U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

October 31, 2017

Ms. Natasha Amlani
Electronic Privacy Information Center
Suite 200
1718 Connecticut Avenue, NW
Washington, DC 20009
amlani@epic.org

Re: DOJ-2016-003626 (AG)
DOJ-2016-003627 (OLP)
D.D.C. No. 17-410
VRB:ACS

Dear Ms. Amlani:

This is our final response to your Freedom of Information Act (FOIA) request dated and received in this Office on June 15, 2016, in which you requested records relating to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies. This response is made on behalf of the Offices of the Attorney General (OAG) and Legal Policy (OLP).

By letter dated August 16, 2017, we provided you with an interim response and informed you that we were continuing to process records on behalf of OAG and OLP. Our work on your request is now complete.

Specifically, we have completed our processing of an additional 2,726 pages containing records responsive to your request. I have determined that 359 pages are appropriate for release with excisions made pursuant to Exemptions 5 and 6 of the FOIA, 5 U.S.C. § 552(b)(5) and (b)(6). Additionally, 2,367 pages are being withheld in full pursuant to Exemption 5. Exemption 5 of the FOIA pertains to certain inter- and intra-agency communications protected by the deliberative process and presidential communications privileges. Exemption 6 of the FOIA pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. Portions of the records being withheld in full pursuant to Exemption 5 are also withheld pursuant to FOIA Exemption 6.

Furthermore, emails in the enclosed documents which use the account name "Lew Alcindor" denote emails to or from former Attorney General Eric Holder's official Department of Justice email account. Mr. Holder's official email account did not use his name, in order to protect his security and privacy and enable him to conduct Department business efficiently via email.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2015)

(amended 2016). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Alex Shoaibi of the U.S. Attorney's Office for the District of Columbia, at 202-252-2511.

Sincerely,

Vanessa R. Brinkmann
Senior Counsel

Enclosures

Alcindor, Lew

From: Alcindor, Lew Attorney General Holder's official email address
Sent: Monday, July 28, 2014 8:38 PM
To: (b) (6) Attorney General Holder's personal email address
Subject: FW: Prep memo for TIME Magazine interview
Attachments: AG TIME Magazine prep memo 7 28 14.docx; Annual Letter 2014 FINAL TO ODAG OAG 070214.docx

---

From: Fallon, Brian (OPA)
Sent: Monday, July 28, 2014 08:17 PM
To: Alcindor, Lew Attorney General Holder's official email address
Cc: Bradley, Annie (OAG); Richardson, Margaret (OAG)
Subject: Prep memo for TIME Magazine interview

Sir,

Attached is a prep memo for your 10 am phone interview with TIME Magazine.

Separately, I have attached the draft of the department's report to the Sentencing Commission. Pages 1-9 detail our criticisms of "data-based sentencing" in further detail beyond the attached memo.

Best,

Brian Fallon

Director of Public Affairs

U.S. Department of Justice

202.616.0503 *office*
(b) (6)
cell

<<AG TIME Magazine prep memo 7 28 14.docx>> <<Annual Letter 2014 FINAL TO ODAG OAG 070214.docx>>

Document ID: 0.7.11378.6283 20170906 - 0000622

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530*

July 29, 2014

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Saris:

The Sentencing Reform Act of 1984 requires the Criminal Division to submit to the United States Sentencing Commission, at least annually, a report commenting on the operation of the sentencing guidelines, suggesting changes to the guidelines that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o) (2006). We are pleased to submit this report pursuant to the Act. The report also responds to the Commission's request for public comment on its proposed priorities for the guideline amendment year ending May 1, 2015. *Notice of Proposed Priorities and Request for Public Comment*, 79 Fed. Reg. 31409 (June 2, 2014).

The Promise and Danger of Data Analytics in Sentencing and Corrections Policy

Eleven years ago, Michael Lewis released *Moneyball*,[1] a book describing how Billy Beane, the general manager of Major League Baseball's Oakland Athletics, used what was then considered massive amounts of statistical data to predict the future performance of baseball players. Beane built a winning ballclub by collecting promising players identified by his statistical models who had been passed over by other teams. These players then went on to overachieve at a startling rate. Beane succeeded by replacing the traditional method of evaluating baseball talent being used by most Major League clubs with something new. In the traditional method, older experienced baseball men "scouted" players – watching the players

[1] MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2003). Other commentators have also seen the value of *Moneyball* as a particularly illustrative example of how data analytics can outperform human decision making in all sorts of endeavors. *See, e.g.,* Kate Torgovnick May, *infra* note 2. These include scholars and practitioners who have made the connection between *Moneyball* and criminal justice. *See, e.g.,* Dawinder S. Sidhu, *Moneyball Sentencing*, (July 8, 2014), available at SSRN: http://ssrn.com/abstract=2463876 or http://dx.doi.org/10.2139/ssrn.2463876 , Anne Milgram, *infra* note 7.

perform and using their accumulated wisdom and judgment to identify those players who, they believed, would succeed into the future. These scouts were indeed the qualitative experts of baseball at the time. But Beane saw the value in analyzing past performance data in a more sophisticated and rigorous way to dramatically improve the building of a baseball team by more accurately predicting the future performance of players than scouts ever could. Finding value through data, Beane built a winning team at a low cost.

Since the publishing of Lewis' book, there has been an explosion in the use of data analytics to identify patterns of human behavior and experience and bring new insights to fields of nearly every kind.[2] The story of analytics in industry after industry often follows the pattern found in *Moneyball*.[3] The qualitative experts in a field – the wise men and women with years of experience – are outdone by a statistical researcher with little field knowledge, and even less experience, but with a tremendous understanding of modern data analysis. The researcher knows what the wise men and women have a tough time grasping: that an algorithm working on a problem thousands of times faster than traditional methods can bring new understanding of a correlation or sometimes even a specific cause and effect. Scientists have known for some time now that when sufficient information can be collected and quantified, statistical analysis will outperform an individual almost every time. The growth in computing power, storage capacity and statistical and computational methods has brought this reality to new areas of human experience at a growing pace. We have seen the linking of diverse datasets, the deployment of sophisticated analytics and algorithms, and the advancement in knowledge of human behavior applied to everything from marketing to medicine; genomics to agriculture; banking to matchmaking.[4]

In criminal justice, the use of analytics is not new, of course. CompStat, the New York City Police Department's management tool – now replicated and deployed in many other police departments across the country – has, for example, been used for decades to allocate police resources efficiently by mapping where crime has occurred and predicting where and when crimes are most likely to occur in the future.[5] The analytics of policing are evolving steadily and Predictive Policing – the use of algorithms that combine historical and up-to-the-minute crime information to do the work of hundreds of traditional crime analysts and produce real-time targeted patrol areas – is spreading.[6] Judges are also beginning to adopt risk assessment tools

---

[2] Kate Torgovnick May, *The Moneyball Effect: How Smart Data is Transforming Criminal Justice, Healthcare, Music, and even Government Spending*, TED: IDEAS WORTH SPREADING (Jan. 28, 2014, 12:26 PM), http://blog.ted.com/2014/01/28/the-moneyball-effect-how-smart-data-is-transforming-criminal-justice-healthcare-music-and-even-government-spending/.

[3] *See* Lewis, *supra* note 1.

[4] *See* Torgovnick May, *supra* note 2.

[5] *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE & POLICE EXECUTIVE RESEARCH FORUM, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES (2013), *available at* https://www.bja.gov/Publications/PERF-Compstat.pdf.

[6] *See, e.g.*, Gordon Tokumatsu, *LAPD Rolls Out "Predictive Policing" to Prevent Crime*, NBC LOS ANGELES, (Feb. 11, 2014, 10:39 PM), http://www.nbclosangeles.com/news/local/LAPD-Rolls-Out-Predictive-Policing-Prevent-Crime-245073541.html; *see also*, Wm F. Cody, *Predictive Policing – Law Enforcement's New Cyber Tool*, LAW ENFORCEMENT TODAY (Jan. 15, 2012), http://www.lawenforcementtoday.com/2012/01/15/predictive-policing-%E2%80%93-law-enforcements-new-cyber-tool/.

based on data analytics in pretrial hearings. Recently, former New Jersey Attorney General Anne Milgram – who first connected *Moneyball* and criminal justice – together with the Arnold Foundation, developed a "comprehensive, universal risk assessment" tool that is already being used by judges at pretrial hearings in every county in Kentucky.[7]

Similarly, predictive analysis has been part of sentencing and corrections in the United States for many decades. The rehabilitative model of sentencing and corrections, which was at the heart of the creation of the modern penitentiary and which dominated sentencing and corrections policy in the U.S. until the late 20th Century, was fundamentally based on predicting future behavior.

> After a sentencing judge had imposed a prison term, which sometimes would be set in a range as broad as one year to life, prison and parole officials were expected and instructed to consistently review offenders' behavior in prison to determine if and when they should be released to the community.[8]

The work of these prison and parole officials – and the goal of the rehabilitative model – was to predict when the offender's return to the community would be safe for all.

Through the 1960s, the determination of when an offender would be released from prison to the community looked a lot like a team of baseball scouts predicting the future performance of a prospect. It was human analysis: the gathering of bits of data and running them through individual human experience and wisdom to make the assessment – for the release decision by a parole board just as for picking a first baseman by a scout team. Psychological theory and research examined this kind of human analysis and decision making and revealed clear findings that are now, with new and better data analytics, becoming even clearer. First, this kind of complex human decision making is often based on errors, biases and heuristics. Second, decision makers have little insight into their own decision-making processes. And third, statistical models are more accurate and more consistent, and thus fairer, than non-statistical human decision making.[9]

This understanding of human decision making and its limitations compared to actuarial and statistical modeling first led the U.S. Parole Commission to issue guidelines for its release decisions and thus begin transforming the parole function to take advantage of statistical modeling. That Commission created the Salient Factor Score, based on such modeling, to help determine what the Commission called "the parole prognosis," the likelihood of a parole

---

[7] Anne Milgram, *Why Smart Statistics are the Key to Fighting Crime*, TED: IDEAS WORTH SPREADING (Oct. 2013), http://www.ted.com/talks/anne_milgram_why_smart_statistics_are_the_key_to_fighting_crime; Leila Walsh, *Laura and John Arnold Foundation Develops National Model for Pretrial Risk Assessments*, LAURA AND JOHN ARNOLD FOUNDATION (Nov. 14, 2013), http://www.arnoldfoundation.org/laura-and-john-arnold-foundation-develops-national-model-pretrial-risk-assessments.

