

NOMINATION OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

White House Office of Science and Technology Policy and National Science Foundation

Regarding the

Implementation Plan for a National Artificial Intelligence Research Resource

October 1, 2021

EPIC submits the following comments to the White House Office of Science and Technology Policy and National Science Foundation on the Implementation Plan for a National Artificial Intelligence Research Resource (“NAIRR”).¹ EPIC urges the NAIRR Task Force to (1) devote significant resources to the robust assessment and preservation of privacy, civil rights, and civil liberties in the face of growing AI use; (2) provide regulators at the federal, state, and local levels with resources to ensure that civil rights and consumer protection laws are enforced against entities that deploy AI or automated decision-making systems; and (3) to limit partnerships with the private sector.

EPIC is a public interest research center in Washington, D.C. that was established in 1994 to focus public attention on emerging privacy and related human rights issues and to protect privacy, the First Amendment, and constitutional values.² EPIC has a long history of promoting transparency and accountability for information technology.³

EPIC has a particular interest in promoting algorithmic transparency and has consistently advocated for the adoption of the Universal Guidelines for AI (“UGAI”) to promote trustworthy and

¹White House Office of Sci. and Tech. Policy and Nat’l Sci. Found., *Request for Information (RFI) on an Implementation Plan for a National Artificial Intelligence Research Resources*, 86 Fed. Reg. 3908, <https://www.federalregister.gov/documents/2021/07/23/2021-15660/request-for-information-rfi-on-an-implementation-plan-for-a-national-artificial-intelligence>.

² EPIC, *About EPIC* (2019), <https://epic.org/epic/about.html>.

³ EPIC, *Algorithmic Transparency* (2018), <https://www.epic.org/algorithmic-transparency/>; EPIC, *Algorithms in the Criminal Justice System* (2018), <https://www.epic.org/algorithmic-transparency/crim-justice/>; Comments of EPIC, *Consumer Welfare Implications Associated with the Use of Algorithmic Decision Tools, Artificial Intelligence, and Predictive Analytics*, Fed. Trade Comm’n (Aug. 20, 2018), <https://epic.org/apa/comments/EPIC-FTC-Algorithmic-Transparency-Aug-20-2018.pdf>; Comments of EPIC, *Developing UNESCO’s Internet Universality Indicators: Help UNESCO Assess and Improve the Internet*, United Nations Educ., Sci. & Cultural Org. 5-6 (Mar. 15, 2018), [https://epic.org/internetuniversality/EPIC_UNESCO_Internet_Universality_Comment%20\(3\).pdf](https://epic.org/internetuniversality/EPIC_UNESCO_Internet_Universality_Comment%20(3).pdf).

careful adoption of algorithms.⁴ EPIC has advocated for transparency and accountability in the deployment of AI and algorithmic decision-making tools, litigating cases against the U.S. Department of Justice to compel production of documents regarding “evidence-based risk assessment tools”⁵ and against the U.S. Department of Homeland Security to produce documents about a program to assess the probability that an individual will commit a crime.⁶ In 2018, EPIC and leading scientific organizations petitioned the U.S. Office of Science and Technology Policy to solicit public input on U.S. Artificial Intelligence Policy.⁷ EPIC submitted comments urging the National Science Foundation to adopt the UGAI and to promote and enforce the UGAI in the funding, research, and deployment of U.S. AI systems.⁸ EPIC has also recently submitted comments to the National Security Commission on Artificial Intelligence, the U.S. Office of Science and Technology Policy, the European Commission, and the U.S. Office of Management and Budget urging robust regulation to protect individuals.⁹

In an effort to establish necessary consumer safeguards, EPIC has filed FTC complaints against HireVue,¹⁰ an employment screening company, and AirBnB,¹¹ the rental service that claims to assess risk in potential renters based on an opaque algorithm. EPIC has also filed a petition with

