

**Before  
U.S. Customs and Border Protection  
Washington, D.C. 20229**

In the Matter of: )  
)  
Agency Information Collection Activities: ) Agency Docket Number: 1651-0111  
Arrival and Departure Record )  
(Forms I-94 and I-94W) and )  
Electronic System for Travel Authorization )

**COMMENTS OF FREE PRESS**

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## INTRODUCTION

Free Press is a 501(c)(3) nonprofit dedicated to protecting people’s ability to connect and communicate freely. We have worked extensively on Net Neutrality, free speech, privacy, and technology issues. We write to oppose the Department of Homeland Security (DHS) proposal to add an optional question to the Electronic System for Travel Authorization (ESTA) and Form I-94W. The proposed addition to the ESTA suggests that applicants “enter information associated with your online presence – provider/platform – social media identifier.”<sup>1</sup>

The proposal is not, in the words of the Notice seeking comment, “necessary for the proper performance of the functions of” the U.S. Customs and Border Protection (CBP); nor does the information that might be collected seem to have any “practical utility”;<sup>2</sup> and it is entirely speculative and unproven that it would “enhance the existing investigative process and provide DHS greater clarity and visibility of possible nefarious activity and connections.”<sup>3</sup> Implementing the proposal would instead chill expressive activity and violate individual’s privacy without any discernible offsetting benefits.

That filling out the section of the form may be “optional” does not cure it of these defects. The border is a heavily policed and coercive environment. It is common sense that if a question is asked at the border, it is more than likely to be answered. For travelers there is no way to know if opting not to respond is consequence-free, or if indeed there are ramifications to know what those consequences may ultimately be.

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<sup>1</sup> Notice And Request For Comments; Revision Of An Existing Collection Of Information, U.S. Customs and Border Protection, 81 FR 40892 (June 23, 2016), available at <https://www.federalregister.gov/articles/2016/06/23/2016-14848/agency-information-collection-activities-arrival-and-departure-record-forms-i-94-and-i-94w-and>.

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

<sup>3</sup> *Id.* at 40893.

No would-be wrongdoers are likely to hand over their social media identifier information detailing their plots to U.S. government officers, whether that disclosure is mandatory or not. Instead, asking for those identifiers chills the speech of all those that seek to come to the United States, and also subjects the protected speech of those visitors' friends, family, and colleagues in the United States to disproportionate scrutiny too, by not only DHS but the broader U.S. intelligence community as well.

The proposal is fatally flawed. The proposed question is broad, ambiguous, and lacking in clear scope. It also suppresses lawful and desirable speech, and invades privacy. For these reasons we urge DHS not to adopt the proposal.

#### **I. THE DHS PROPOSAL IS AMBIGUOUS AND LACKS CLEAR SCOPE.**

The proposal fails to articulate what qualifies as a “social media” account, fails to explain how gathering that information will further the proposal’s stated purpose, and does not articulate how or by whom the accounts will be analyzed.

##### **A. “Social Media” is a term so broad as to be meaningless.**

The term “social media” is extraordinarily broad and the regulation provides no guidance as to its meaning. As commonly understood and defined by Merriam-Webster “social media” means “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).”<sup>4</sup> This definition encompasses a huge portion of online communications and shows the utter futility of this

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<sup>4</sup> “Social Media,” *Merriam-Webster Dictionary*, <http://www.merriam-webster.com/dictionary/social%20media> (last visited July 7, 2016).

proposal. DHS might specify in advance which social media platforms it intends to monitor (though it should not monitor any in this fashion, for the reasons set forth below); but what it has done here is even more untenable. It asks an open-ended question that would be impossible for anyone to answer comprehensively in enumerating the entirety of the “information associated with [their] online presence,” while allowing those few applicants who might wish to hide such information the ability to pick and choose among the most innocuous and anodyne of their social media accounts.

**II. THE PROPOSAL PROVIDES NO GUIDANCE ON HOW INFORMATION GAINED FROM “SOCIAL MEDIA” PROFILES WILL FURTHER THE INDICATED PURPOSE, OR HOW IT COULD BE OBJECTIVELY ANALYZED.**

DHS fails to provide any information on how acquiring social media identifiers will further its stated purpose, or any indication that it has any objective mechanisms by which to analyze those accounts. DHS’s discretion in establishing such rules and creating any such vetting scheme is not unlimited. Reviewing courts may reject any such agency “action, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion.”<sup>5</sup> Agency findings must be grounded in the record and reasonable.

In this case, there is no stated rationale for the proposal. There is merely the conclusory statement that it would enhance investigative processes, based on the circular argument that the collection would collect more data for analysts to investigate. Far from providing what the Notice euphemistically calls “greater clarity” for investigators, the collection of such voluminous but typically innocuous data – with no stated method for objectively analyzing it – would just cloud the picture.

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<sup>5</sup> 5 U.S.C. § 706(2)(A).