[8] Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest J. L. & Pol'y 151, 159 (2014).

[9] *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); R. Barry Ruback and Jonathan J. Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psych. Pub. Pol. And L. 739 (2001).

violation of one kind or another by an offender being considered for release. The Parole Commission understood the superiority of the actuarial model in predicting future behavior and the evenhandedness that would come with using such a model as compared to human decision making. Subsequent research has shown the Salient Factor Score – and later the Sentencing Commission's own Criminal History Score – to be reliable predictors of post-imprisonment misconduct.[10]

* * *

The sentencing reform movement of the 1970s and 80s replaced the rehabilitative model of sentencing that had been in place from the earliest days of the Republic with a new sentencing framework based on truth-in-sentencing and the idea that a criminal sentence should largely be based on the crime committed. The foundation of the new system was the belief that reducing reoffending was not a task worth pursuing – that nothing worked to change offending behavior – and that excessive discretion in charging, sentencing and parole decisions had led to unwarranted disparities and discriminatory impacts on the poor and people of color. It was thought that certainty in sentencing – certainty in the imposition of a particular sentence for a particular crime, and certainty in the time to be served for a sentence imposed – would simultaneously improve public safety by deterring new criminality, and also increase fairness in sentencing by reducing unwarranted sentencing disparities. This new determinate system of sentencing did not depend largely on predicting future behavior, for sentences were based primarily on the offender's past criminal conduct.

The sentencing reform movement not only brought with it a new framework for sentencing but also led, as we and many others have documented, to an extraordinary increase in the use of incarceration. The Attorney General has written and spoken regularly about the increase in the Nation's prison population over the last three decades and why, in particular, it is imperative that we control federal prison spending. The Commission's recent vote to reset guideline offense levels for drug trafficking offenses is an important step to meeting that imperative. We continue to work with Congress and the Commission to find ways to adequately control the federal prison population while simultaneously ensuring public safety.

We have also previously noted how the increase in the prison population led to an explosion in the number of people returning to the community each year from stints in prison.[11] Then-Attorney General Janet Reno and then-National Institute of Justice Director Jeremy Travis recognized this phenomenon in the late 1990s, and much has been done to focus on effectively preparing offenders to return to the community. Various efforts to reduce reoffending have

---

[10] *E.g.*, Peter B. Hoffman, *Twenty Years of Operational Use of a Risk Prediction Instrument: The United States' Parole Commission's Salient Factor Score*, 22 J. CRIM. JUST. 477 (1994); *see also* U.S. SENTENCING COMM'N, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf.

[11] Annual Report from Jonathan Wroblewski, Director, Office of Policy and Legislation, Criminal Division, Department of Justice, to Patti B. Saris, Chair, U.S. Sentencing Comm'n (July 11, 2013) (on file with Dept. of Justice, *available at* http://www.justice.gov/criminal/foia/docs/2013annual-letter-final-071113.pdf).

yielded promising results, and legislators, prosecutors, courts, and probation offices around the country are focusing more and more on effective prisoner reentry.

This new focus on reentry has brought with it a renewed need to identify those offenders most at risk for reoffending upon release to the community and to identify the individual needs of those offenders that if effectively addressed could reduce the risk of reoffending. In the federal system, this has taken form, for example, in the Judiciary's implementation of "evidence-based practices" and the deployment of the Post-Conviction Risk Assessment Instrument (PCRA). The PCRA uses information from an offender's past to identify both the risk of reoffending and the needs to be addressed to lessen that risk.[12] Risk and needs assessment instruments like the PCRA are a step in bringing data and the scientific method to corrections. We think there is much to be celebrated about this step.

Moreover, research and experience are showing increasingly that the notion from the 1970s that nothing works to reduce reoffending is simply incorrect. Effective prisoner reentry is eminently possible. However, for many offenders, especially those who enter the criminal justice system with social deficits, limited skills and little family support, reentry is very difficult work. Despite the progress seen in prisoner reentry programs in recent years, recidivism research continues to show unacceptably high rates of reoffending among released offenders.[13] Clearly, there is far more to be done, and we believe the Commission has an important role in supporting research and development work around reentry programs.

In particular, we believe the Commission should support research and development around the use of data analytics in reentry programs. We believe such use has the potential to dramatically improve performance of reentry programs and to transform the work of probation and community supervision. It holds the long term potential to revolutionize community corrections to make it far more effective than it is today and also a far more palatable alternative to incarceration in certain cases.

The deployment of analytics and other information technology in furtherance of reentry can improve risk and needs assessments, but also has the potential to do far more. For example, we believe that properly deployed, analytics and information technology more generally can provide early warnings when an offender is straying from her reentry plan. They can enable faster responses from probation officers to get an offender back on track. They can provide more effective delivery of needed services, the real-time awareness to let probation officers know what's happening on the ground moment by moment, and real-time feedback comparing what's happening relative to what was intended. Effective service delivery combined with swift, certain and fair responses to misconduct – the keys to successful corrections – can be greatly facilitated by these technologies and analytics.

---

[12] OFFICE OF PROB. AND PRETRIAL SERV.S, ADMIN. OFFICE OF THE U.S. COURTS, AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT (2011) *available at* http://www.uscourts.gov/uscourts/FederalCourts/PPS/PCRA_Sep_2011.pdf.

[13] PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS (Apr. 2011) *available at* http://www.pewtrusts.org/en/research-and-analysis/reports/2011/04/12/state-of-recidivism-the-revolving-door-of-americas-prisons.

We think the role, effectiveness and efficiency of community corrections and individual probation officers could be dramatically reengineered with the use of varied technologies and analytical tools and that recidivism rates can be brought down on the same scale that violent crime has been reduced over the last two decades. Linking diverse datasets, deploying analytics, and applying advances in knowledge of human behavior, we believe, will all be part of that reengineering. As former New Jersey Attorney General Anne Milgram stated, "The returns for better applying technology in criminal justice extend far beyond reducing crime or costs, to something that government officials are sworn to uphold: justice."[14] The research and development around this potential transformation is something the Sentencing Commission is in a unique position to accomplish, and we think it is something the Commission should have on its agenda.

* * *

While we are excited about the promise of using analytics in risk and needs assessments and otherwise in furtherance of effective reentry, we are troubled by another use of these tools in sentencing and corrections: the increasing role of risk assessment tools in the sentencing phase of criminal cases, specifically in determining how long an individual will be imprisoned for a criminal conviction. As we noted, risk assessments – through the Salient Factor Score – had a prominent place in the federal parole system in place prior to the Sentencing Reform Act and were a major determinant of the amount of time a federal offender served in federal prison for an offense. The Sentencing Reform Act was enacted to reduce the role of such assessments and to base imprisonment terms largely, but not entirely, on the crime committed and proven in court.

In recent years, states are increasingly adding risk assessments to the criminal sentencing process. Pennsylvania[15] and Tennessee,[16] for example, have enacted legislation mandating the use of risk assessments to inform sentencing decisions. Vermont[17] and Kentucky[18] use sex offense recidivism risk instruments in sentencing defendants convicted of sex crimes. For many years now, Virginia has mandated the use of an actuarial risk tool to identify low-risk offenders for diversion from prison for certain criminal convictions and high-risk sex offenders for an increased sentencing range.[19] The Model Penal Code is in the process of being revised to include actuarial risk tools in the sentencing process. The revisions would direct sentencing commissions to –

> Develop actuarial instruments or processes, supported by current and ongoing recidivism research, that will estimate the relative risk that individual offenders pose to public safety through their future criminal conduct. When these

---

[14] Milgram, *supra* note 7.
[15] 42 Pa. Consol. Stat. Ann. § 2154.5 (2009).
[16] Tenn. Code Ann. § 41-1-412(b) (2013).
[17] 28 V.S.A. § 204a(b)(1) (2013).
[18] KRS 17.554(2) (2013).
[19] Jordan M. Hyatt et al., *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing*, 49 DUQ. L. REV. 707, 723 (2011).

> instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.[20]

In the federal system, legislation pending in both the House and Senate would make risk assessment once again a major determinant of imprisonment terms served by federal offenders.[21] The legislation would regulate the portion of an imposed term of imprisonment ordered by a court that would actually be served by a federal offender. While the goals of improving reentry programming and efficacy are laudable and while there is much we support in the legislation, we are concerned by these key provisions that would base imprisonment periods to be served on the results of a yet-to-be-created risk assessment instrument that will evolve over time as data analytics develop and make their way into such instruments. We think these provisions – and the larger emerging trends around risk assessments and sentencing – raise many concerns the Commission ought to study and address.

First, most current risk assessments – and in particular the PCRA, which is specifically mentioned in the pending federal legislation – determine risk levels based on static, historical offender characteristics such as education level, employment history, family circumstances and demographic information. We think basing criminal sentences, and particularly imprisonment terms, primarily on such data – rather than the crime committed and surrounding circumstances – is a dangerous concept that will become much more concerning over time as other far reaching sociological and personal information unrelated to the crimes at issue are incorporated into risk tools. This phenomenon ultimately raises constitutional questions because of the use of group-based characteristics and suspect classifications in the analytics. Criminal accountability should be primarily about prior bad acts proven by the government before a court of law and not some future bad behavior predicted to occur by a risk assessment instrument.

Second, experience and analysis of current risk assessment tools demonstrate that utilizing such tools for determining prison sentences to be served will have a disparate and adverse impact on offenders from poor communities already struggling with many social ills. The touchstone of our justice system is equal justice, and we think sentences based excessively on risk assessment instruments will likely undermine this principle.

Third, use of risk assessments to determine sentences erodes certainty in sentencing, thus diminishing the deterrent value of a strong, consistent sentencing system that is seen by the community as fair and tough. Our brothers and sisters in the defense and research communities have repeatedly cited research to the Commission about the value and efficacy of certainty of apprehension and certainty of punishment in deterring crime. Swift, certain and fair sanctions are what work to deter crime, both individually and across society. We know that certainty in sentencing – certainty in the imposition of a particular sentence for a particular crime, and certainty in the time to be served for a sentence imposed – simultaneously improves public safety and reduces unwarranted sentencing disparities. We are concerned that excessive reliance on

---

[20] Model Penal Code: Sentencing § 6B.09(2) (Tentative Draft No. 3, 2014).
[21] Recidivism Reduction and Public Safety Act, S.1675, 113th Cong. (2014); Public Safety Enhancement Act, H.R.2656, 113th Cong. (2013).

risk tools will greatly undermine what has been achieved around certainty of sentencing in the federal system.

