

United States Senate

WASHINGTON, DC 20510

May 10, 2019

Mr. Kevin K. McAleenan
Acting Secretary
U.S. Department of Homeland Security
3801 Nebraska Ave. NW
Washington, D.C. 20016

Dear Acting Secretary McAleenan,

I write to draw your attention to profound concerns about Customs and Border Protection's (CBP) Social Media Monitoring and Situational Awareness Initiative¹ and other Department of Homeland Security (DHS) programs and initiatives which may be used to collect sensitive personal information on U.S. persons. This kind of government surveillance, including of U.S. persons, is particularly troubling when it targets journalists and those providing legal services to migrants, as well as those who protest the Trump Administration's immigration policies at the US-Mexico border, such as child separation.

Recent reports indicate there are ongoing efforts to expand the collection and retention of social media data under the pretense of enhancing 'situational awareness' and without appropriate limits consistent with the Constitution. This practice creates great risk of abuse of that information, such as using it to discourage advocacy contrary to the interests of the administration. And in fact we already see reports of abuse of this information to monitor and harass individuals critical of DHS and its agencies or attorneys representing the targets of DHS enforcement actions. Furthermore, there is a risk that DHS is engaging in conduct that would violate the Privacy Act of 1974. A government agency cannot create records of U.S. citizens and lawful permanent residents' First Amendment activities when those activities are not pertinent to and within the scope of its authorized law enforcement activity.²

In early March, a local television report revealed the existence of a CBP list of 59 individuals referred to as suspected "organizers, coordinators, lawyers, instigators, and media," 40 of whom were identified as US citizens.³ There would appear to be no legitimate basis for CBP to develop

¹ DHS, Privacy Impact Assessment, Mar. 25, 2019, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp58-socialmedia-march2019.pdf>

² Privacy Act 1974, 5 U.S.C. § 552a(e)(7) ("Each agency that maintains a system of records shall...maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.").

³ Jones, Tom, et al. "Leaked Documents Show the Government Tracking Journalists." NBC 7 San Diego, NBC 7 San Diego, 8 Mar. 2019, www.nbcsandiego.com/investigations/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html.

a list of individuals, including journalists and attorneys, in order to specifically target them for enhanced inspection at ports of entry based on their perceived association with asylum-seekers.

Sadly, there is strong reason to believe that this incident is not an isolated deviation from CBP practice but a predictable consequence of a broader policy aimed at the collection and monitoring of constitutionally protected speech and activities when the government disagrees with them. In another shocking development, recently revealed documents show that the DHS Office of Intelligence and Analysis received and distributed information from a private intelligence firm that documented more than 600 demonstrations across the country protesting DHS's child separation policy.⁴ That information was then shared with intelligence fusion centers across the country making it available to federal, state and local law enforcement entities, raising additional privacy and First Amendment concerns considering the vast amount of data collected by participating entities and shared and analyzed at the fusion centers, with a high level of secrecy and little oversight. Additionally, in the summer of 2018, Immigration and Customs Enforcement created a spreadsheet labeled as "Anti-Trump Protests" with information on protests in New York City, noting the groups sponsoring them and suspected political motivations.⁵ This information—about U.S. persons protesting a cruel child separation policy which the President himself publicly reversed—appears to have been gathered in ways that are outside of accepted data collection practices.

The American people expect DHS to help keep our communities safe from violent attacks, not keep lists of journalists and attorneys to harass at legal ports of entry, or track and disseminate information about public protests of DHS child separations. Even the appearance of targeting on the basis of protected expression can have a severe chilling effect on protected speech and raises serious constitutional concerns. Surveillance that collects personally identifiable information of activists, journalists, lawyers, that results in undue questioning and warrantless searches undermines the freedoms of speech, press, and association, and violates constitutional rights.

We urge you to direct your personal attention to these matters and bring about a stop to any and all DHS activity that impedes constitutionally-protected speech, including the free press, and access to legal services.

To better understand these activities, and to inform the public, we request timely and substantive responses to the following questions by May 24, 2019:

- Is DHS monitoring journalists, lawyers, activists, and media personnel based solely or in part on their association with asylum-seekers, opposition to family separation, or participation in protests related to asylum-seekers or family separation policies?

