

April 26, 2017

The Honorable Ron DeSantis, Chairman  
The Honorable Stephen Lynch, Ranking Member  
House Committee on Oversight and Government Reform  
Subcommittee on National Security  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman DeSantis and Ranking Member Lynch:

We write to you regarding the hearing “The Border Wall: Strengthening Our National Security.”<sup>1</sup> EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC is focused on the protection of individual privacy rights, and we are particularly interested in the privacy problems associated with surveillance.<sup>2</sup>

We understand that enhanced surveillance techniques may be part of the discussion over border security.<sup>3</sup> EPIC writes to warn that enhanced surveillance at the border will almost certainly sweep up the personal data of U.S. citizens. Before there is any new deployment of surveillance at the U.S. border, an assessment of the privacy implications should be conducted. Additionally, deployment of surveillance technology should be accompanied by new policy and procedures and independent oversight to protect citizens' rights. And any law enforcement agency that uses surveillance tools must be prepared to comply with all current laws, including any open government laws. The privacy assessments, policies and procedures, and oversight mechanisms should all be made public.

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<sup>1</sup> *The Border Wall: Strengthening Our National Security*, 115th Cong. (2017), H. Comm. on Oversight and Gov't Reform, Subcomm. on National Security, <https://oversight.house.gov/hearing/border-wall-strengthening-national-security/> (April 27, 2017).

<sup>2</sup> EPIC, *EPIC Domestic Surveillance Project*, <https://epic.org/privacy/surveillance/>, Statement of EPIC, “Unmanned Aircraft Systems: Innovation, Successes, and Challenges,” Hearing Before S. Comm. on Commerce, Science, and Transportation, United States Senate, Mar. 13, 2017, <https://epic.org/testimony/congress/EPIC-SCOM-Drones-Mar2017.pdf>; *The Future of Drones in America: Law Enforcement and Privacy Considerations: Hearing Before the S. Judiciary Comm.*, 113th Cong. (2013) (statement of Amie Stepanovich, EPIC Director of the Domestic Surveillance Project), available at <https://epic.org/privacy/testimony/EPIC-Drone-Testimony-3-13-Stepanovich.pdf>; Comments of EPIC to DHS, Docket No. DHS-2007-0076 CCTV: Developing Privacy Best Practices (2008), available at [https://epic.org/privacy/surveillance/epic\\_cctv\\_011508.pdf](https://epic.org/privacy/surveillance/epic_cctv_011508.pdf).

<sup>3</sup> Samantha Schmidt, *Border wall with Mexico won't be built 'from sea to shining sea,' DHS secretary says*, Washington Post, April 6, 2017, <https://www.washingtonpost.com/news/morning-mix/wp/2017/04/06/border-wall-with-mexico-wont-be-built-from-sea-to-shining-sea-dhs-secretary-says/>.

## Surveillance at the Border

Customs and Border Protection (CBP) is already using aerial drones with facial recognition technology at the border.<sup>4</sup> In 2013, records obtained by EPIC under the Freedom of Information Act showed that the CBP is operating drones in the United States capable of intercepting electronic communications.<sup>5</sup> The records obtained by EPIC also indicate that the ten Predator B drones operated by the agency have the capacity to recognize and identify a person on the ground.<sup>6</sup> The documents were provided in response to a request from EPIC for information about the Bureau's use of drones across the country. The agency has made the Predator drones available to other federal, state, and local agencies. The records obtained by EPIC raise questions about the agency's compliance with federal privacy laws and the scope of domestic surveillance.

Following the revelations about drone surveillance at the border, EPIC, joined by thirty organizations and more than a thousand individuals, petitioned CBP to suspend the domestic drone surveillance program, pending the establishment of concrete privacy regulations.<sup>7</sup> The petition stated that "the use of drones for border surveillance presents substantial privacy and civil liberties concerns for millions of Americans across the country." *Any authorization granted to CBP to conduct surveillance at the border must require compliance with federal privacy laws and regulations establishing privacy regulations for surveillance tools, including drones.*

Much of this surveillance technology could, in theory, be deployed on manned vehicles. However, drones present a unique threat to privacy. Drones are designed to maintain a constant, persistent eye on the public to a degree that former methods of surveillance were unable to achieve. The technical and economic limitations to aerial surveillance change dramatically with the advancement of drone technology. Small, unmanned drones are already inexpensive; the surveillance capabilities of drones are rapidly advancing; and cheap storage is readily available to maintain repositories of surveillance data.<sup>8</sup> Drones "represent an efficient and cost-effective alternative to helicopters and airplanes," but their use implicates significant privacy interests.<sup>9</sup> As the price of drones "continues to drop and their capabilities increase, they will become a very

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<sup>4</sup> Russel Brandom, *The US Border Patrol is trying to build face-reading drones*, The Verge, Apr. 6, 2017, <http://www.theverge.com/2017/4/6/15208820/customs-border-patrol-drone-facial-recognition-silicon-valley-dhs>; Dept. of Homeland Security, *Other Transaction Solicitation (OTS) HSHQDC-16-R-00114 Project: Small Unmanned Aircraft Systems (sUAS) Capabilities*, Jul. 15, 2016, <https://www.fbo.gov/spg/DHS/OCPO/DHS-OCPO/HSHQDC-16-R-00114/listing.html>.