Determining imprisonment terms should be primarily about accountability for past criminal behavior. While any effective sentencing and corrections policy will take account of future behavior to some extent – incapacitating those more likely to recidivate and utilizing effective reentry efforts to reduce the likelihood of recidivism – we believe the length of imprisonment terms should mostly be about accounting for past criminal conduct. As analytics evolve, we are concerned about the implications of sentencing policy moving away from this precept.

We think the Sentencing Commission's agenda should include the study of risk assessment tools and their various uses in the sentencing and corrections/reentry processes. Following such study, the Commission should issue a statement of policy about the proper role of these instruments in the federal criminal justice system in particular. As analytical tools transform risk assessment instruments, there is great potential for their use, but also great dangers. With the Commission's help, the good can be harnessed, the dangers avoided, and like Billy Beane, we can achieve success – here, increased public safety and greater justice – at far lower costs to all.

Structural Sentencing Reform

Several years ago, we noted that federal sentencing practice was fragmenting into at least two distinct sets of sentencing outcomes. On the one hand, sentencing outcomes in many courts remain closely tied to the sentencing guidelines. These courts have continued to impose sentences within the applicable guideline range for most offenders and most offenses.[22]

On the other hand, many courts that while still influenced by the sentencing guidelines deviate regularly and significantly from them.[23] These courts regularly impose sentences outside the applicable guideline range irrespective of the offense type or the nature of the offender.[24] In addition, there are certain offense types for which the guidelines have lost the respect of a large number of judges across districts. The most obvious of these offense types is child pornography crimes.

We remain concerned by this evolution of federal sentencing into two separate practices. Most importantly, the research and data make increasingly clear that this divide leads to unwarranted sentencing disparities. More and more, studies are showing that a defendant's sentence will be significantly influenced by the judicial assignment of the case and the particular

[22] *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 26 (2013) *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table26.pdf.
[23] *See id.*
[24] *See id.* at Table 27 *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table27.pdf.

court that conducts the sentencing.[25] This is quite troubling. In our consideration of federal sentencing policy, we begin from the principle that offenders who commit similar offenses and have comparable criminal histories should be sentenced similarly. This was the foundational principle of the Sentencing Reform Act of 1984. It seems that our federal sentencing system may be meeting this principle less and less.

We continue to believe the Commission should study these diverging practices and, over the long run, consider structural reform of the federal sentencing guidelines to address them. In addition to increasing disparities, the current guidelines structure spurs much needless litigation. This is not surprising, given that the guidelines structure was developed for a different legal framework, when the guideline calculation was intended to be the last word for most cases.

To this end, much can be learned from state sentencing guideline systems. There has been significant research of state guideline systems.[26] As we have stated before, these systems, by and large, differ structurally from the federal sentencing guidelines in that they have simpler sentencing grids, fewer grid cells, and less complex guideline formulas – *i.e.* fewer aggravating and mitigating factors *embodied in rules* for litigators to fight over. Conventional thinking would suggest that a greater numbers of cells with more factors embodied in rules would create a greater number of sets of similarly situated offenders and result in a greater degree of sentencing consistency and meaningful differentiation among offenders.[27] However, the available research and experience suggest that greater detail in the sentencing grid and sentencing formulas does not better sort offenders into more meaningful categories for purposes of sentencing decisions.[28] In particular, our experience with the very detailed federal guidelines, when applied through the legal framework created by *Booker*, has seen quite disparate guideline application and sentencing outcomes. These findings should guide the Commission in its work evaluating unwarranted disparities as much as data on guideline compliance by federal judges. Moreover, we think these findings – along with many other factors – should guide the Commission to consider structural guidelines reform to produce a simpler guideline system.

We continue to believe that a strong and consistent federal sentencing system is important to improving public safety across the country – as it has over the past decades – and to furthering greater justice for all in a cost effective manner. And we further believe that much can be learned from the states, including how a simpler form of sentencing guidelines can improve consistency, reduce unwarranted sentencing disparities, and better allocate sentencing decisions among the stakeholders in the criminal justice system.

---

[25] Transactional Records Access Clearinghouse, Surprising Judge-to-Judge Variations Documented in Federal Sentencing, TRACREPORTS (March 5, 2012), http://trac.syr.edu/tracreports/judge/274/.

[26] *E.g.*, Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190-1232 (2005).

[27] Wroblewski, *supra* note 11.

[28] *See, e.g.*, BRIAN J. OSTROM, ET AL., NAT'L CTR. FOR STATE COURTS, ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES (2008).

A strong and effective federal sentencing system is critical to keeping national crime rates low, moving them still lower, improving justice, and addressing specific and acute crime problems.

Other Priorities

While simultaneously considering systemic reforms, we think the Commission can and must consider evolving and problematic crime-specific, application and reentry issues under the current sentencing guidelines structure.

A. Congressional Enactments

One Commission priority for the coming amendment year must be to respond to directives and other enactments from Congress. The Commission is a product of Congress and exercises authority delegated by Congress. Thus, its first priority should be to respond to congressional action. During the amendment year, the Commission should complete work on any congressional pending directives addressing particular guideline areas as well as any other congressional enactments involving criminal law. Below, we note an enactment from 2010 the Commission has not yet addressed, and an enactment from 2002 that the Commission did not address completely.

1. The Small Business Jobs Act of 2010, Contract Fraud Related to the Small Business Administration, and Credits Against Loss

The Commission should amend the guidelines, consistent with the Small Business Jobs Act of 2010 (Act),[29] so offenders who fraudulently obtain federal contracts under small business preference programs serve at least some minimal time in prison. The applicable guideline, §2B1.1 (Theft, Property Destruction, and Fraud), currently directs an insufficient sentencing outcome, steering courts to focus only on the net pecuniary loss involved, which is an inadequate measure of culpability and harm in this context.

Section 2B1.1 measures harm in procurement fraud cases in relation to pecuniary loss. But a recurring theme in the Commission's 2013 Symposium on Economic Crime[30] was that loss is an inadequate measure of culpability in some fraud cases. For this unique crime type, where offenders obtain government contracts by fraudulently certifying they are part of a minority owned firm, there is often no pecuniary loss to any identified victim. There may be no direct impact on the quality of the goods or services provided to the government from these fraudulently obtained contracts. Application note 3(E) (Credits Against Loss) provides that "Loss shall be reduced by . . . the fair market value of the property returned and the services

[29] Pub. L. No. 111-240, 124 Stat. 2504 (2010).
[30] *U.S Sentencing Comm'n Symposium on Economic Crimes*, (2013), *available at* http://www.ussc.gov/research-and-publications/research-projects-and-surveys/economic-crimes/united-states-sentencing-commission-symposium-economic-crime.

rendered, by the defendant . . . to the victim before the offense was detected."[31] Thus, application of §2B1.1 in these cases will often result in no loss or in a loss amount that includes only re-procurement costs. As a result, a guideline sentence in cases where small business contractors make material false statements to the government regarding their compliance with Federal requirements such as contract eligibility, but where the government suffers no financial loss because it obtains the contracted-for goods or services, will rarely include even a short prison term. We believe this is insufficient to serve the purposes of punishment.

We also think the current guideline application for these cases is at odds with 15 U.S.C. § 632, which was amended by the Act. Section 632 now provides a presumption that the loss to the United States is to be based on the total amount expended on the contract whenever a small business concern receives a government contract by misrepresentation.[32] The credits against loss provision of §2B1.1 as applied to these cases is inconsistent with the revised statute.

One of the purposes of the Act is to ensure that some government contracts are awarded to small businesses and businesses owned by minorities and disadvantaged persons. When bidders' obtain contracts by falsely certifying their status, the harm done is to qualifying competitors who were cheated, to the integrity of the Small Business Administration, and to the will of Congress. Allowing fraudsters like these to go virtually unpunished fails the sentencing goals of just punishment as well as deterring this type of fraud and fraud in government contracting more generally.

This type of fraudulent conduct directly undercuts the government's policy of providing benefits to small firms owned by minorities or disadvantaged persons. Legitimate small business contractors are prevented from obtaining program benefits, and fraudsters benefit from illegal acts, encouraging public contempt for federal programs and for the law generally.

We believe the Commission should take up this issue this amendment year and should amend the guidelines so they recommend that these offenders serve at least some minimal time in prison.

2. Hidden Offshore Bank Accounts and Matching the Statutory Enhancement in 31 U.S.C. § 5322(b) to §2S1.3 (Money Laundering And Monetary Transaction Reporting)

The Commission should also amend the sentencing enhancement at §2S1.3(b)(2) so that it is consistent with the similar statutory enhancement enacted in 2002,[33] by expressly providing that the sentencing enhancement applies if the defendant committed a Title 31 offense "while violating another law of the United States or as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." Although §2S1.3(b)(2) was added in 2002 in response to statutory amendments providing for enhanced criminal penalty provisions under 31

[31] *See* USSG §2B1.1 comment. n. (3)(E) (Credits Against Loss).
[32] 15 U.S.C. § 632(w)(1) (2012).
[33] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT), Pub. L. No. 107-56, § 371(c), 115 Stat. 337 (2002).

U.S.C. § 5322(b),[34] the sentencing enhancement omits the statutory language "while violating another law of the United States."

A top priority for the Department's Tax Division is combating violations of U.S. tax laws using secret offshore bank accounts. Increased technical sophistication of financial instruments and the widespread use of the Internet have made it increasingly easy to move money around the world. According to reports, the use of secret offshore accounts to evade U.S. tax laws costs the Treasury at least $100 billion annually.[35] The linchpin of the Department's Offshore Compliance Initiative is § 5314 (records and reports on foreign financial agency transactions), which obligates U.S. citizens and resident aliens to report financial accounts in a foreign country with an aggregate value of more than $10,000.[36]

The Tax Division charges violations of § 5314 under § 5322 (criminal penalties), which provides for an increased maximum penalty of a $500,000 fine and 10 years imprisonment for willfully committing the reporting violation "while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period."[37] Unfortunately, as explained below, the guidelines in their current form impede the application of this statutory sentencing enhancement to all of the circumstances intended by Congress.