⁴See, e.g., EPIC v. DOJ, No. 18-5307 (D.C. Cir. settled Mar. 25, 2020), <https://epic.org/foia/doj/criminal-justice-algorithms/>; Comments of EPIC, *Intellectual Property Protection for Artificial Intelligence Innovation*, U.S. Patent and Trademark Office (Jan. 10, 2020), <https://epic.org/apa/comments/EPIC-USPTO-Jan2020.pdf>; Comments of EPIC, *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard*, Dep’t of Hous. and Urban Dev. (Oct. 18, 2019), <https://epic.org/apa/comments/EPIC-HUD-Oct2019.pdf>; Testimony of EPIC, Mass. Joint Comm. on the Judiciary (Oct. 22, 2019), <https://epic.org/testimony/congress/EPIC-FacialRecognitionMoratorium-MA-Oct2019.pdf>; Statement of EPIC, *Industries of the Future*, U.S. Senate Comm. on Commerce, Sci. & Transp. (Jan. 15, 2020), <https://epic.org/testimony/congress/EPIC-SCOM-AI-Jan2020.pdf>; Comments of EPIC, *Request for Information: Big Data and the Future of Privacy*, Office of Sci. and Tech. Policy (Apr. 4, 2014), <https://epic.org/privacy/big-data/EPIC-OSTP-Big-Data.pdf>.

⁵ EPIC, *EPIC v. DOJ (Criminal Justice Algorithms)* (2020), <https://epic.org/foia/doj/criminal-justice-algorithms/>.

⁶ See *id.*; EPIC, *EPIC v. DHS (FAST Program)* (2018) <https://epic.org/foia/dhs/fast/>.

⁷ EPIC, *Petition to OSTP for Request for Information on Artificial Intelligence Policy* (July 4, 2018) <https://epic.org/privacy/ai/OSTP-AI-Petition.pdf>.

⁸ EPIC, *Request for Information on Update to the 2016 National Artificial Intelligence Research and Development Strategic Plan*, Nat’l Sci. Found., 83 Fed. Reg. 48655 (Oct. 26, 2018), <https://epic.org/apa/comments/EPIC-Comments-NSF-AI-Strategic-Plan-2018.pdf>.

⁹ Comments of EPIC, *Solicitation of Written Comments by the National Security Commission on Artificial Intelligence*, 85 Fed. Reg. 32,055, Nat’l Sec. Comm’n on Artificial Intelligence (Sept. 30, 2020) <https://epic.org/apa/comments/EPIC-comments-to-NSCAI-093020.pdf>; Comments of EPIC, *Request for Comments on a Draft Memorandum to the Heads of Executive Departments and Agencies, “Guidance for Regulation of Artificial Intelligence Applications,”* 85 Fed. Reg. 1,825, Office of Management and Budget (Mar. 13, 2020) <https://epic.org/apa/comments/EPIC-OMB-AI-MAR2020.pdf>; Comments of EPIC, *Request for Feedback in Parallel with the White Paper on Fundamental Rights*, European Comm’n Fundamental Rights Policy Unit (May 29, 2020), <https://epic.org/apa/comments/EPIC-EU-Commission-AI-Comments-May2020.pdf>; Comments of EPIC, *Proposal for a legal act of the European Parliament and the Council laying down requirements for Artificial Intelligence*, European Comm’n (Sept. 10, 2020), <https://epic.org/apa/comments/EPIC-EU-Commission-AI-Sep2020.pdf>.

¹⁰ Complaint of EPIC, *In re HireVue* (Nov. 6, 2019), https://epic.org/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf.

¹¹ Complaint of EPIC, *In re Airbnb* (Feb. 27, 2019), https://epic.org/privacy/ftc/airbnb/EPIC_FTC_Airbnb_Complaint_Feb2020.pdf.

the FTC for a rulemaking for AI in Commerce¹² and a complaint with the Attorney General for the District of Columbia concerning automated test proctoring tools.¹³ EPIC has also published the *AI Policy Sourcebook*, the first reference book on AI policy.¹⁴

In addition to EPIC's responses to the specific questions posed about NAIRR, EPIC urges the Task Force to prioritize protecting civil liberties and civil rights over leading the world in AI deployment and development. EPIC warns the Task Force against incentivizing the deployment and development of AI simply for the sake of innovation and competition, given the threat to human rights posed by the increased collection of sensitive data and the use of inaccurate or discriminatory automated decision-making systems. It is these risks that led United Nations High Commissioner for Human Rights Michelle Bachelet to recently call on governments to “ban AI applications that cannot be operated in compliance with international human rights law and impose moratoriums on the sale and use of AI systems that carry a high risk for the enjoyment of human rights, unless and until adequate safeguards to protect human rights are in place.”¹⁵ Commissioner Bachelet also stressed the need for comprehensive data protection legislation in addition to a regulatory approach to AI that prioritizes protection of human rights. Commissioner Bachelet explained: “The risk of discrimination linked to AI-driven decisions—decisions that can change, define or damage human lives—is all too real. This is why there needs to be systematic assessment and monitoring of the effects of AI systems to identify and mitigate human rights risks.”¹⁶ Accordingly, the Task Force should take this opportunity to drive *thoughtful* and *responsible* development and deployment of AI.

