



Civil Rights/Civil Liberties Impact Assessment

**Future Attribute Screening Technology (FAST) –
Interactive and Passive Programs**

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Reviewing Official

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Executive Summary

The Office for Civil Rights and Civil Liberties (CRCL) of the Department of Homeland Security (DHS) has completed a Civil Rights/Civil Liberties Impact Assessment to examine the Future Attribute Screening Technology (FAST) research program currently underway by DHS' Science and Technology Directorate (S&T). CRCL has conducted this assessment in accordance with its statutory role to advise Department leadership on constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department. *See* 6 U.S.C. § 345. This assessment has been provided to the Secretary, the Undersecretary for Science and Technology, the Commissioner of U.S. Customs and Border Protection, and the Administrator of the Transportation and Security Administration.

Beginning in 2007, S&T has been engaged in research to develop technology that may assist screeners, in a variety of settings, to determine whether individuals intend to cause harm. Currently, screeners rely primarily on screening technologies, behavioral detection, and traditional interview techniques. FAST could supplement these approaches through the use of non-contact sensors to measure physiological and behavioral indicators of "malintent"—defined as the mental state and intention of an individual planning or intending to cause harm to the United States or the general public.

FAST is still in the research phase; it is not currently, and may never become, operational. Nonetheless, it seems appropriate, as the Department works on this research, to ensure that deployment, if it ever occurs, would not diminish the public's civil rights or civil liberties. *See* 6 U.S.C. 111(b)(1)(G).

Pending further testing and with appropriate operational limits, notice, and monitoring, we conclude that FAST could be deployed consistent with constitutional requirements.

Fourth Amendment

While no court has addressed this precise issue, we conclude that use of the FAST system by governmental actors to detect malintent would likely constitute a search for Fourth Amendment purposes. Whether its use would be constitutional depends on the circumstances. FAST applied in the context of a border search is similar to other searches that courts have deemed routine, and, therefore, constitutionally reasonable even without any individualized suspicion. FAST applied in the context of aviation screening or other lawful transit screening would probably likewise be reasonable under the administrative search doctrine. Use of FAST in some other contexts, as part of suspicionless screening whose primary purpose is indistinguishable from general law enforcement, would require either individualized suspicion or consent.

Discrimination on the Basis of Race or Other Protected Category – Equal Protection

Under the Equal Protection Clause, intentional and invidious discrimination on account of race, religion, or ethnicity is constitutionally forbidden. One of the benefits of FAST is that it would be an objective screening method, which would potentially minimize the opportunity for bias by screeners. Nonetheless, similar to all other screening methods, there is still the possibility that screeners could intentionally discriminate with regard to which individuals should be subject to

FAST or how to respond to FAST indicators, based on race, ethnicity, or some other constitutionally-suspect classification. There are, however, potential hardware-related controls that could minimize or prevent intentional discrimination in the operation of FAST (for example, limiting the operator's ability to alter various settings). We recommend development and use of such controls should FAST be deployed.

Discrimination on the Basis of Race or Other Protected Category – Disparate Impact

The purpose of Title VI of the Civil Rights Act is to ensure that public funds are not spent in a way that encourages, subsidizes, or results in racial, color, or national origin discrimination. DHS's Title VI regulations bar not only intentional discrimination, but also activities that have an inappropriate disparate impact. A disparate impact on the basis of race, color, or national origin could occur if FAST resulted in disproportionately high false positive malintent readings among members of a particular race, color, or national origin. However, while CRCL and S&T have been monitoring and should continue to monitor for this possibility, currently there is no evidence that FAST raises disparate impact concerns.

Discrimination on the Basis of Disability

Section 504 of the Rehabilitation Act (§504), 29 U.S.C. § 794, and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, forbid federal agencies, recipients of federal funding, state and local governments, and private entities operating places of public accommodations from discriminating against individuals on the basis of disability. It is conceivable that individuals with various disabling physical impairments might be unable to be screened using FAST or might be more likely to trigger positive malintent readings on the basis of their impairments. Cosmetic disfigurement, or various physical differences might interfere with the system. Currently, there is no evidence of improper malintent readings due to disability, but CRCL and S&T should continue to monitor this issue.