In a typical offshore tax evasion case, a defendant earns income from an offshore account and willfully conceals the existence of the account from the government in order to avoid paying taxes on the income. This conduct violates both the tax laws and Title 31, which governs monetary transactions. Under the guidelines, sentences for tax crimes are governed by Part T of Chapter Two, under which the offense level is generally determined by intended tax loss. In contrast, sentences for violations of 31 U.S.C. §§ 5314 and 5322 are governed by §2S1.3, where the offense level is generally determined by the value of the funds that went unreported. Section 2S1.3 provides a base offense level for a violation of § 5314 of 6 plus the number of offense levels from the table in §2B1.1.[38] Significantly, however, §2S1.3(b)(3) provides that the offense level is reset back to 6 if no §2S1.3 sentencing enhancement applies. The triggering of the reset provision will almost always result in a lower offense level under §2S1.3 than under Part T – the tax guidelines which reach offense level 8 with only $2,000 in tax loss.[39]

If the funds in the undisclosed foreign bank account were amassed legally and are used for a lawful purpose, the government's ability to avoid the reset to offense level 6 is largely limited to proving that the enhancement under §2S1.3(b)(2) applies; *i.e.*, that the defendant "committed the [Title 31] offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." Although it is the Department's position that a defendant's failure to pay tax on the income generated by unreported funds in an unreported foreign account

---

[34] *See* USSG App. C, vol. II, amend. 637, supp. at 244 (2002).
[35] *See e.g.*, Staff Rep. S. Perm. Subcomm. on Investigations, 111th Cong., TAX HAVEN BANKS AND U.S. TAX COMPLIANCE, at 1 (July 17, 2008).
[36] 31 U.S.C. § 5314 (2012).
[37] 31 U.S.C. § 5322(b) (2012).
[38] USSG §2S1.3(a)(2).
[39] USSG §2T4.1(B).

satisfies the "pattern of unlawful activity" requirement – because the conduct would violate both the tax laws and the offshore-account reporting requirement – adding the phrase "while violating another law of the United States" to §2S1.3(b)(2) would remove any ambiguity on that point, thus fulfilling the provision's purpose of "giv[ing] effect to the enhanced penalty provisions under 31 U.S.C. § 5322(b)."[40] We ask the Commission to amend §2S1.3(b)(2) in this way this amendment year.

B. The "Categorical Approach"

As the Commission well knows, one of the most vexing application issues in federal sentencing is determining whether certain prior convictions trigger higher statutory and guideline sentences. We have repeatedly encouraged the Commission to review the terms "crime of violence," "violent felony," "aggravated felony," and "drug trafficking offense" as they are used in federal sentencing statutes and guidelines, and the use of the "categorical approach" to determine whether prior convictions trigger higher statutory and guideline sentences.

Few statutory and guideline sentencing issues lead to as much litigation as determining whether a prior offense is categorically a "crime of violence," "violent felony," "aggravated felony," or "drug trafficking offense." Although the Supreme Court has employed the murky "categorical approach" to define these terms as they appear in statutes,[41] because of the advisory nature of the guidelines, we believe the Commission is free to simplify the determination within the guidelines manual. The Commission is also well positioned to advise Congress on how to do the same in federal statutes.

The examples of problems caused by the doctrine are countless, and we think this issue should concern the Commission because the categorical approach has led the courts to very inconsistent sentencing results.[42] We do not believe defendants should receive dramatically different sentences simply because of varying practices in charging and record-keeping among the 50 states and thousands of counties and parishes throughout the United States or because of varying drafting conventions among state legislatures. Moreover, Congress, the Commission and the Administration have all made clear that for many crime types, significant imprisonment terms should be reserved for those who are violent, aggravated or repeat offenders. The inability to efficiently and effectively define prior aggravated convictions thwarts this sensible strategy. We are hopeful the Commission's work will result in a resolution of this problem that will ultimately reduce the resources needed to litigate these cases and increase sentencing consistency.

C. Child Exploitation Crimes

The Department shares the Commission's view that child pornography offenses are serious crimes that have a profound impact on victims and their families. We also agree with the

[40] USSG App. C, vol. II, amend. 637, supp. at 244 (2002).
[41] *See Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); and *Chambers v. United States*, 555 U.S. 122 (2009).
[42] We have noted these inconsistent results for the Commission in the past.

Commission that technological advancements have changed the way offenders obtain and distribute child pornography, so much so that the specific offense characteristics in the current guidelines no longer reliably capture the seriousness of offender conduct, nor fully account for differing degrees of offenders' dangerousness. The Department has repeatedly called for reform of the sentencing guidelines for non-production child pornography crimes, but has stated that such reform must keep the threat offenders pose to children front and center.

Specifically, the Department is hoping to work with the Commission to obtain congressional authority to amend §2G2.2 of the guidelines. As we have detailed before,[43] we believe §2G2.2 (under the current guideline structure) should be amended in a number of ways. For example, we believe an enhancement should be added to account for offenders who, through online communication with others, encourage the sexual abuse or exploitation of a minor, solicit the production of child pornography, or facilitate measures to avoid detection. We also recommend an enhancement for offenders who engage in repeated and long term child pornography trafficking and collecting. The guideline should also account for the sophistication of the offender's behavior, particularly with respect to measures taken to avoid detection or prosecution, such as using anonymizing mechanisms designed to mask an offender's identity online, and encryption, which greatly impedes investigators' ability to gain access to evidence necessary to procure a conviction. These actions demonstrate a level of sophistication and commitment to offending that should play a role in enhancing an offender's sentence.

After undertaking a multi-year examination of sentencing in child pornography cases, the Commission concluded that ". . . the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability."[44] As a consequence, the child pornography guideline is currently being followed in only about a third of child pornography cases.[45] We urge the Commission to continue its work in this area to resolve this situation as soon as possible.

D. Review of Supervised Release Violators

We support the Commission's review of recidivism and reoffending. We reiterate our hope that the review will focus in significant part on the circumstances under which offenders who violate their terms of supervised release have those terms of supervision revoked so that they are returned to federal prison. As we have indicated in the past,[46] innovative work – like the HOPE Program – happening across the country and involving probation and supervision violators, suggests there may be opportunities for public safety improvements and cost savings regarding this group of offenders in the federal system.

---

[43] Wroblewski, *supra* note 11.
[44] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES, at i-xxvi, ii *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Executive_Summary.pdf (2012).
[45] U.S. SENTENCING COMM'N, *supra* note 22, at Table 27.
[46] Wroblewski, *supra* note 11, at 12.

E. Native American Advisory Group

We previously sent a letter to the Commission requesting that it form a new American Indian Sentencing Advisory Group to study the treatment of American Indian defendants and victims in federal criminal courts. In light of the unique federal jurisdiction in Indian Country and the expanded focus of federal law enforcement on crimes committed there, we believe such an advisory group is critical to further developing trust and confidence in the federal sentencing system and the federal criminal justice system more broadly. An advisory group could make use of various data sources and the Commission's research capacity to identify concerns with federal sentencing in Indian Country and recommend solutions as warranted. We urge the Commission to form such a group this year.

F. *Burrage* and Causation

The Controlled Substances Act provides for a 20-year mandatory minimum sentence when a defendant unlawfully distributes a covered substance and "death or serious bodily injury results from the use of such substance."[47] The guidelines similarly provide an enhanced penalty, in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking, Or Possession; Continuing Criminal Enterprise), when the "the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance."[48]

In *Burrage v. United States*, the Supreme Court interpreted the phrase "results from" in the Controlled Substances Act to require but-for causation between the use of the drug distributed by the defendant and the resulting death or serious bodily injury, where the use of the drug is not an independently sufficient cause of the death or injury.[49] According to Commission data, 83 defendants were sentenced under §2D1.1(a)(2), where the offense established that death or serious bodily injury resulted from the use of the substance, during fiscal year 2012.[50] We believe in most circumstances, when a drug trafficker sells a controlled substance that is a contributing – but not a but-for – factor in the end user's death or serious bodily injury (perhaps because, as in the case of *Burrage*, the user had consumed other drugs that also contributed to the death), the trafficker should still receive some enhanced penalty to account for the death or injury.

To address this issue, the Commission should amend the guidelines to provide additional guidance to courts in sentencing drug offenders who sold drugs involved in the death or serious bodily injury of users both to conform the guidelines with *Burrage* and to ensure appropriate penalties for the serious harm caused by these offenses. This should include an invited upward departure provision to account for the death or serious bodily injury caused when a controlled

---

[47] *See, e.g.*, 21 U.S.C. § 841(b)(1)(C) (2012).
[48] USSG §2D1.1(a)(2), which triggers a base offense level of 38 (235-293 months at Criminal History Category I), consistent with the statutory minimum.
[49] *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).
[50] *See* U.S. SENTENCING COMM'N, FISCAL YEAR 2012 DATAFILE, *available at* http://www.ussc.gov/research-and-publications/commission-datafiles (2012).

substance that is a contributing – but not a but-for – factor in the end user's death or serious bodily injury.

G. Definition of "Controlled Substance Offense"

In 2008, the Commission amended the guidelines to clarify that the term "drug trafficking offense" includes "offers to sell" illegal drugs.[51] There has also been litigation over the term "controlled substance offenses" and whether it also includes offers to sell.[52] We believe a similar amendment should now be made to make clear that the term "controlled substance offense" as used in the guidelines includes offers to sell. An amendment clarifying the term in a manner consistent with the 2008 amendment would be appropriate.

H. Definition of "Criminal Justice Sentence"

Pursuant to §4A1.1(d), a defendant receives two criminal history points if he commits "the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release or escape status." The introductory commentary to §4A1.1 explains the rationale for the adjustment: "Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation" and that a defendant's "likelihood of . . . future criminal behavior" must be considered.

However, the applicability of the adjustment for offenders who commit the instant offense while already serving a sentence is limited to sentences countable under §4A1.2. In 2007, the Commission amended §4A1.2 to exclude certain misdemeanor offenses from the criminal history score.[53] Defendants no longer receive the two criminal history points under §4A1.1(d) if the instant offense was committed while under a term of probation of exactly one year for misdemeanor convictions for reckless driving, contempt of court, disorderly conduct, disturbing the peace, driving without a license or with a revoked or suspended license, giving false information to a police officer, gambling, hindering or failing to obey a police officer, writing a bad check, leaving the scene of an accident, failure to pay child support, prostitution, resisting arrest and trespassing.[54]

In many cases – including violent crime, firearms and narcotics cases – defendants are serving a term of probation at the time of the federal offense for one of the offenses listed in §4A1.2(c)(1). As the Commission itself has recognized, this fact evidences an increased likelihood of recidivism. Nonetheless, under the current guideline, the two-point increase does not apply.