EPIC Answers to Specific OSTP/NIST Questions):

2. Which capabilities and services (see, for example, item D above) provided through the NAIRR should be prioritized?

The Task Force should prioritize the assessment of “privacy, civil rights, and civil liberties requirements associated with the NAIRR” above other “capabilities and services.” The protection of privacy, civil rights, and civil liberties should guide the other capabilities and services listed, including making government data sets available as part of the NAIRR.¹⁷

¹² EPIC, *Petition for Rulemaking Concerning Use of Artificial Intelligence in Commerce* (Feb. 3, 2020) <https://epic.org/privacy/ftc/ai/EPIC-FTC-AI-Petition.pdf>.

¹³ EPIC, *In re Online Test Proctoring Companies* (2021), <https://epic.org/privacy/dccppa/online-test-proctoring/>.

¹⁴ *EPIC AI Policy Sourcebook 2020* (2020), <https://epic.org/bookstore/ai2020/>.

¹⁵ United Nations Human Rights Council, *The Right to Privacy in the Digital Age*, A/HRC/48/31 (Sept. 13, 2021), <https://epic.org/UN-AI-Moratorium-Call-And-Report.pdf>.

¹⁶ *Id.*

¹⁷ White House Office of Sci. and Tech. Policy and Nat'l Sci. Found., *supra* note 1, at 39,082 (“As outlined in § 5106(b) of Public Law 116-283, the implementation roadmap developed by the Task Force should include the following:

- A. Goals for establishment and sustainment of a National Artificial Intelligence Research Resource and metrics for success;
- B. A plan for ownership and administration of the National Artificial Intelligence Research Resource, including:
 - i. An appropriate agency or organization responsible for the implementation, deployment and administration of the Research Resource; and
 - ii. A governance structure for the Research Resource, including oversight and decision-making authorities;

3. How can the NAIRR and its components reinforce principles of ethical and responsible research and development of AI, such as those concerning issues of racial and gender equity, fairness, bias, civil rights, transparency, and accountability?

NAIRR should provide resources for companies and government entities developing AI to safeguard privacy and to address issues of racial and gender bias, fairness, civil rights, transparency, and accountability. For resources NAIRR will create for developers, this means recommending prohibitions on certain uses of AI and the collection of certain types of data as well as guidance on data minimization and strict restrictions on data sharing and selling. The Task Force should also create an accountability toolkit that developers should be encouraged to implement throughout their design and deployment process—including independent mandatory validation studies, civil rights impact assessments, and algorithmic audits. In addition to this, the NAIRR should provide guidance for government agencies procuring AI or automated decision-making systems to be purposeful and transparent about what they procure.

In some countries, including Canada, certain AI systems used in public contexts must undergo Algorithmic Impact Assessments that evaluate the risks posed by an individual system based on the sensitivity of data used, design attributes, and relation to areas designated as requiring additional considerations and protections.¹⁸ For example, the Canadian tool prompts an entity deploying an AI system to evaluate the stakes of the decisions that the system in question makes, the vulnerability of subjects, and whether the system constitutes a predictive risk assessment.¹⁹ The tool also allows for multiple answer options and a detailed explanation of responses. The Canadian assessment also requires detailing the downstream processes of an AI system, including (i) whether the system will only be used to assist a decision-maker; (ii) whether the system will be replacing a decision that would otherwise be made by a human; (iii) whether the system will be replacing human judgment; (iv) whether the system is being used by the same entity that developed it; (v) consideration and explanation of both economic and environmental impacts; and (vi) consideration of the sensitivity of data collected.²⁰ NAIRR should incorporate a resource that addresses these questions for both developers and contractors and a template for transparency concerning

C. A model for governance and oversight to establish strategic direction, make programmatic decisions, and manage the allocation of resources;

D. Capabilities required to create and maintain a shared computing infrastructure to facilitate access to advanced computing resources for researchers across the country, including provision of curated data sets, compute resources, educational tools and services, a user-interface portal, secure access control, resident expertise, and scalability of such infrastructure;

