

Before

**U.S. CUSTOMS AND BORDER PROTECTION
DEPARTMENT OF HOMELAND SECURITY**

Washington, DC 20229

Agency Information
Collection Activities: Arrival
and Departure Record (Forms
I-94 and I-94W) and
Electronic System for Travel
Authorization (ESTA);
USCBP-2007-0102-0016,
FR Doc. 2016-1484; OMB
Control Number 1651-0111

**COMMENTS OF THE
IDENTITY PROJECT
(IDP)**

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

A project of the First Amendment Project

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August 22, 2016

The Identity Project (IDP) submits these comments in response to the notice and request for comments, “Agency Information Collection Activities: Arrival and Departure Record (Forms I-94 and I-94W) and Electronic System for Travel Authorization (ESTA)”, docket number USCBP-2007-0102-0016, FR Doc. 2016-1484, published at 81 *Federal Register* 40892-40893 (June 23, 2016):

DHS proposes to add the following question to ESTA and to Form I-94W: “Please enter information associated with your online presence—Provider/Platform—Social media identifier.” It will be an optional data field to request social media identifiers to be used for vetting purposes, as well as applicant contact information. Collecting social media data will enhance the existing investigative process and provide DHS greater clarity and visibility to possible nefarious activity and connections by providing an additional tool set which analysts and investigators may use to better analyze and investigate the case.

We oppose this absurd and un-American questioning of foreign visitors to the U.S., and urge USCBP to withdraw this proposal.¹

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

1 We also reiterate our objections to the entirety of the ESTA travel-permission program, as stated in "Comments of the Identity Project and John Gilmore re: Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program; Interim Final Rule and Solicitation of Comments", USCBP-2008-0003 (August 8, 2008), available at <<https://hasbrouck.org/IDP/IDP-ESTA-comments.pdf>>.

II. FREEDOM OF SPEECH AND FREEDOM OF MOVEMENT ARE CONSTITUTIONAL AND HUMAN RIGHTS.

Both freedom of speech and freedom of movement ("the right of the people... peaceably to assemble") are recognized by the First Amendment to the U.S. Constitution. These rights are also recognized in Article 12 (freedom of movement) and Article 19 (freedom of expression) of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by, and binding on, the U.S. In addition, Article 17 of the ICCPR recognizes a right to protection against "arbitrary or unlawful interference with ... privacy ... or correspondence."

USCBP, along with all other executive agencies, has been ordered by the President to consider human rights treaties including the ICCPR in performing its functions including rulemaking: Executive Order 13107, "Implementation of Human Rights Treaties," directs all executive departments and agencies to "maintain a current awareness of United States international human rights obligations that are relevant to their functions and... perform such functions so as to respect and implement those obligations fully."

The essence of human rights law is that these rights are recognized as universal rights to which all people are entitled regardless of their citizenship or nationality (if any).

This proposal ignores these fundamental Constitutional and human rights. It treats foreign visitors to the U.S. as lacking these human rights, and thus implicitly as less than human.

The U.S. government has been justifiably condemned by people around the world for the exceptionalism of its position that certain fundamental rights are possessed only by U.S. citizens

and not by foreigners. As U.S. citizens, we wholeheartedly endorse this condemnation of the U.S. government for failing to recognize the essential universality of human rights.

It is also a fundamental principle of both Constitutional law and human rights law that the exercise of one of these rights cannot be conditioned on the forfeiture or waiver of another right.

So the exercise of the right to freedom of movement – a right of both U.S. citizens and foreign visitors – cannot lawfully be made contingent on waiver or forfeiture of the right to free expression or of the right to protection against interference with one's correspondence. Foreign visitors should not be forced to choose between giving up their freedom of expression and the privacy of their correspondence (which is often conducted through the correspondence and communications channels provided by social media platforms) by submitting their "social media identifiers" for scrutiny and "vetting" by USCBP, or giving up the possibility of travel to the U.S.