---

[51] USSG App. C, Amendment 709 (Nov. 1, 2007).
[52] *See, e.g., United States v. Savage*, 542 F.3d 959 (2d Cir. 2008) (vacating and remanding a federal sentence because the previous conviction under a Connecticut statute that criminalized offers to sell illegal drugs was not necessarily a "controlled substance offense" under the guidelines); *United States v. Price*, 516 F.3d 285, 288 (5th Cir. 2008) (vacating and remanding a federal sentence because Texas controlled substance offense included a broader range of offenses, including offers to sell, unlike "controlled substance offense" as defined in the guidelines).
[53] USSG App. C, Amendment 709 (Nov. 1, 2007).
[54] *See* USSG §4A1.2(c)(1).

We believe that anytime a defendant commits a federal offense while serving a period of state parole or probation, that defendant should receive two additional criminal history points to reflect an increased risk of recidivism. We think the Commission should review this issue and consider amending Chapter Four accordingly.

I. Hidden Offshore Bank Accounts Involved in Tax Crimes

In addition to the tax issue discussed above concerning hidden offshore bank accounts and §2S1.3(b)(2) (Money Laundering And Monetary Transaction Reporting), the Commission should also review a separate issue involving hidden foreign bank accounts and §2T1.1 (Income Taxes, Employment Taxes, Estate Taxes, Gift Taxes, And Excise Taxes). By law, U.S. taxpayers are required to report worldwide income from all sources, including income from offshore accounts.[55] Similarly, the law requires a U.S. taxpayer to report to the U.S. Treasury Department his or her foreign accounts with balances in excess of $10,000 as to which he or she has certain ownership interests and/or control.[56] The use of bank or investment accounts maintained in a tax haven with strict bank secrecy laws is often done less for customary investment purposes (due to low rates of return and high fees) than because it increases the difficulty of U.S. law enforcement agencies to discover the accounts and enforce U.S. laws.

Our national tax enforcement program is enhanced when wrongdoers are appropriately sentenced and those who would contemplate engaging in similar conduct are deterred. Conversely, the program is impaired and tax revenue is correspondingly lost when offshore cases that are criminally prosecuted result in sentences that do not deter continued evasion. We believe in many cases involving offshore accounts, the tax loss will significantly understate the seriousness of the tax offense (as a result of low rates of return and high fees charged in exchange for the secrecy procured).

We propose that the Commission amend the commentary in §2T1.1 to recognize that an upward departure may be warranted where the tax loss, the customary proxy for harm in tax-related cases, substantially understates the seriousness of the offense. A provision patterned after Application Note 19 in §2B1.1 would best accomplish this and be most consistent with the current guideline structure. We propose a new Application Note 8 to §2T1.1 as follows:

> *8. Upward Departure Consideration*— There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted.
>
> For example, a defendant who willfully fails to disclose an offshore bank account may have unreported income from the account that is relatively small in comparison with the value of the assets hidden, as a result of low rates of return and high fees charged in exchange for the secrecy procured. In such a case, the tax loss table in §2T4.1 may

[55] Foreign Account Tax Compliance Act; Pub. L. No. 111-147, 124 Stat. 97 (codified as amended in scattered sections of 26 U.S.C.).
[56] 31 C.F.R. § 1010.340 (2010).

produce an offense level that substantially understates the seriousness of the offense. If so, an upward departure may be warranted.

J. Economic Crimes

We are pleased the Commission will be continuing its review of sentencing policy for economic crimes and in particular the application of fraud guideline, §2B1.1, over the coming amendment year. While we believe the current guideline recommends appropriate sentences in most cases, we recognize that certain amendments to §2B1.1 may be needed. The Commission's 2013 Symposium on Economic Crime[57] helped to identify discrete and important issues that we believe ought to be addressed this year. We look forward to working with the Commission on these issues in the coming months.

K. Evasion of Export Controls

We recommend the Commission amend §2M5.1 (Evasion of Export Controls) in order to conform the guideline to the structure of the export control regime administered pursuant to the International Emergency Economic Powers Act (IEEPA), as well as to address problems created by the inflexibility of the current guideline applicable in IEEPA prosecutions.

The applicable guideline should reflect the range of conduct governed by IEEPA. The Commerce Control List (CCL) administered by the Department of Commerce regulates a range of munitions and dual use items of varying levels of sensitivity, the unlawful export of which may constitute a criminal violation of IEEPA. The CCL regulates many items that are highly sensitive, including items that can be used in nuclear weapons, and controls exports based on important national security and foreign policy interests associated with the sensitivity of the items or the destination countries or end users. The controls also apply to less sensitive items, end uses, and end users. These controls have undergone significant reform under the President's Export Reform Initiative to ensure that the controls are calibrated to the national security and foreign policy interests at stake. In addition, the Departments of State and Treasury also administer controls under the authority of IEEPA, criminal violations of which are captured by this guideline.

The current §2M5.1 does not take full account of this regulatory regime. The current guideline imposes a base offense level of 26 in nearly all cases. A base offense level of 14 is available in very limited instances (when national security controls or countries supporting international terrorism are not involved). For the most sensitive controls, a base offense level of 26 does not capture the seriousness of the conduct. At the same time, the fact that the guideline does not account for the broad range of controls in the CCL has led to a widespread practice of district courts departing or varying from the guidelines. The courts have imposed disparate sentences that undermine the strong policy interest in uniform sentencing, often sentencing defendants at levels that reflect unwarranted departures from the base offense level of 26. This

[57] *U.S Sentencing Comm'n Symposium on Economic Crimes*, (2013) *available at* http://www.ussc.gov/research-and-publications/research-projects-and-surveys/economic-crimes/united-states-sentencing-commission-symposium-economic-crime.

practice weakens the credibility of the guideline in a range of potential cases, frustrating the government's ability to rely on the guideline to lead to an adequate sentence.

A revised guideline could address these problems by providing a greater range of sentencing levels to better capture the range of export control violations to which the guideline applies. Rather than two base offense levels in the current guideline, we propose three possible base offense levels, with the addition of three specific offense characteristics for three types of aggravating factors. We propose a base offense level of 25 if controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; a base offense level of 22 if other national security controls were evaded, or if the offense involved a financial transaction with a country supporting international terrorism; and a base offense level of 14 in cases where none of these factors applied.

We further suggest three specific offense characteristics: a three level increase if the relevant item, technology or services relates to a WMD program, a weapon, or a military, missile or nuclear end use or end user; a three-level increase if the relevant commodity, technology, software, or service was intended for or facilitated or received by (A) a country, foreign entity or person that is sanctioned or otherwise designated by the Departments of Treasury, State, or Commerce for national security or foreign policy reasons; or (B) a country subject to a U.S. arms embargo; and a three-level increase if the transaction involves more than $100,000. An application note should specify in addition that if the base offense level of 25 applied for controls relating to nuclear, biological, or chemical weapons or materials, then the specific offense characteristic relating to WMD programs, weapons, or military, missile or nuclear end use or end users would not apply.

The resulting adjusted offense levels for the most serious offenses would be higher than under the current guideline, but the graduated offense level structure would also allow for a lower offense level in cases without the aggravating factors. We believe that a guideline revised in this manner would provide judges with more useful advice and generally promote greater consistency in sentencing.

The addition of a base offense level and the specific offense characteristics would further provide flexibility to allow tailored sentences for defendants who participate in a criminal network. Section 2M5.1 is most frequently used for IEEPA Iranian sanctions offenses and "dual-use" items to China offenses, and some of these networks may be relatively complex, involving actors of differing culpability.

We are continuing to evaluate whether a similar approach is justified as to §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), but the export controls subject to §2M5.2 are significantly different from the controls administered under the CCL. The sensitivity of items on the International Traffic in Arms Regulations (ITAR), violations of which implicate §2M5.2, tend to be more uniform. As part of the Export Reform Initiative, less sensitive items on the ITAR are being moved to the CCL. For these reasons, §2M5.2 does not present the same need for the proposed calibrated structure (and restructuring) we are proposing for §2M5.1.

Circuit Conflicts and Other Court Decisions

We continue to urge the Commission to make the resolution of circuit conflicts a priority for this guideline amendment year, pursuant to its responsibility outlined in *Braxton v. United States*.[58] We also urge the Commission to clarify the guidelines in light of issues identified by the appellate courts in case law.

A. Section 2Q1.2 and Recordkeeping Offenses to Conceal Substantive Environmental Offenses

The Commission should resolve a circuit split concerning the application of §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) when the defendant has engaged in a recordkeeping offense that conceals a substantive environmental offense.

Section 2Q1.2 applies to prosecutions brought pursuant to a host of environmental criminal statutory provisions.[59] When the violation is a "recordkeeping offense," §2Q1.2(b)(5) provides, "[i]f a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense."[60]

Nevertheless, there is a split among the circuit courts of appeals on how to apply §2Q1.2(b)(5). The Tenth Circuit (and a district court in the Seventh Circuit) has held that the enhancements in §2Q1.2(b)(1) - (4) apply to recordkeeping violations regardless of the motive for the violation.[61] In contrast, the Sixth and Second Circuits have held that when the motive is at least in part other than to conceal an environmental violation, those enhancements do not apply.[62] In other words, if a defendant's motive to falsify records or not disclose information as required is motivated by some other factor, such as to save money, to save time, or simple laziness, the enhancements do not apply in the Sixth and Second Circuits even if the result of the

---

[58] 500 U.S. 344, 347-49 (1991).

[59] These include, among others, the Clean Water Act, the Resource Conservation and Recovery Act, and the Clean Air Act. Section 2Q1.3 is applicable to charges brought pursuant to the same provisions, but generally applies to violations involving other, less hazardous substances. It has a base offense level of 6.

[60] Application Note 1 further defines a "recordkeeping offense" to include ". . . both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed." The Background explains: "The first four specific offense characteristics [§2Q1.2(b)(1)-(4)] provide enhancements when the offense involved a substantive violation. The fifth and sixth specific offense characteristics [§2Q1.2(b)(5)-(6)] apply to recordkeeping offenses." In defining the term broadly, the Sentencing Commission recognized that in the environmental context, recordkeeping violations can have significant repercussions that should be punished consistent with substantive environmental violations that have the same consequences.

[61] *See United States v. Morris*, 85 Fed. App'x 117 (10th Cir. 2003); *United States v. Hagerman*, 525 F.Supp.2d 1058 (S.D. Ind. 2007), aff'd on other grounds, 555 F.3d 553 (7th Cir. 2009).