E. An assessment of, and recommended solutions to, barriers to the dissemination and use of high-quality government data sets as part of the National Artificial Intelligence Research Resource;

F. An assessment of security requirements associated with the National Artificial Intelligence Research Resource and its management of access controls;

G. An assessment of privacy and civil rights and civil liberties requirements associated with the National Artificial Intelligence Research Resource and its research;

H. A plan for sustaining the National Artificial Intelligence Research Resource, including through Federal funding and partnerships with the private sector; and

I. Parameters for the establishment and sustainment of the National Artificial Intelligence Research Resource, including agency roles and responsibilities.”)

¹⁸ Canada Digital Servs., *Algorithmic Impact Assessment* (2021), <https://open.canada.ca/aia-eia-js/?lang=en>.

¹⁹ *Id.*

²⁰ *Id.*

developers, factors used, data sources, and more. EPIC particularly urges the Task Force to consult the resources referenced below in Question 4 that provide guidance on government procurement of new technologies.²¹

4. What building blocks already exist for the NAIRR, in terms of government, academic, or private-sector activities, resources, and services?

EPIC recommends that the Task Force consider the following resources and principles as building blocks for the implementation of the NAIRR:

- Public Voice Coalition, [*Universal Guidelines for AI*](#)
 - Right to Transparency.
 - Right to Human Determination.
 - Identification Obligation.
 - Fairness Obligation.
 - Assessment and Accountability Obligation.
 - Accuracy, Reliability, and Validity Obligations.
 - Data Quality Obligation.
 - Public Safety Obligation.
 - Cybersecurity Obligation.
 - Prohibition on Secret Profiling.
 - Prohibition on Unitary Scoring.
 - Termination Obligation.²²
- Organisation of Economic Cooperation and Development, [*OECD AI Principles*](#)
 - Inclusive growth, sustainable development and well-being.
 - Human-centered values and fairness.
 - Transparency and explainability.
 - Robustness, security and safety.
 - Accountability.²³
- Rashida Richardson, [*Best Practices for Government Procurement of Data-Driven Technologies*](#) (2021)
- World Economic Forum, [*AI Procurement in a Box: AI Government Procurement Guidelines*](#) (2020)
- Emanuel Moss, Elizabeth Anne Watkins, Ranjit Singh, Madeleine Clare Elish, Jacob Metcalf, [*Assembling Accountability: Algorithmic Impact Assessment for the Public Interest*](#), Data & Society (2021)
- Mona Sloane, [*The Algorithmic Auditing Trap*](#), OneZero (Mar. 17, 2021)
- Rebecca Kelly Slaughter, Janice Kopec, & Mohamad Batal, [*Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission \(Info. Soc. Project & Yale J. Law & Tech.\)*](#) (2021).

²¹ Rashida Richardson, *Best Practices for Government Procurement of Data-Driven Technologies* (2021); World Econ. Forum, *AI Procurement in a Box: AI Government Procurement Guidelines* (2020).

²² *Id.*

²³ *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019), legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449.

- United Nations High Comm’r for Human Rights, [*The Right to Privacy in the Digital Age*](#) (2021)
- Ben Green & Amba Kak, [*The False Comfort of Human Oversight as an Antidote to A.I. Harm*](#), Slate (June 15, 2021)
- Amba Kak & Rashida Richardson, [*Suspect Development Systems: Databasing Marginality and Enforcing Discipline*](#), 55 U. Mich. J.L. Reform (forthcoming 2022)
- Rashida Richardson, [*Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*](#), [*Berkeley Technology Law Journal*](#), Vol. 36, No. 3 (forthcoming 2022).

5. What role should public-private partnerships play in the NAIRR? What exemplars could be used as a model?

Public-private partnerships should play an extremely limited role in the NAIRR in order to maximize independence and prioritization of civil liberties and rights. If public-private partnerships are necessary, NAIRR should set rigorous restrictions on the influence of companies involved and on the access those companies have to government data sets.

Conclusion

EPIC looks forward to engaging further with the NAIRR and urges the Task Force to help make the NAIRR a trusted resource for the responsible development and deployment of AI. The NAIRR should prioritize privacy, civil rights, and civil liberties and create useful resources that can operationalize these principles and bring AI deployment into compliance with consumer protection and civil rights laws.

Respectfully Submitted,

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