).

[12] Comment of the ACLU, ACLU of Ill., ACLU of Mass., ACLU of San Diego & Imperial Counties, and ACLU of Wash. in Opposition to 85 Fed. Reg. 56338 (Oct. 13, 2020), https://www.aclu.org/aclu-biometric-collection-nprm-comment.

Thank you for your consideration of this matter. If you have any questions, please contact Ashley Gorski, ACLU Senior Staff Attorney, at agorski@aclu.org.

Access Now

Advocacy for Principled Action in Government

American Civil Liberties Union

American Civil Liberties Union of Massachusetts

American Civil Liberties Union of Washington

American Library Association

Asian Americans Advancing Justice | AAJC

Center for Democracy & Technology

Coalition for Humane Immigrant Rights (CHIRLA)

Council on American-Islamic Relations (CAIR)

Defending Rights & Dissent

Electronic Frontier Foundation

Electronic Privacy Information Center (EPIC)

Fight for the Future

The Freedom to Read Foundation

Immigrant Defense Project

Just Futures Law

National Immigrant Justice Center

National Immigration Law Center

New America's Open Technology Institute

Open MIC (Open Media and Information Companies Initiative)

Project On Government Oversight

Restore The Fourth