[62] *See United States v. White*, 270 F.3d 356, 369 (6th Cir. 2001); *United States v. Canal Barge Co., Inc., et al.*, 631 F.3d 347 (6th Cir. 2011) (involving a failure to report a benzene leak on a vessel as required by the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1) (2006), motivated by a desire to avoid delay of vessel's voyage due to unsafe condition); *United States v. Liebman*, 40 F.3d 544, 552 (2d Cir. 1994).

violation is a discharge into the environment, a death, an evacuation, or a disposal without a permit.

At odds with the interpretations of the Sixth and Second Circuits is the recent Supreme Court decision in *Loughrin v. United States*.[63] In *Loughrin*, the Court held that for bank fraud (18 U.S.C. § 1344), the government is not required to prove that the defendant intended to defraud a financial institution, as there is no such requirement in the statute's text.[64] Rather, the government must show merely that a defendant obtained money (or funds, or property, etc.) under the custody or control of a financial institution by means of false or fraudulent pretenses, representations or promises.[65] Requiring more would prevent the statute from applying to cases falling within the clear terms of the statute's language, in the case of bank fraud, third party custodians of bank owned property.[66]

Similarly, in §2Q1.2(b)(5), there is no requirement that the judge must rule out an additional motivation, besides the effort to conceal a substantive environmental offense. More generally, the nation's environment is a precious resource that deserves protection, and we think this interpretation of the guidelines impedes the full protection intended by the Commission and the law. We believe the Commission should resolve this conflict by clarifying that the Tenth Circuit's interpretation is correct as a matter of law and of policy.

B. Prior Convictions for Statutory Rape and Sexual Abuse of a Minor

The Commission should also resolve a circuit split concerning the application of a 16-level adjustment under §2L1.2 (Unlawfully Entering or Remaining in the United States) for prior crimes of statutory rape and sexual abuse of minor. The 16-level enhancement is triggered by a prior felony crime of violence conviction.[67] Application Note 1(B)(iii) defines "crime of violence" to include statutory rape and sexual abuse of a minor.[68] Circuits differ, though, as to whether statutory rape and sexual abuse of a minor require the victim to be under 16 or under 18. The Supreme Court has not taken up this issue, denying many petitions for certiorari entreating the Court to resolve this circuit split and leaving the issue to the Commission.[69]

The Ninth Circuit, relying on the fact that thirty-two states, the federal government, and the District of Columbia have all set the age of consent at 16, has held that the age of consent for

---

[63] No. 13-316, 2014 U.S. LEXIS 4306 (U.S. June 23, 2014).
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] USSG §2L1.2(b)(1)(A)(ii).
[68] USSG §2L1.2 comment.
[69] *See, e.g.*, *Perez-Mejia v. United States*, No. 13-9150 (June 16, 2014); *Gonzalez-Silva v. United States*, No. 13-5808 (Feb. 24, 2014); *Rodriguez v. United States*, No. 12-10695 (Nov. 4, 2013); *see also, e.g.*, *Quiroga-Hernandez v. United States*, No. 12-10954 (Nov. 4, 2013); *Anaya-Santiago v. United States*, No. 12-8034 (Feb. 19, 2013); *Vera-Gonzalez v. United States*, No. 11-06378 (Jan. 9, 2012); *Mancera v. United States*, No. 10-9053 (June 20, 2011); *Castaneda-Alfaro v. United States*, No. 10-8562 (May 31, 2011); *Martinez v. United States*, No. 10-8558 (May 31, 2011).

the purposes of the "generic, contemporary meaning" of statutory rape in §2L1.2 is 16.[70] The Fourth Circuit has likewise held that the generic definitions of the offense of statutory rape and sexual abuse of a minor require the victim to be younger than 16.[71] In contrast, the Fifth Circuit, relying on Webster's Dictionary and Black's Law Dictionary, has held that the generic meaning of "minor" in sexual abuse of a minor is a person under 18 and that the age of consent for statutory rape is defined by local statute.[72]

As a result, in the Ninth and Fourth Circuits, a defendant's previous conviction under a state statute where the age of consent is seventeen or eighteen or that defines a child as a person under seventeen or eighteen (as at least seventeen states do) would not qualify as a prior crime of violence, whereas in the Fifth Circuit such convictions would qualify.[73]

A related issue is whether both statutory rape and sexual abuse of a minor require an age differential between the perpetrator and the victim. An element of sexual abuse of a minor, under 18 U.S.C. § 2243 (sexual abuse of a minor or ward), is that the victim be at least four years younger than the perpetrator. However, this is not the case in all relevant state statutes.

To our knowledge, only the Ninth Circuit has directly addressed the issue. Relying in part on the definition found in federal law at § 2243, the Ninth Circuit has held that the generic definition of sexual abuse of a minor includes an age difference of at least four years.[74] The Ninth Circuit similarly found a four-year age differential in the generic definition of statutory rape.[75] In contrast, the Fifth Circuit did not mention a requirement of an age differential when holding that the age of consent for statutory rape is that defined by the state statute.[76]

We believe the Commission should resolve all of these issues related to §2L1.2 in the coming amendment year.

---

[70] *United States v. Rodriguez-Guzman,* 506 F.3d 738 (9th Cir. 2007).
[71] *United States v. Rangel-Castaneda*, 709 F.3d 373, 378 (4th Cir. 2013).
[72] *United States v. Rodriguez*, 711 F.3d 541, 561 (5th Cir. 2013) *cert. denied*, 134 S. Ct. 512 (2013) ("We reject the Ninth Circuit's reliance on this definition of 'age of consent' because the Black's Law Dictionary definition of 'statutory rape' states explicitly that the age of consent in the specific context of statutory rape is to be defined by statute.").
[73] Muddying the waters further, a dissenting judge in the Eighth Circuit questioned whether the majority view is truly representative, given that seventeen states are excluded, including the most populous state California. *See United States v. Viezcas-Soto*, 562 F.3d 903, 914 (8th Cir. 2009) (Gruender, J., dissenting) ("It seems to me that a definition of 'statutory rape' that excludes the statutory rape laws of seventeen states, including the most populous state in the Union [California], along with Texas [age of consent 17], New York [17], Florida [18], and Illinois [17], cannot reasonably be classified as 'generic.'").
[74] *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1156 (9th Cir. 2008); *United States v. Gomez*, 2014 U.S. App. LEXIS 7810, 47 (9th Cir. Wash. Apr. 24, 2014) ("[W] e defined the generic offense of "sexual abuse of a minor" as requiring "four elements: (1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor.").
[75] *Gomez*, at 50-51. ("The development of our law in this area, as well as the statutory law of other jurisdictions, leads us to conclude that a four-year age difference is an element of the generic offense of statutory rape.") ; *see United States v. Caceres-Olla*, 738 F.3d 1051, 1057 (9th Cir. 2013).
[76] *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (*en banc*).

C. *King, Williams*, and The Effect of Grouping on Career Offender Predicates

The Commission should resolve an emerging circuit split concerning the effect of consolidated state convictions on whether or not a crime qualifies as a career offender predicate. In *King v. United States*,[77] the Eighth Circuit held that the "concurrent sentence provision" of §4A1.2(a)(2) (Definitions and Instructions for Computing Criminal History) is ambiguous. It found that the provision is subject to two plausible interpretations, and under the rule of lenity, the defendant is entitled to the more favorable interpretation. Under *King's* construction of §4A1.2(a)(2), a conviction that would qualify as a career offender predicate on its own ceases to qualify if the defendant was simultaneously convicted of another non-predicate offense for which he received a longer concurrent sentence. Thus, in the Eighth Circuit, a prior conviction for armed robbery alone is a predicate felony for career offender purposes, but if the prior conviction for armed robbery is consolidated with a non-predicate offense, for example, drug possession, it would cease to be a predicate felony for career offender purposes if the sentences for the two crimes were ordered to run concurrently and the sentence for the drug possession count was longer.

In *United States v. Williams*, the Sixth Circuit, fully aware of the Eighth Circuit's view, ruled the opposite way: that the concurrent sentence provision of §4A1.2(a)(2) is not ambiguous, because it says nothing about the scoring of multiple crimes within a single predicate episode.[78] Therefore each of Williams's previous convictions, including his conviction for fourth-degree fleeing and eluding, independently supported the assessment of criminal history points under §4A1.1(a), (b), and (c) and thus the fleeing and eluding conviction would count as a career offender predicate.[79]

We believe the Commission did not intend an otherwise applicable predicate conviction to be excluded from the career offender calculus by the conviction of an additional crime, and we therefore ask the Commission to clarify the relevant guideline language.

D. Conditions of Supervised Release

In *United States v. Siegel*,[80] the Seventh Circuit, in an opinion by Judge Posner, held that several conditions of supervised release were invalid on vagueness grounds. One of the invalidated conditions – to refrain from excessive alcohol use – is found at §5D1.3(c)(7) of the guidelines and is among a number listed in the guidelines as recommended standard conditions of supervised release.[81] In subsequent cases, the Seventh Circuit has rejected various imposed conditions of supervised release based on the sentencing court's failure to explain the need for the conditions.[82]

---

[77] 595 F.3d 844 (8th Cir. 2010).
[78] No. 12-2108 (6th Cir. June 2, 2014).
[79] *Id.*
[80] 2014 WL 2210762 (7th Cir. May 29, 2014).
[81] *See also*, 18 U.S.C. § 3563(b)(7).
[82] *See, e.g., United States v. Benhoff*, 13-2369, 2014 WL 2724650 (7th Cir. 2014); *United States v. Baker*, 13-1641, 2014 WL 2736016 (7th Cir. 2014); *United States v. Farmer*, 13-3373, 2014 WL 2808079 (7th Cir. 2014); *United States v. Johnson*, 12-3229, 2014 WL 2854996 (7th Cir. 2014).

We believe the Commission can and should remedy any vagueness problem in §5D1.3(c)(7), either by amending the guidelines to more specifically address the circumstances that would constitute excessive alcohol use or in the alternative by directing sentencing courts to specify such circumstances. Further, we think the Commission should consider amending the commentary in Chapter Five more generally to direct sentencing courts, in imposing conditions of supervised release, to specifically address the need for the conditions.