III. FOREIGN VISITORS SHOULD NOT BE SUBJECTED TO TREATMENT THAT WOULD NOT BE PERMITTED FOR U.S. CITIZENS.

The Privacy Act , 5 U.S. Code § 552a (e)(7), provides that each agency 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."

The I-94 and I-94W forms and the online ESTA application are administrative requirements applied to all foreign visitors to the U.S., even those who are not the object of any particularized suspicion or law enforcement activity.

There is no express statutory authorization for the collection of "social media identifiers" about travelers or, for that matter, any U.S. citizens under any circumstances.

Accordingly, any collection of "social media identifiers" from U.S. citizens would be expressly forbidden by statute, regardless of whether the answers to questions about social media identifiers were recorded in a system of records and regardless of how they were used.

Given that the answers to questions about social media identifiers unquestionably concern how individuals exercise rights protected by the First Amendment and the ICCPR, it would be completely inappropriate for USCBP to ask foreign visitors questions that USCBP and all other agencies have been expressly forbidden by statute from asking U.S. citizens.

Once again, this would reinforce the impression around the world that the U.S. does not believe in or respect human rights, but regards these universal human rights as "privileges" granted by the government and enjoyed only by U.S. citizens.

We do not want to live under such a government or in such a world.

IV. THE PROPOSED QUESTIONING SERVES NO LEGITIMATE PURPOSE.

Given that providing social media identifiers would supposedly be "optional", we are completely at a loss to understand what the government thinks this questioning will accomplish, other than discouraging foreign citizens from visiting the U.S.

Obviously, would-be visitors who have posted evidence on social media of illegal activity or of facts which would make them ineligible for admission to the U.S. would not voluntarily provide their social media identifiers as pointers to these incriminating admissions.

The only way to make any sense out of this proposal is to understand it as either (1) a "trial balloon" and step toward making the provision of social media identifiers mandatory, (2) an effort to trick visitors into thinking that they are required to answer the question, or (3) intended to form the basis in at least some cases for denial of admission or imposition of other adverse consequences on the basis of whether or not an individual "chooses" to respond.

None of these are acceptable uses or justifications for the proposed questioning.

Many visitors, of course, are not native speakers of English. Even native speakers may have difficulty distinguishing between a genuinely optional request (which can be ignored with no risk of adverse consequences) and something which, although nominally and out of politeness worded as a request, is actually a demand that can result in sanctions for nonresponse.

USCBP says that social media identifiers will be "used for vetting purposes". Although "vetting" is not defined in the notice or anywhere else in the law governing USCBP's activities, we understand this to mean that the social media identifiers themselves, as well as information obtained by using them, will be added to the (secret) data set that serves as the input to the (secret) algorithmic rule set of the "black box" that decides whether to grant foreign citizens "permission" to travel to the U.S., and decides how to treat them when they arrive.

Adding social media identifiers and information obtained through their use to this witches brew of pre-crime profiling and travel "permission" decision-making would only make a bad system worse, and compound the ongoing violations of travelers' rights.

V. OTHER COUNTRIES WOULD BE TEMPTED TO RECIPROCATATE AGAINST VISITING U.S. CITIZENS.

Government treatment of foreign visitors is often reciprocal. Some countries' laws require that foreign visitors be subjected to the same requirements as are applied to their citizens. Even in countries where this is not a requirement, and where visitors from the U.S. are treated better than are local citizens when they seek to visit the U.S., reciprocity is the international norm for treatment of visitors.

As U.S. citizens, we want our human rights – including our right to freedom of expression and our right to freedom of movement – to be respected by foreign governments when we travel. We do not want to be associated with the unjust, discriminatory, and legally incorrect position of the U.S. government, expressed in this proposal, that foreign citizens lack human rights. We do not wish to be the target of reciprocal denial of our human rights, including freedom of movement and freedom of speech, in other countries that we visit. We urge USCBP to set a good example to the world, not a bad example, by withdrawing this proposal.

Respectfully submitted,

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