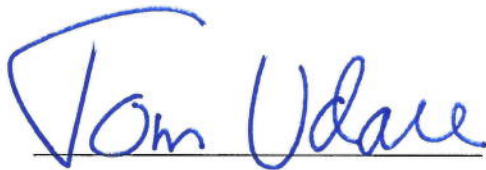
⁴ Devereaux, Ryan. "Homeland Security Used a Private Intelligence Firm to Monitor Family Separation Protests." The Intercept, 29 Apr. 2019, theintercept.com/2019/04/29/family-separation-protests-surveillance/; American Immigration Council, Family Separation FOIA Response Key Documents, https://americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_ice_production_03.08.19.pdf

⁵ Jimmy Tobias, Exclusive: ICE Has Kept Tabs on 'Anti-Trump' Protests in New York City, The Nation (Mar. 6, 2019), <https://www.thenation.com/article/ice-immigration-protest-spreadsheet-tracking/>.

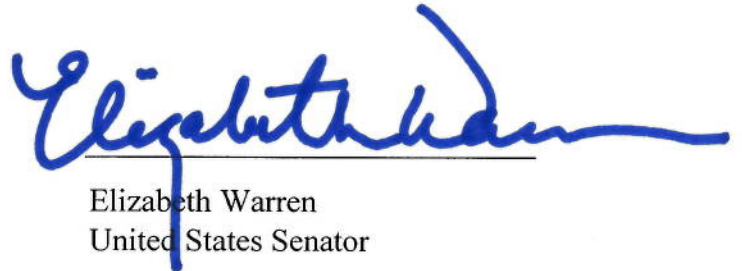
- What is DHS doing to ensure that its investigative officers are acting in accordance with privacy laws such as the Privacy Act of 1974 or other regulations and internal policies?
- Disclose investigative guidelines, handbooks, and criteria that govern DHS components' conduct as it relates to creating records of U.S. citizens and lawful permanent residents' First Amendment activities when those activities are not pertinent to and within the scope of its authorized law enforcement activity; Disclose any legal analysis of the agency's authority to engage in this conduct under the Constitution, or applicable statutes and regulations.
- What specific assurances can DHS provide to demonstrate that border screening enforcement and surveillance conduct is not politically motivated? Does DHS conduct similar monitoring and screening action against right wing or anti-immigration figures, or only of those whose actions are sympathetic to asylum seekers or protesting DHS policies like child separation?
- What is the current scope of DHS's social media collection program regarding journalists, activists, protestors, and attorneys who are not under suspicion of committing a crime? What is the process, if any, for approving the use of search terms that could result in the collection and retention of social media information under this program? What is the basis for each search term? What steps are taken to ensure that search terms are tailored to identify actual threats while limiting any burden on free speech?
- Provide detailed information on the extent CBP, or its contractors, accessed non-public information, either online or otherwise, when creating the list of 59 individuals referred to as suspected "organizers, coordinators, lawyers, instigators, and media," or family separation protestors? Did CBP, or its contractors, create or use fake personas or use other tactics in order to access information that is not available to the public?
- What policies or guidelines cover DHS's use of private intelligence contractors in situations like this and what tools does DHS itself use to monitor open source and social media information on protestors, activists, journalists and attorneys?

The Administration's surveillance practices and targeting of individuals providing legal services to migrants and journalists, as well as those who protest the Trump Administration's immigration policies at the US-Mexico border, such as child separation, are beyond alarming and demand an immediate course correction. We look forward to your timely response to these questions. Thank you for your prompt attention to this matter.

Sincerely,



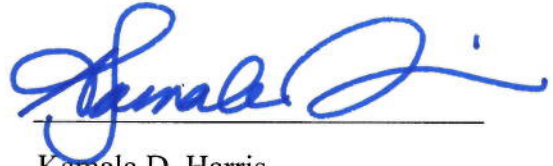
Tom Udall
United States Senator



Elizabeth Warren
United States Senator



Richard Blumenthal
United States Senator



Kamala D. Harris
United States Senator

cc:

John Kelly

Senior Official Performing the Duties of the Inspector General, DHS Office of Inspector General

Cameron Quinn

Officer for Civil Rights and Civil Liberties, DHS Office for Civil Rights and Civil Liberties

John Sanders

Acting Commissioner, U.S. Customs and Border Protection

Matthew T. Albence

Acting Director, U.S. Immigration and Customs Enforcement

Jonathan Cantor

Acting Chief Privacy Officer, DHS Privacy Office