Miscellaneous Issues

A. Antitrust Offenses

The Commission has indicated it plans "a study of antitrust offenses, including examination of the fine provisions in §2R1.1." The American Antitrust Institute (AAI) has previously requested that the Commission re-examine §2R1.1's 10 percent overcharge presumption and at least double this presumption due to its belief that it significantly understates the gain from cartel activity.[83]

We believe the current §2R1.1 fine provisions, which provide for a base fine of 20 percent of an organizational defendant's volume of affected commerce, are appropriate.[84] The Commission determined that volume of commerce "is an acceptable and more readily measurable substitute" for damages caused or profit made by a defendant, because antitrust "damages are difficult and time consuming to establish."[85] The Commission also established the 20 percent proxy for the economic impact of, or loss from, an antitrust offense, based on the estimated average gain of 10 percent and the recognition that loss from an antitrust offense exceeds gain, in order "to avoid the time and expense . . . required for the court to determine the actual gain or loss."[86] The Commission directed that "[i]n cases in which the actual . . . overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range."[87]

Based on current evidence, the Department believes the typical cartel does increase prices more than 10 percent, but the actual average overcharge is subject to debate. Very recent literature concludes that the accumulated evidence points to a lower average overcharge than the AAI presumes, although still greater than 10 percent.[88] We do not believe it would be a

---

[83] Letter to the U.S. Sentencing Commission from The American Antitrust Institute, (July 8, 2013), *available at* http://www.antitrustinstitute.org/sites/default/files/USSCAAILetter.pdf.
[84] USSG §2R1.1(d)(1), 8C2.4(b).
[85] USSG §2R1.1, comment. (backg'd.).
[86] USSG §2R1.1, comment. (n.3).
[87] *Id.*
[88] Marie-Laure Allain, Marcel Boyer & Jean-Pierre Ponssard, *The Determination of Optimal Fines in Cartel Cases: Theory and Practice*, 4 CONCURRENCES 32, (2011); Marcel Boyer & Rachidi Kotchoni, *How Much Do Cartels Overcharge?* (Toulouse School of Economics, Working Paper TSE-462, 2014).

worthwhile expenditure of resources to put any process in motion to increase the 10 percent presumption marginally. The current guidelines already provide a mechanism to increase fines by imposing fines higher in the guidelines range. By sentencing a defendant at or near the top of a defendant's guidelines range, a court can impose a sentence that accounts for overcharges well in excess of the 20 percent figure proposed by the AAI. Thus, even if the Commission were to adopt the AAI's proposal, it would have only a marginal impact on our ability to adequately deter, detect and punish cartel offenses.

Any reconsideration of the guidelines' approach to antitrust fines should also not lose sight of the general deterrence rationale of the antitrust guideline. The purpose of antitrust fines and jail sentences and the antitrust guideline is to deter antitrust offenses through a predictable, uniform methodology. Closely tying antitrust penalties to a defendant's attributable volume of commerce necessarily promotes the twin goals of certainty of punishment and proportionality of punishment. The deterrence rationale for penalties means that proper sentences are only loosely related to the actual harm from offences. The level of the penalty necessary to deter relates to the *expected* gain from offending at the time the decision whether to offend is made.

We would be happy to address any additional issues of interest to the Commission regarding antitrust fines.

B. Cyberstalking, Violence and Extortion by Proxy, Hacking of Personal Social Media and Extortion, and the Statutory Index for Convictions Under 18 U.S.C. § 1030

We believe the guidelines' statutory index should be amended so that convictions under 18 U.S.C. § 1030 (Fraud and Related Activity in Connection with Computers) are considered under the guideline for stalking, §2A6.2, in addition to the guideline for theft and fraud, §2B1.1. We believe the fraud guideline is inappropriate and inadequate when the offense behavior involves cyberstalking and related conduct. As the digital age continues to evolve, so have online threats. These threats are variously described as cyberstalking, violence and extortion by proxy, hacking of personal social media, "sextortion," and "revenge pornography." In a recent case, for example, perpetrators hacked into a victim's email, Facebook, and other social media accounts, found compromising pictures and videos, then used these files to extort nude and otherwise compromising pictures and videos of the victim and to gain access to the accounts of others, and do the same thing to them.[89]

[89] In *United States v. Kazaryan*, No. 13-56 (C.D. Cal. Feb. 25, 2013), the defendant hacked into hundreds of victims' email, Facebook and Skype accounts. He then methodically searched these accounts for nude pictures of the victim, passwords, and contact information of the victim's friends. Once he had access to an account, he would take over the account and pretend to be that person to her friends. He would persuade the friends to show him sexually explicit pictures of themselves and to provide other information that he then used to obtain access to their accounts. He would then return to original victims in the guise of another victim's account, extorting additional sexually explicit pictures and videos. If the victims hesitated at all, he posted previously obtained pictures publicly, causing the victims to receive calls from other friends about how their entire friend network could now see them naked. There were 370 victims. Those targeted most seriously characterized the experience as devastating, akin to rape, with the harm ongoing.

Unless interstate communications are demonstrably involved, such defendants are usually charged with computer hacking under 18 U.S.C. § 1030. Unfortunately, the applicable guideline under Appendix A, §2B1.1 (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit), is not designed to address this kind of cyberstalking and related conduct. Although Application Note 20(A)(ii) contemplates an upward departure where the offense "caused or risked substantial non-monetary harm," sentences usually fail to reflect the tremendous harm done to the victims. We ask that the Commission to review these cases and consider amending the Appendix A so that convictions under 18 U.S.C. § 1030 are also referenced to the guideline for stalking, §2A6.2.

Conclusion

The policy agenda we suggest here is substantial. The range of issues represents the range of the Commission's statutory responsibilities, including overseeing the systemic health of the federal sentencing system and its structural elements, addressing individual guidelines in need of reform, resolving circuit conflicts, and more. We look forward to discussing all these issues with you and the other Commissioners with the goal of refining the sentencing guidelines and laying out a path for developing effective, efficient, fair, and stable sentencing policy long into the future.

Under the leadership of the Attorney General, violent crime rates continue to fall and are now at generational lows. Our goal is to continue to improve public safety while ensuring justice for all by means of the efficient use of enforcement, judicial and correctional resources. We appreciate the opportunity to provide the Commission with our views, comments, and suggestions.

Sincerely,

Jonathan J. Wroblewski
Director, Office of Policy and Legislation

cc: Commissioners
Kenneth P. Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel

From: Phillips, Channing D. (OAG)
Sent: Thursday, July 31, 2014 12:11 PM
To: Leary, Marylou; Werner, Sharon (OAG)
Cc: O'Donnell, Denise
Subject: RE: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Hi Mary Lou,

We're also going to have Jonathan Wroblewski give you a call to explain the position we took before the Sentencing Commission in our annual report on this issue.

Channing

From: Leary, Marylou
Sent: Thursday, July 31, 2014 11:46 AM
To: Werner, Sharon (OAG); Phillips, Channing D. (OAG)
Cc: O'Donnell, Denise
Subject: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data Driven Sentencing"

Just got this. It must be the basis of a call that Adam gel got yesterday from a reporter saying that the AG is going to speak this week and state that he is opposed to risk assessment in criminal justice.

(b) (5) [redacted]

Wanted to make sure you were aware of this.

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "O'Donnell, Denise"
Date:07/31/2014 11:37 AM (GMT-05:00)
To: "Leary, Marylou"
Subject: FW: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

The answer…

From: Solomon, Amy
Sent: Thursday, July 31, 2014 11:35 AM
To: O'Donnell, Denise; Darden, Silas; Qazilbash, Ruby
Cc: Mason, Karol V.; McGarry, Beth
Subject: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

I wanted to make sure you all saw this. (b) (5) [redacted] Today's my last day in office for two weeks and I'm running around… but wanted to flag this. I'm sure our stakeholders are going to have questions…. Amy

Time: Attorney General Eric Holder to Oppose Data-Driven Sentencing

Exclusive: Attorney General Eric Holder to Oppose Data-Driven Sentencing: Statistics can predict criminal risk. Can they deliver equal justice?
By Massimo Calabresi

Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

Over the past 10 years, states have increasingly used large databases of information about criminals to identify dozens of risk factors associated with those who continue to commit crimes, like prior convictions, hostility to law enforcement and substance abuse. Those factors are then weighted and used to rank criminals as being a high, medium or low risk to offend again. Judges, corrections officials and parole officers in turn use those rankings to help determine how long a convict should spend in jail.

Holder says if such rankings are used broadly, they could have a disparate and adverse impact on the poor, on socially disadvantaged offenders, and on minorities. "I'm really concerned that this could lead us back to a place we don't want to go," Holder said on Tuesday.

Virtually every state has used such risk assessments to varying degrees over the past decade, and many have made them mandatory for sentencing and corrections as a way to reduce soaring prison populations, cut recidivism and save money. But the federal government has yet to require them for the more than 200,000 inmates in its prisons. Bipartisan legislation requiring risk assessments is moving through Congress and appears likely to reach the President's desk for signature later this year.

Using background information like educational levels and employment history in the sentencing phase of a trial, Holder told TIME, will benefit "those on the white collar side who may have advanced degrees and who may have done greater societal harm — if you pull back a little bit — than somebody who has not completed a master's degree, doesn't have a law degree, is not a doctor."

Holder says using static factors from a criminal's background could perpetuate racial bias in a system that already delivers 20% longer sentences for young black men than for other offenders. Holder supports assessments that are based on behavioral risk factors that inmates can amend, like drug addiction or negative attitudes about the law. And he supports in-prison programs — or back-end assessments — as long as all convicts, including high-risk ones, get the chance to reduce their prison time.

But supporters of the broad use of data in criminal-justice reform — and there are many — say Holder's approach won't work. "If you wait until the back end, it becomes exponentially harder to solve the problem," says former New Jersey attorney general Anne Milgram, who is now at the nonprofit Laura and John Arnold Foundation, where she is building risk-assessment tools for law enforcement. For example, prior convictions

and the age of first arrest are among the most powerful risk factors for reoffending and should be used to help accurately determine appropriate prison time, experts say.

And data-driven risk assessments are just part of the overall process of determining the lengths of time convicts spend in prison, supporters argue. Professor Edward Latessa, who consulted for Congress on the pending federal legislation and has produced broad studies showing the effectiveness of risk assessment in corrections, says concerns about disparity are overblown. "Bernie Madoff may score low risk, but we're never letting him out," Latessa says.

