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June 25, 2018

House Committee on Science, Space, and Technology
Subcommittee on Research and Technology
Subcommittee on Energy
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairs Comstock and Weber and Ranking Members Lipinski and Veasey:

We write to you in advance of the hearing "Artificial Intelligence – With Great Power Comes Great Responsibility."[1] It is imperative that Congress implement extensive oversight mechanisms to oversee the use of AI by federal agencies and require algorithmic transparency, particularly for government systems that involve the processing of personal data.

The Electronic Privacy Information Center ("EPIC") is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.[2] EPIC has promoted algorithmic transparency" for many years and has litigated several cases on the frontlines of AI in the federal government.[3] EPIC successfully sued U.S. Customs and Border Protection for documents relating to its use of secret, analytic tools to assign "risk assessments" to travelers.[4] In *EPIC v. DHS*, EPIC sought to compel the Department of Homeland Security to produce documents related to a program that assesses "physiological and behavioral signals" to determine the probability that an individual might commit a crime.[5] EPIC also sued the Department of Justice to produce documents concerning the use of "evidence-based risk assessment tools," algorithms that try to predict recidivism, in all stages of sentencing.[6] The algorithms at issue in these three lawsuits are examples of problematic uses of AI by the federal government.

These problems could now become more widespread across the federal government, On May 10, 2018 the White House held a summit on "Artificial Intelligence for American Industry."[7]

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[1] *Artificial Intelligence – With Great Power Comes Great Responsibility*, 115th Cong. (2018), H. Comm. on Science, Space, & Technology, Subcomm. on Research and Technology and Subcomm. on Energy (June 26, 2018), https://science.house.gov/legislation/hearings/subcommittee-research-and-technology-and-subcommittee-energy-hearing-artificial.

[2] EPIC, *About EPIC*, https://epic.org/epic/about.html.

[3] EPIC, *Algorithmic Transparency*, https://epic.org/algorithmic-transparency/.

[4] *EPIC v. CBP (Analytical Framework for Intelligence)*, https://epic.org/foia/dhs/cbp/afi/.

[5] *EPIC v. DHS- FAST Program*, https://epic.org/foia/dhs/fast/.

[6] *EPIC v. DOJ (Criminal Justice Algorithms)*, https://epic.org/foia/doj/criminal-justice-algorithms/.

[7] Office of Science and Technology Policy, *Summary of the White House Summit on Artificial Intelligence for American Industry*, (May 10, 2018) [hereinafter *White House AI Summit Summary*], https://www.whitehouse.gov/wp-content/uploads/2018/05/Summary-Report-of-White-House-AI-Summit.pdf.

Privacy is a Fundamental Right.

According to the OSTP summary report, the participants discussed "the promise of [artificial intelligence] and the policies we will need to realize that promise for the American people and maintain U.S leadership in the age of artificial intelligence."[8] However, the meeting was not open to the public and many critical issues in the AI-field were not discussed.

For example, the words "accountability," "transparency," "ethics," and "fairness" do not appear in the report of the White House AI summit.[9] The only reference to "privacy" is an assurance that personal data can be opened to research without compromising privacy. There is a similar assurance about public safety.[10]

At the summit, the White House also announced the creation of the Select Committee on Artificial Intelligence.[11] According to the charter, the Select Committee will:

> address significant national and international policy matters that cut across agency boundaries and shall provide a formal mechanism for interagency policy coordination and the development of Federal artificial intelligence activities, including those related to autonomous systems, biometric identification, computer vision, human-computer interactions, machine learning, natural language processing, and robotics.[12]

Despite the broad social implications of these topics, the Charter identifies only the "private sector" as a source of advice. Unless the channels of input are formally broadened and deepened substantially, the Select Committee will fail to understand and mitigate the risks of AI deployment.

Several professional organizations have developed significant policy frameworks to help policymakers understand and assess AI technology. For example, the Association for Computing Machinery's ("ACM") Statement on Algorithmic Transparency and Accountability states that, "the ubiquity of algorithms in our everyday lives is an important reason to focus on addressing challenges associated with the design and technical aspects of algorithms and preventing bias from the onset." [13] The IEEE-USA stated in 2017 that, "Effective AI public policies and government regulations are needed to promote safety, privacy, intellectual property rights, and cybersecurity, as well as to enable the public to understand the potential impact of AI on society."[14]

Leading computer scientists and legal scholars have expressed concern that the development of the nation's policy for Artificial Intelligence should be more open and more inclusive. There are also a broader range of issues for the Selection Committee to consider:

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[8] *Id.* at 2.
[9] *Id.*
[10] *Id.* at 10.
[11] Office of Science and Technology Policy, *Summary of the White House Summit on Artificial Intelligence for American Industry*, Appendix A (May 10, 2018) [hereinafter *AI Select Committee Charter*], https://www.whitehouse.gov/wp-content/uploads/2018/05/Summary-Report-of-White-House-AI-Summit.pdf.
[12] *Id.* at 1.
[13] *See,* ACM US Public Policy Council, *Statement on Algorithmic Transparency and Accountability* (Jan. 2017), https://www.acm.org/binaries/content/assets/.../2017_usacm_statement_algorithms.pdf.
[14] IEEE-USA, *Artificial Intelligence Research, Development and Regulation* (Feb. 10, 2017), http://globalpolicy.ieee.org/wp-content/uploads/2017/10/IEEE17003.pdf.