DHS has also opened the door to the use of automated scanning techniques to examine this database.<sup>6</sup> The use of algorithms does not cure the lack of objective rationales or mechanisms with this proposal. Contextualizing speech is an extraordinarily difficult task for humans, let alone computers. Experts at DHS have recognized that “algorithms have a poor ability to discern sarcasm or parody.”<sup>7</sup> Other studies have shown that algorithms merely perpetuate the biases of their programmers.<sup>8</sup>

The Department has not articulated any standard by which speech on social media would be judged. It is inevitable that this proposal would be applied in a discriminatory and arbitrary fashion with disproportionate scrutiny applied to Arab and Muslim visitors and their U.S. contacts.<sup>9</sup>

### **III. DEMANDING ACCESS TO SOCIAL MEDIA IDENTIFIERS WILL SUPPRESS SPEECH AND VIOLATE PRIVACY.**

#### **A. Speech**

Though immigrants and visitors at the border are not under the protection of the First Amendment,<sup>10</sup> it is a policy of the United States to spread respect for the freedom of

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<sup>6</sup> Notice at 40892. The Notice raises the question whether “automated collection techniques” or “other forms of information technology” should be used to analyze social media accounts.

<sup>7</sup> Ron Nixon, *U.S. to Further Scour Social Media Use of Visa and Asylum Seekers* (Feb. 23, 2016), <http://www.nytimes.com/2016/02/24/us/politics/homeland-security-social-media-refugees.html>.

<sup>8</sup> Nanette Byrnes, *Why We Should Expect Algorithms to Be Biased*, MIT Technology Review (June 24, 2016), available at <https://www.technologyreview.com/s/601775/why-we-should-expect-algorithms-to-be-biased/>.

<sup>9</sup> Coalition Letter Opposing DHS Social Media Collection Proposal, Center for Democracy and Technology (August 22, 2016), available at <https://cdt.org/insight/coalition-letter-opposing-dhs-social-media-collection-proposal/>

<sup>10</sup> See, *Kerry v. Din*, 576 U.S. \_\_\_, (2015) (Kennedy, J., concurring).

expression<sup>11</sup> and to let individuals exercise that right on the internet “free from undue interference or censorship.”<sup>12</sup> It is easy to see how those visiting or intending to visit the United States would be wary of what they post online, knowing they might be asked for their social media identifiers. As reported in the *New York Times*, “travel industry officials and immigration rights advocates say the new policy carries the peril of making someone who posts legitimate criticism of American foreign policy or who has friends or followers who express sympathy toward terrorists subject to unwarranted scrutiny.”<sup>13</sup>

For example, any of the 1.65 billion monthly active Facebook users<sup>14</sup> and others familiar with the structure of Facebook will know it is quite common to change one's profile picture or cover photo – both are publically accessible – to reflect political opinions. For example, users often use filters on profile pictures to include the pride flag or country flags after tragic events and victories. Cover photos also commonly reflect those political sentiments. Imagine a person has a cover photo with a burning American Flag; a protected expression of free speech. Does that place a visitor under additional scrutiny? What if they had a filter on their profile picture with an Afghan flag the day after a U.S. military strike?

The meaning and intent behind those messages will often be unclear. The Afghan flag may be intended as a statement against the U.S. strike, a statement reflecting grief for

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<sup>11</sup> Issues: Freedom of Expression, HumanRights.Gov (Aug. 19, 2016), *available at* <http://www.humanrights.gov/dyn/issues/freedom-of-expression.html>.

<sup>12</sup> Internet Freedom, Department of State (Aug. 19, 2016), *available at* <http://www.state.gov/e/eb/cip/netfreedom/index.htm>.

<sup>13</sup> Ron Nixon, *U.S. to Further Scour Social Media Use of Visa and Asylum Seekers* (Feb. 23, 2016), <http://www.nytimes.com/2016/02/24/us/politics/homeland-security-social-media-refugees.html>.

<sup>14</sup> Statista, Number of monthly active Facebook users worldwide as of 1st quarter 2016, <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>.

civilian loss, or simply a statement of pride for the country. A burning flag may reflect opposition towards the nation as a whole, a protest for actions that its government has taken, a rallying cry for freedom of speech, or nothing at all. It would be almost impossible for DHS to contextualize that speech. For potential visitors it is unclear how engaging in what might be protected speech in their own countries may affect their ability to visit the United States.

DHS should also be wary of potentially triggering reciprocal action by other countries to demand the social media account information of U.S. visitors. U.S. residents enjoy the world's most liberal free speech laws. Inviting scrutiny of their speech by other, less permissive, countries they may visit diminishes the ability of U.S. persons to exercise that right. This uncertainty would surely chill the speech of visitors, their U.S. contacts, and potentially many other U.S. travelers.

## **B. Privacy**

The exceptionally broad meaning of "social media" poses a substantial violation of the privacy of travelers and their social media contacts. The breadth of information available from "social media" as so broadly and indefinitely used in the proposal would allow the government to obtain not just images of the applicant and their contacts, but also information on their daily musings, sexual orientation, religious beliefs, ailments, and location information. The Department has not indicated whether or how it would minimize the use of that information; whether scrutinizing the accounts of visitors would continue while they are in the United States; or if any such scrutiny and monitoring might continue after their return home.

## **CONCLUSION**

The Department of Homeland Security's proposed addition to the ESTA and Form I-94W poses numerous serious concerns to freedom of expression and privacy for both visitors and U.S. citizens, and it would be exceedingly unlikely to provide useful information for screening out "nefarious" individuals attempting to enter the U.S. The proposed question would likely not be answered by those whom it purportedly targets. The "social media" information it targets is overbroad and ambiguous. The proposal is ill-advised and Free Press strongly urges the Department not to adopt it.