<sup>5</sup> EPIC, *EPIC FOIA - US Drones Intercept Electronic Communications and Identify Human Targets*, Feb. 28, 2013, <https://epic.org/2013/02/epic-foia--us-drones-intercep.html> (record received available at <https://epic.org/privacy/drones/EPIC-2010-Performance-Specs-1.pdf>.)

<sup>6</sup> *Performance Spec for CBP UAV System*, Bureau of Customs and Border Patrol, <https://epic.org/privacy/drones/EPIC-2005-Performance-Specs-2.pdf>.

<sup>7</sup> EPIC, *Domestic Drones Petition*, [https://epic.org/drones\\_petition/](https://epic.org/drones_petition/).

<sup>8</sup> See generally EPIC, *Drones: Eyes in the Sky*, Spotlight on Surveillance (2014), <https://www.epic.org/privacy/surveillance/spotlight/1014/drones.html>.

<sup>9</sup> M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 Stan. L. Rev. Online 29, 30 (Dec. 12, 2011); See also Jeffrey Rosen, *Symposium Keynote Address*, 65 Rutgers L. Rev. 965, 966 (2013) ("[A]s police departments increasingly begin to use drone technologies to track individual suspects 24/7, or to put areas of the country under permanent surveillance, this possibility of 24/7 tracking will become increasingly real.").

powerful surveillance tool.”<sup>10</sup> *The use of drones in border security will place U.S. citizens living on the border under ceaseless surveillance by the government.*

The Supreme Court has not yet considered the limits of drone surveillance under the Fourth Amendment, though the Court held twenty years ago that law enforcement may conduct manned aerial surveillance operations from as low as 400 feet without a warrant.<sup>11</sup> No federal statute currently provides adequate safeguards to protect privacy against increased drone use in the United States. However, some border states do limit warrantless aerial surveillance. In 2015, the Supreme Court of New Mexico held that the Fourth Amendment prohibits the warrantless aerial surveillance of, and interference with, a person's private property.<sup>12</sup> Accordingly, there are substantial legal and constitutional issues involved in the deployment of aerial drones by law enforcement and state and federal agencies that need to be addressed.

### **Drone Privacy Policies**

In late 2015, the Department of Homeland Security (DHS) released a set of drone privacy best practices.<sup>13</sup> The best practices reflect many of the recommendations made by EPIC in testimony to Congress, including limiting data collection, use, dissemination, and retention. The recommendations also propose a redress program so individuals can challenge inappropriate collection. But the best practices are only guidelines. Any approval of increased surveillance at the border should include a codification of those best practices.

In fact, a 2015 Presidential Memorandum on drones and privacy required that all federal agencies to establish and publish drone privacy procedures by February 2016.<sup>14</sup> Emphasizing the “privacy, civil rights, and civil liberties concerns” raised by the technology,<sup>15</sup> President Obama ordered agencies to ensure that any use of drones by the federal government in U.S. airspace comply with “the Constitution, Federal law, and other applicable regulations and policies.”<sup>16</sup>

However, the agencies have failed to produce reports required by the 2015 Presidential Memorandum. EPIC has submitted a FOIA request for DHS’ policies and reports required under the Presidential Memorandum, but has not received a response.

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<sup>10</sup> Bruce Schneier, *Surveillance And the Internet of Things*, Schneier on Security (May 21, 2013), [https://www.schneier.com/blog/archives/2013/05/the\\_eyes\\_and\\_ea.html](https://www.schneier.com/blog/archives/2013/05/the_eyes_and_ea.html).

<sup>11</sup> See *Florida v. Riley*, 488 U.S. 445 (1989) (holding that a police helicopter flying more than 400 feet above private property is not a search).

<sup>12</sup> *State v. Davis*, 360 P.3d 1161 (N.M. 2015); see Brief of Amicus Curiae EPIC, *id.*, available at <https://epic.org/amicus/drones/new-mexico/davis/State-v-Davis-Opinion.pdf>.

<sup>13</sup> *Best Practices for Protecting Privacy, Civil Rights, and Civil Liberties In Unmanned Aircraft Systems*, U.S. Dept. of Homeland Security, Dec. 18, 2015, <https://www.dhs.gov/sites/default/files/publications/UAS%20Best%20Practices.pdf>.

<sup>14</sup> President Barack Obama, *Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems* (Feb. 15, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua>.

<sup>15</sup> *Id.* at § 1(e).

<sup>16</sup> *Id.* at § 1.

## Conclusion

Most Americans oppose the expansion of warrantless surveillance.<sup>17</sup> We ask the Subcommittee to exercise great care in ensuring that in seeking political compromise on the border wall, freedoms valued by the American people are not themselves compromised.

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Subcommittee 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 Scott  
Jeramie Scott  
EPIC National Security Counsel

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<sup>17</sup> George Gao, *What Americans Think About NSA Surveillance, National Security and Privacy*, PEW RESEARCH CTR. (May 29, 2015), <http://www.pewresearch.org/fact-tank/2015/05/29/what-americans-think-about-nsa-surveillance-national-security-and-privacy/>.