(1) What potential harms arise from the use of AI and how are these risks currently addressed?

(2) What are the legal frameworks currently governing AI, and are they adequate?

(3) How could companies and government agencies be more transparent in the use of AI?

(4) What technical measures could promote the benefits of AI while minimizing the risks?

(5) What experience have other countries had trying to address the challenges of AI?

(6) What future trends concerning AI could inform the current discussion?

EPIC and others in the scientific and legal community will urge the Office of Science and Technology Policy to establish a public comment process for the Administration's work on AI.

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Democratic governance is built on principles of procedural fairness and transparency. And accountability is key to decision making. We must know the basis of decisions made by government, whether right or wrong. But as decisions are automated, and organizations increasingly delegate decision making to techniques they do not fully understand, processes become more opaque and less accountable. It is therefore imperative that algorithmic processes be open, provable, and accountable.

When the government uses AI to make decisions about people, it raises fundamental questions about accountability, due process, and fairness. Algorithms deny people educational opportunities, employment, housing, insurance, and credit.[15] Many of these decisions are entirely opaque, leaving individuals to wonder whether the decisions were accurate, fair, or even about them. The Privacy Act of 1974, which governs data processing across the federal government, sought to ensure fairness and accountability in the government's use of personal data.[16] But many new activities, including AI-based analysis, may fall outside the reach of the law.

The Department of Homeland Security released a white paper last year outlining potential uses of AI techniques.[17] DHS proposed the development of predictive systems to assess future risk. A similar proposal a few years ago – The Future Attribute Screening ("FAST") – was developed to detect "malintent." The program collapsed after it became clear the system would not work.[18]

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[15] Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1 (2014).

[16] 5 U.S.C. § 552a; *see also* EPIC, *The Privacy Act,* https://epic.org/privacy/1974act/.

[17] Homeland Security Science and Technology Advisory Committee (HSSTAC): Quadrennial Homeland Security Review Subcommittee, *Artificial Intelligence White Paper* (March 10, 2017), https://www.dhs.gov/sites/default/files/publications/Artificial%20Intelligence%20Whitepaper%202017_508%20FINAL_2.pdf.

[18] DHS, *Future Attribute Screening Technology Fact Sheet*, https://www.dhs.gov/publication/future-attribute-screening-technology; Alexander Furnas, *Homeland Security's 'Pre-Crime' Screening Will Never Work*, The

DHS also proposed to use social media analytics to predict human behavior to counter violent extremism.[19] Algorithms are simply not equipped to understand the nuances of online communication and make positive or negative determinations about individuals.[20] Government scrutiny of social media accounts also chill First Amendment-protected activities. When DHS previously monitored social media for criticism of the agency, Congress held hearings and the program was suspended.[21]

Congress should regulate the use of AI by the federal government to ensure accountability and transparency. EPIC supports legislation that would do the following:

- Establish a **Commission on AI Accountability and Algorithmic Fairness.** New York City recently passed legislation establishing an Algorithmic Accountability task force that could serve as a helpful model for the federal government.[22]

- Amend the **E-Government Act** to require an **Algorithmic Fairness Assessment** any time an agency newly develops, implements, or relies on an algorithmic decision tool that implicates personally identifiable information. The Assessment should require disclosure of the logic of algorithms that make determinations about individuals.

- Amend the **Privacy Act** to require publication of an **Algorithmic System Notice** any time an agency newly develops, implements, or relies on an algorithmic decision tool that implicates personally identifiable information.

- Amend the **Privacy Act** to allow any person affected by a rule, policy, or action of an agency—where such decision was made by or with the assistance of an algorithmic decision tool—to request and receive an explanation of that rule, policy, or action and the basis for it.

- Amend the **Freedom of Information Act** to clarify that (b)(4) does not exempt algorithmic decision tools/rule-based techniques from disclosure, even if they would otherwise constitute trade secrets.

We do recognize the value of AI techniques for a wide range of government programs. But government activities that involve the processing of personal data trigger specific legal obligations; the use of new techniques will raise new challenges that this Committee should explore.

Atlantic (Apr. 17, 2012), https://www.theatlantic.com/technology/archive/2012/04/homeland-securitys-pre-crime-screening-will-never-work/255971/; *See*, EPIC v. DHS - FAST Program, https://epic.org/foia/dhs/fast/.
[19] *Id*. at 7.
[20] *See* Computer Scientist Coalition, Letter to The Honorable Elaine C. Duke, Acting Secretary of Homeland Security, Department of Homeland Security (Nov. 16, 2017), https://www.brennancenter.org/sites/default/files/Technology%20Experts%20Letter%20to%20DHS%20Opposing%20the%20Extreme%20Vetting%20Initiative%20-%2011.15.17.pdf.
[21] Marc Rotenberg, President and Ginger McCall, EPIC Open Government Project Director, *Statement for the Record for Hearing on DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, 1-3, Feb. 16, 2012, https://epic.org/privacy/socialmedia/EPIC-Stmnt-DHS-Monitoring-FINAL.pdf.
[22] EPIC, *NYC Establishes Algorithm Accountability Task Force* (Dec. 21, 2017), https://epic.org/2017/12/nyc-establishes-algorithm-acco.html.

We ask that this Statement from EPIC be entered in the hearing record. We look forward to working with you 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

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