epic.org

Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009, USA

+1 202 483 1140
+1 202 483 1248
@EPICPrivacy
https://epic.org

February 26, 2018

The Honorable John Katko, Chairman
The Honorable Bonnie Watson Coleman, Ranking Member
U.S. House Committee on Homeland Security
Subcommittee on Transportation and Protective Security
H2-176 Ford House Office Building
Washington, DC 20515

RE: Hearing on "The Public Face of TSA: Examining the Agency's Outreach and Traveler Engagement Efforts"

Dear Chairman Katko and Ranking Member Coleman:

We write to you regarding the hearing on "The Public Face of TSA: Examining the Agency's Outreach and Traveler Engagement Efforts."[1] We welcome your continued leadership on improvements that can be made at the TSA and look forward to opportunities to work with you and your staff.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.[2] Among our most significant undertakings was the litigation that led to the removal the backscatter x-ray devices from U.S. airports. Those devices were ineffective, invasive, and unlawful. In *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011), the D.C. Circuit Court of Appeals held that the agency failed to conduct a public rulemaking as required by law and must also ensure that passengers are given the opportunity to opt-out if they so choose.

But new privacy issues have arisen with the deployment of facial recognition technology at U.S. airports. An Executive Order recommends that agencies "expedite the completion and implementation of biometric entry exit tracking system,"[3] and Customs and Border Protection ("CBP") has deployed facial recognition technology at several U.S. airports.[4]

Facial recognition poses significant threats to privacy and civil liberties. It can be done covertly, remotely, and on a mass scale. Additionally, there are a lack of well-defined federal

---

[1] *The Public Face of TSA: Examining the Agency's Outreach and Traveler Engagement Efforts*, 115th Cong. (2018), H. Comm. on Homeland Security, Subcomm. on Transportation and Protective Security, https://homeland.house.gov/hearing/public-face-tsa-examining-agencys-outreach-traveler-engagement-efforts/ (February 27, 2018).
[2] *See About EPIC*, EPIC.org, https://epic.org/epic/about.html.
[3] Exec. Order No. 13,780 § 8.
[4] U.S. Customs and Border Protection, *CBP Deploys Facial Recognition Biometric Technology at 1 TSA Checkpoint at JFK Airport* (Oct. 11, 2017), https://www.cbp.gov/newsroom/national-media-release/cbp-deploys-facial-recognition-biometric-technology-1-tsa-checkpoint.

regulations controlling the collection, use, dissemination, and retention of biometric identifiers. Ubiquitous and near effortless identification eliminates individual's ability to control their identities and poses a specific risk to the First Amendment rights of free association and free expression.

Transparency about these biometric surveillance programs is essential, particularly because their accuracy is questionable. In December 2017, because of a Freedom of Information Act lawsuit pursued by EPIC, we obtained a report from Custom and Border Protection, which evaluated iris imaging and facial recognition scans for border control. The "Southwest Border Pedestrian Field Test" reveals that the agency program does not perform operational matching at a "satisfactory" level.[5] In a related FOIA lawsuit, EPIC previously obtained documents from the Federal Bureau of Investigation concerning the Next Generation Identification database which contains facial scans, fingerprints, and other biometrics of millions of Americans.[6] The documents obtained by EPIC revealed that biometric identification is often inaccurate.[7]

The use of facial recognition at the border has real consequences for U.S. citizens as well as non-U.S. citizens. All people entering the U.S., including U.S. passport holders, could be subject to this new screening technique. EPIC has filed a Freedom of Information Act lawsuit to obtain documents to determine if there are proper privacy safeguards in place for the collection of biometric information at US airports.[8]

There is also a new study from the MIT Media Lab which found that facial recognition is less accurate for persons of color. The MIT study found that the error rate in face recognition software for dark-skinned females was 20.8% − 34.7%, while the error rate for light-skinned males was 0.0% - 0.3%.[9] As the New York Times explained, "[t]hese disparate results, calculated by Joy Buolamwini, a researcher at the M.I.T. Media Lab, show how some of the biases in the real world can seep into artificial intelligence, the computer systems that inform facial recognition."[10] If it is correct that that facial recognition as a form of identification discriminates against persons of color in ways that other forms of identification do not, there is a substantial civil rights concern that the Committee should investigate.

The involvement of private companies raises additional concerns. CBP has enlisted airlines such as JetBlue and Delta to implement face recognition technology at various points in

---

[5] U.S. Customs and Border Protection, *Southern Border Pedestrian Field Test Summary Report,* https://epic.org/foia/dhs/cbp/biometric-entry-exit/Southern-Border-Pedestrian-Field-Test-Report.pdf (December 2016).
[6] *EPIC v. FBI – Next Generation Identification*, EPIC, https://epic.org/foia/fbi/ngi/.
[7] DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, NEXT GENERATION IDENTIFICATION (NGI) SYSTEM REQUIREMENTS DOCUMENT VERSION 4.4 at 244 (Oct. 1, 2010), https://epic.org/foia/fbi/ngi/NGI-System-Requiremets.pdf.
[8] *EPIC v. CBP (Biometric Entry/Exit Program)*, EPIC, https://epic.org/foia/dhs/cbp/biometric-entry-exit/.
[9] Joy Buolamwini and Timnit Gebru, Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification, Proceedings of Machine Learning Research (2018) at 11, *available at* http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf.
[10] Steve Lohr, *Facial Recognition Is Accurate, if You're a White Guy*, New York Times, Feb. 9, 2018, https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html.

airports.[11] JetBlue is running a self-boarding program using facial recognition in lieu of checking boarding passes. Delta aims to use facial recognition as part of baggage drop off.[12] It is unclear whether access to biometric identifiers by JetBlue and Delta will lead to non-security uses of biometric identifiers.

The airlines are selling the use of facial recognition as a convenience feature, but it's part of a larger effort by the government to implement a biometric surveillance program. And, it's not clear if passengers realize what they are signing up for. Even if some of the passengers are aware, there is still a lack of information about the government's biometric entry-exit program.

The CBP and the TSA now plan deploy facial recognition technology at TSA checkpoints—further expanding the use of a privacy-invasive technology without regulations in place to provide proper protections.

Acting Assistant Administrator for Civil Rights and Liberties Christine Griggs should be asked the following questions:

- How exactly do these biometric tracking systems work? Are they accurate?
- How does facial recognition technology at TSA checkpoints fit into the biometric tracking system?
- Are there future plans for the increase use of facial recognition or other biometric identifiers by the TSA?
- Did CBP share the findings of the reports associated with the various Biometric Entry/Exit pilots? And if so, could you detail what the findings were?
- How will TSA ensure that the collection and use of biometric data will not expand beyond the original purpose?
- What restrictions on the use of biometric identifiers by private companies have been established?

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

[11] Asma Khalid, *Facial Recognition May Boost Airport Security But Raises Privacy Worries*, NPR, June 26, 2017, https://www.npr.org/sections/alltechconsidered/2017/06/26/534131967/facial-recognition-may-boost-airport-security-but-raises-privacy-worries.
[12] Ben Mutzabaugh, *Delta to test facial-recognition tech on new self-service bag drop*, USA TODAY, May 15, 2017, https://www.usatoday.com/story/travel/flights/todayinthesky/2017/05/15/delta-test-facial-recognition-tech-new-self-service-bag-drops/101703956/.

/s/ *Jeramie Scott*
Jeramie Scott
EPIC National Security Counsel

/s/ *Christine Bannan*
Christine Bannan
EPIC Policy Fellow