

March 6, 2018

Representative William Hurd, Chairman
Representative Robin Kelly, Ranking Member
U.S. House Committee on Oversight & Government Reform
Subcommittee on Information Technology
2154 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Hurd and Ranking Member Kelly:

We write to you in advance of the second hearing in your artificial intelligence series: “Artificial Intelligence and the Federal Government.”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 transparency³ 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.

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.

¹ *Game Changers: Artificial Intelligence Part II, Artificial Intelligence and the Federal Government*, 115th Cong. (2018), H. Comm. on Oversight & Gov. Reform, Subcomm. on Information Technology (March 7, 2018), <https://oversight.house.gov/hearing/game-changers-artificial-intelligence-part-ii-artificial-intelligence-federal-government/>.

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/>.

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.⁷ 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.⁸ 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.⁹ 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.¹⁰

DHS also proposed to use social media analytics to predict human behavior to counter violent extremism.¹¹ Algorithms are simply not equipped to understand the nuances of online communication and make positive or negative determinations about individuals.¹² 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.¹³

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

⁷ Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1 (2014).

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

⁹ 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.

¹⁰ 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 Atlantic* (Apr. 17, 2012), <https://www.theatlantic.com/technology/archive/2012/04/homeland-securitys-pre-crime-screening-will-never-work/255971/>; *See generally*, EPIC v. DHS - FAST Program, <https://epic.org/foia/dhs/fast/>

¹¹ *Id.* at 7.

¹² *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-%202011.15.17.pdf>.

¹³ 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>.

- 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.¹⁴
- 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.
- 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.

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

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/s/ Caitriona Fitzgerald

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¹⁴ EPIC, *NYC Establishes Algorithm Accountability Task Force* (Dec. 21, 2017), <https://epic.org/2017/12/nyc-establishes-algorithm-acco.html>.