

# United States Senate

WASHINGTON, DC 20510

December 21, 2017

The Honorable Kirstjen Nielson  
Secretary  
Department of Homeland Security  
245 Murray Lane SW  
Washington, DC 20528

Dear Secretary Nielson:

We write to express concern regarding the privacy implications of the Department of Homeland Security's (DHS) biometric exit program which is currently operating at nine airports, including Boston Logan International. Under this program, DHS requires travelers, including U.S. citizens, departing on international flights to submit to a face scan so that their faces can be compared to a DHS biometric database for identity verification purposes. DHS has expressed its intent to expand the program to have some form of biometric exit face scanning in place in 2018 at all the country's largest international airports.

We request that DHS stop the expansion of this program and provide Congress with its explicit statutory authority to use and expand a biometric exit program on U.S. citizens. If there is no specific authorization, then we request an explanation for why DHS believes it has the authority to proceed without Congressional approval. Additionally, we ask that you address a number of our privacy concerns associated with the program.

First, potential flaws with this biometric technology raise a number of questions, especially since no perfectly accurate biometric scanning program currently exists.<sup>1</sup> We ask that DHS address accuracy concerns and potential flaws before broadening the practice. In fact, DHS has stated its goal of a 96 percent true accept rate, meaning that only 4 percent of travelers, despite using their true identification, will be improperly flagged. This means that under DHS's true accept rate goal, there would still be a false denial for one in 25 travelers. Further, there is evidence that certain face scans exhibit different error rates depending on the race or gender of the person being scanned.<sup>2</sup> That means thousands of travelers could be wrongfully denied boarding each day.<sup>3</sup>

In response, we request that: (1) DHS provide data demonstrating that the biometric exit program will not unduly burden travelers; and (2) DHS demonstrate, using a sufficient sample size, that its biometric scans do not unduly burden a certain race or gender.

Second, DHS has stated that the base justification for its biometric exit program is to detect and prevent visa overstay travel fraud. We ask that DHS supply the following: (1) data regarding the

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<sup>1</sup> Georgetown Law Center on Privacy and Technology, *Not Ready for Takeoff: Face Scans at Airport Departure Gates*, 9 (2017).

<sup>2</sup> *Id.* at 12.

<sup>3</sup> *Id.* at 13.

extent of visa overstay travel fraud; and (2) justifications for how biometric exit programs could correct that problem. Specifically, we ask that DHS provide the “true reject” rate—the rate at which the biometric technology will actually reject an imposter flying under a visa overstay’s identity. This number should represent the efficacy of biometric exit at accomplishing its stated goal of improving visa overstay travel fraud.

Third, American citizens should not have to choose between travelling internationally and ensuring the security of their personal data. We ask that DHS provide the text of the tear-sheet or announcement, if any, which is read or provided to travelers prior to flights with biometric exit. If it does not already, we ask that the tear-sheet or announcement include prominent notice that U.S. citizens have the right to opt-out of biometric scanning. Additionally, after U.S. citizens or foreign nationals are scanned via biometric exit scanning, their information is currently stored by DHS for 14 days. While DHS has stated it only shares the data with the National Institute of Standards and Technology (NIST) to check for fraud, this process appears not have the proper safeguards to prevent the spread of this data to third parties or other government agencies. More importantly, we question whether DHS has the statutory authority to collect the data of U.S. citizens through a biometric exit program. We request that you provide the explicit statutory authority to collect and store the biometric data of U.S. citizens through a biometric exit program.

Fourth and most crucially, while Congress has repeatedly voted to authorize biometric entry-exit scanning of foreign nationals, it has never authorized biometric exit scanning for U.S. citizens. In fact, Congress has pointedly neglected to authorize DHS to use the program on U.S. citizens for any purpose. Additionally, while airport infrastructure may not be conducive to separate boarding procedures for U.S. citizens and non-citizens, convenience should not be placed above congressionally mandated requirements. We are concerned that the use of the program on U.S. citizens remains facially unauthorized.

We look forward to your response addressing the concerns expressed in this letter and thank you for your attention to this important measure. Please provide a written response by January 18, 2018.

Sincerely,

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Edward J. Markey  
United States Senator

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Mike Lee  
United States Senator