

June 12, 2017

The Honorable John Carter, Chairman  
The Honorable Lucille Roybal-Allard, Ranking Member  
U.S. House Committee on Appropriations  
Subcommittee on Homeland Security  
H-305, The Capitol  
Washington, DC 20515

Dear Chairman Carter and Ranking Member Roybal-Allard:

We write to you regarding the upcoming hearing on “Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request.”<sup>1</sup> EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues and manages one of the most extensive open government litigation programs in the United States.<sup>2</sup> EPIC is focused on the protection of individual privacy rights, and we are particularly interested in the privacy problems associated with surveillance.<sup>3</sup> EPIC submits this statement to bring attention to two pressing issues facing ICE and CBP: compliance with the Freedom of Information Act (FOIA) and surveillance at the border.

## **Compliance with FOIA**

The FOIA is critical for the functioning of democratic government because it helps ensure that the public is fully informed about matters of public concern. The need for public oversight increases as government agencies propose new surveillance methods that routinely disregard the need for public accountability. EPIC has used the FOIA to enable public oversight of invasive surveillance initiatives.<sup>4</sup>

<sup>1</sup> *Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request*, 115th Cong. (2017), H. Comm. on Appropriations, Subcomm. on Homeland Security, <https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394892> (June 13, 2017).

<sup>2</sup> See *About EPIC*, EPIC.org, <https://epic.org/epic/about.html>; *EPIC FOIA Cases*, EPIC, <https://epic.org/foia/>; Marc Rotenberg *et al*, *The Open Government Clinic: Teaching the Basics of Lawyering*, 48 IND. L. REV. 149 (2014); EPIC, *Litigation Under the Federal Open Government Laws 2010* (2010).

<sup>3</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>4</sup> See *EPIC Open Government*, EPIC, [https://www.epic.org/open\\_gov/](https://www.epic.org/open_gov/).

Last year, EPIC obtained hundreds of documents from Customs and Border Protection about a controversial datamining program used to build profiles on international travelers, including U.S. Citizens.<sup>5</sup> The Analytical Framework for Intelligence" program assigns secret "risk assessments" to travelers using personally identifiable information from a variety of sources, including government databases, commercial data brokers, and other Internet sources. The determinations by a federal agency are without accountability and entirely contrary to the federal Privacy Act. The documents, obtained by EPIC, also revealed Palantir's substantial role in the CBP project.<sup>6</sup>

More recently, a coalition of open government organizations, including EPIC, wrote to Secretary Kelly urging DHS to comply with the Freedom Information Act, and disclose full information on immigration enforcement cooperation between federal and non-federal law enforcement agencies. ICE has become more secretive, specifically in response to FOIA requests for information on immigration detainees.<sup>7</sup> In April, ICE announced that it was suspending the publication of its weekly "Declined Detainer Outcome Reports," which had in the past allowed the public to examine the number of people detained or removed through several lenses, such as type of criminal conviction, over a long period of time.<sup>8</sup>

Complete access immigration enforcement data is a matter of high public interest. Acting Director Homan should be asked:

- **When will ICE resume publication of the weekly "Declined Detainer Outcome Reports?"**
- **Is ICE complying with the FOIA when it receives requests for immigration data?**

### **Surveillance at the Border**

EPIC understands that enhanced surveillance techniques may be part of the discussion over border security.<sup>9</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

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<sup>5</sup> *EPIC v. CBP* (Analytical Framework for Intelligence), EPIC, <https://epic.org/foia/dhs/cbp/afi/>.

<sup>6</sup> Spencer Woodman, *Documents suggest Palantir could help power Trump's 'extreme vetting' of immigrants*, The Verge (Dec. 21, 2016), <http://www.theverge.com/2016/12/21/14012534/palantir-peter-thiel-trump-immigrant-extreme-vetting>.

<sup>7</sup> *ICE Refuses To Release More Comprehensive Detainer Data*, Transactional Records Access Clearinghouse (TRAC) (Mar. 20, 2017), <http://trac.syr.edu/whatsnew/email.170320.html>.

<sup>8</sup> Ron Nixon, *Trump Administration Halts Reports on Immigration Cooperation*, N.Y. Times, (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/us/politics/trump-administration-immigration.html>.

<sup>9</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/>.

agency that uses surveillance tools should 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.

Customs and Border Protection (CBP) is already deploying aerial drones with facial recognition technology at the border.<sup>10</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>11</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>12</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>13</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 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>14</sup> Drones "represent an efficient and cost-effective alternative to helicopters and airplanes," but their use implicates significant privacy interests.<sup>15</sup>

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<sup>10</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>11</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>12</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>13</sup> EPIC, *Domestic Drones Petition*, [https://epic.org/drones\\_petition/](https://epic.org/drones_petition/).

<sup>14</sup> See generally EPIC, *Drones: Eyes in the Sky*, Spotlight on Surveillance (2014), <https://www.epic.org/privacy/surveillance/spotlight/1014/drones.html>.

<sup>15</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

As the price of drones “continues to drop and their capabilities increase, they will become a very powerful surveillance tool.”<sup>16</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>17</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>18</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.

A 2015 Presidential Memorandum on drones and privacy required that all federal agencies to establish and publish drone privacy procedures by February 2016.<sup>19</sup> Emphasizing the “privacy, civil rights, and civil liberties concerns” raised by the technology,<sup>20</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>21</sup>

However, the DHS has 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 the DHS has failed to respond.

*Funding for DHS surveillance at the border should be suspended pending the completion of the policies and reports required under the Presidential Memorandum on the Domestic Use of Unmanned Aircraft Systems.* And Deputy Executive Assistant Commissioner Wagner and Acting Chief Provost should be asked:

- **How will CBP comply with state laws prohibiting warrantless aerial surveillance when deploying drones?**
- **When will CBP produce the drone privacy procedures required by the 2015 Presidential Memorandum?**

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of the country under permanent surveillance, this possibility of 24/7 tracking will become increasingly real.”).

<sup>16</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>17</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>18</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>19</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>20</sup> *Id.* at § 1(e).

<sup>21</sup> *Id.* at § 1.

EPIC is now seeking to determine why US travelers, returning to the United States, are subject to eye scanning at US airports.<sup>22</sup> The legal basis for the program remains unclear as are the safeguards for these personal biometric identifiers that the federal agency is collecting.

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

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<sup>22</sup> *EPIC FOIA: EPIC Seeks Information about Airport Eye Scans of U.S. Travelers* (Mar. 2, 2017), <https://epic.org/2017/03/epic-foia-epic-seeks-informati-1.html>.