Another reason Holder may have a hard time persuading states of his concerns is that data-driven corrections have been good for the bottom line. Arkansas's 2011 Public Safety Improvement Act, which requires risk assessments in corrections, is projected to help save the state $875 million through 2020, while similar reforms in Kentucky are projected to save it $422 million over 10 years, according to the Pew Center on the States. Rhode Island has seen its prison population drop 19% in the past five years, thanks in part to risk-assessment programs, according to the state's director of corrections, A.T. Wall.

The spread of data analysis in criminal justice is a relatively new phenomenon: not long ago, reckoning a criminal's debt to society was the work of men. For much of the 20th century judges, parole boards and probation officers made subjective decisions about when and whether a criminal was ready to return to society. Then in the 1970s and '80s, as lawmakers sought to eradicate racial bias and accommodate victims' rights, jail terms increasingly became a matter of a fixed formula set by law in a process that boiled down to the adage, "Do the crime, do the time."

The result was a huge surge in prison populations, jail for low-risk offenders and often freedom for unrehabilitated inmates. The number of U.S. prisoners has risen 500% since 1980, to more than 2.2 million in 2012; 95% of them will be released at some point. Evidence collected everywhere from conservative Texas to liberal Vermont shows that statistical analysis used to rank prisoners according to their risk of recidivism can reduce prison populations and reduce repeat offending.

Holder says he wants to ensure the bills that are moving through Congress account for potential social, economic and racial disparities in sentencing. "Our hope would be to work with any of the Senators or Congressmen who are involved and who have introduced bills here so that we get to a place we ought to be," Holder said.

— With reporting by Tessa Berenson and Maya Rhodan / Washington

From: COCHS MediaScan [mailto:cochsmediascan@cochs.org]
Sent: Thursday, July 31, 2014 6:02 AM
To: COCHS MediaScan
Subject: Fwd: COCHS Media Scan for July 31, 2014

COCHS Media Scan for July 31, 2014

1. **Alliance for Health Reform:** Health Care Behind Bars: A Key to Population Health? (Event is August 1)

2. **The Crime Report:** Medicaid and the Incarceration of Schizophrenia Patients

3. **The Nation:** Why Does This Nation of Immigrants Always Imprison 'The Other'?

4. **Lumina News (NC):** Treatment available for inmates with mental illness

5. **Associated Press:** Idaho scales back claim of problems at prison

6. **Capitol Media Services (AZ):** Judge asked to toss prisoner-care lawsuit

7. **Alabama.com:** Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says

8. **The Huffington Post:** Policymakers Must Include Incarcerated People in Jail Reform Process

9. **The Daily (U of Washington):** Resources and treatment, not jail: A health-oriented approach to drug policy

10. **Time:** Attorney General Eric Holder to Oppose Data-Driven Sentencing

1. **Alliance for Health Reform**

HEADLINE: Health Care Behind Bars: A Key to Population Health?
BYLINE: Meeting Advisory
DATELINE: NA
DATE: July 31, 2014
URL: http://www.allhealth.org/event_reg.asp?bi_327
This briefing will explore innovations and challenges in delivering health care to a growing population of inmates, and also the prospect of health care in the correctional setting as a key to improving population health. This is an expensive group because of the large number of people with mental illness, addiction disorders, conditions associated with aging and Hepatitis C. Indeed, corrections spending is the second fastest-growing state expenditure, behind Medicaid, according to the Pew Charitable Trusts. Panel 1 participants include Steve Rosenberg of COCHS, inmate advocate Debra Rowe, and Jacqueline Craig-Bey, a Washington, DC resident, will describe her personal experiences receiving health care while incarcerated. WHEN: Friday, August 1, 12:00 PM to 1:30 PM (Lunch available at 11:45am) WHERE: Senate Russell Office Building, room 325

2. **The Crime Report**

HEADLINE: Medicaid and the Incarceration of Schizophrenia Patients
BYLINE: NA
DATELINE: NA
DATE: July 31, 2014
URL: http://www.thecrimereport.org/news/inside-criminal-justice/2014-07-medicaid-policies-and-the-incarceration-of-schizophr
A study in The American Journal of Managed Care finds state regulations of certain antipsychotic drugs are associated with higher rates of imprisonment of those with severe psychiatric disorders. Read the full study HERE.

3. **The Nation**

HEADLINE: Why Does This Nation of Immigrants Always Imprison 'The Other'?

BYLINE: Erin Corbett
DATELINE: NA
DATE: July 30, 2014

URL: http://www.thenation.com/blog/180819/why-does-nation-immigrants-always-imprison-other

Over a decade has passed since the United States began its "Global War on Terror," a campaign of dragnet surveillance, mass incarceration, drone attacks on individuals overseas and numerous other actions, many illegal according to domestic and international law. These policies are all deemed necessary, of course, for the sake of national security. The United States has always been known as a "nation of immigrants," a destination for the tired, the poor, the huddled masses to pursue the so-called American dream. But it has been repeatedly consumed by fear of the other. From the Native Americans to late nineteenth-century Chinese immigrants to the Central Americans crossing the Southern border today, there has been a longstanding aversion to and even hatred of ethnic and racial minorities.

4. **Lumina News**

HEADLINE: Treatment available for inmates with mental illness
BYLINE: Miriah Hamrick
DATELINE: NA
DATE: July 31, 2014
URL: http://luminanews.com/2014/07/treatment-available-for-inmates-with-mental-illness-2/
Claims made in New Hanover County Commissioner Brian Berger's pending probationviolation case may shine a spotlight on mental health treatment for inmates in the New Hanover County jail, but officers from the sheriff's department and detention facility maintain the issue of receiving health care as well as medication while in the jail is commonly and properly handled.

5. **Associated Press**

HEADLINE: Idaho scales back claim of problems at prison
BYLINE: Rebecca Boone
DATELINE: Boise
DATE: July 31, 2014
URL: http://www.bradenton.com/2014/07/30/5279142/idaho-scales-back-claim-of-problems.html
Idaho Department of Correction officials on Wednesday dramatically scaled back their assessment of problems encountered when they took over the running of the state's largest prison from Corrections Corporation of America this month.

6. **Capitol Media Services**

HEADLINE: Judge asked to toss prisoner-care lawsuit
BYLINE: Howard Fischer
DATELINE: Phoenix
DATE: July 31, 2014
URL: http://www.yourwestvalley.com/valleyandstate/article_b19d2614-183c-11e4-903b-001a4bcf887a.html
The state is asking federal judge to throw out a lawsuit filed on behalf of more than 34,000 inmates, saying there's no evidence each and every prisoner is at risk.

7. **Alabama.com**

HEADLINE: Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says
BYLINE: Casey Toner
DATELINE: NA
DATE: July 31, 2014
URL: http://www.al.com/news/index.ssf/2014/07/moodys_parent_company_of_adocs.html
The firm that owns the company the Alabama Department of Corrections hired to supply health care to its 25,000 inmates was labeled "speculative" and given a negative rating outlook last year by Moody's Investor Service. A Moody's report from September 2013 says that Valitas Health Services, the owner of ADOC health care supplier Corizon, faces "earnings pressure" following prison contract losses in Maine, Maryland, Tennessee (excluding mental health), and Pennsylvania. It says Valitas' financial obligations are "subject to high credit risk."

8. **The Huffington Post**

HEADLINE: Policymakers Must Include Incarcerated People in Jail Reform Process
BYLINE: Nick Malinowski, Brooklyn Defender Services
DATELINE: NA
DATE: July 30, 2014
URL: http://www.huffingtonpost.com/brooklyn-defender-services/policymakers-must-include-prison-reform_b_5631895.html
The New York City Council is investigating mental health services and violence on Rikers Island and in other city jails as recent media reports have renewed the public's interest on this topic. At a recent oversight hearing conducted by the council, mayoral officials, union leaders, corrections officers, civilians working in city jails and other advocates testified to their experiences. Notably absent from the discussion were people with personal experience inside the cell blocks; with 120,000 people each year churning through city jails -- over 1 million over the past ten years -- it seemed incongruous that the Criminal Justice and Mental Health Committees of the City Council had not included these voices. The City Council legal department has declined to provide us with the list of official invitees to the hearing.

9. **The Daily**

HEADLINE: Resources and treatment, not jail: A health-oriented approach to drug policy
BYLINE: Olivia Spokoiny
DATELINE: NA
DATE: July 30, 2014
URL: http://dailyuw.com/archive/2014/07/30/opinion/resources-and-treatment-not-jail-health-oriented-approach-drug-policy
Earlier this month, the World Health Organization (WHO) called on countries around the globe to consider decriminalizing all illicit substances. This recommendation is part of a policy brief entitled “Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations,” however, the effects of changing drug laws extend far beyond the scope of minimizing HIV breakouts.
The idea behind the WHO’s suggestion for decriminalizing drug use is that it would shift the focus away from punishing people for petty crimes, and more toward ensuring that they have access to adequate health resources and treatment programs.

10. **Time**

HEADLINE: Attorney General Eric Holder to Oppose Data-Driven Sentencing

BYLINE: Massimo Calabresi
DATELINE: NA
DATE: July 31, 2014
URL: http://time.com/3061893/holder-to-oppose-data-driven-sentencing/
Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

--

Click here to subscribe
Click here to unsubscribe

From: Phillips, Channing D. (OAG)
Sent: Thursday, July 31, 2014 12:14 PM
To: Wroblewski, Jonathan
Cc: Werner, Sharon (OAG)
Subject: RE: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Thanks!

From: Wroblewski, Jonathan
Sent: Thursday, July 31, 2014 12:14 PM
To: Phillips, Channing D. (OAG)
Cc: Werner, Sharon (OAG)
Subject: Re: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data Driven Sentencing"

I will call her later today.

-JJW

On Jul 31, 2014, at 12:10 PM, "Phillips, Channing D. (OAG)" <cdphillips@jmd.usdoj.gov> wrote:

> Hi Jonathan,
>
> If you have a few moments, it might be helpful to give Mary Lou Leary a call to explain the position that we've taken with the Sentencing Commission with respect to risk assessment data.
>
> Channing
>
> ---
>
> **From:** Leary, Marylou
> **Sent:** Thursday, July 31, 2014 11:46 AM
> **To:** Werner, Sharon (OAG); Phillips, Channing D. (OAG)
> **Cc:** O'Donnell, Denise
> **Subject:** Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data Driven Sentencing"
>
> Just got this. It must be the basis of a call that Adam gel got yesterday from a reporter saying that the AG is going to speak this week and state that he is opposed to risk assessment in criminal justice.
>
> (b) (5) [redacted]
>
> Wanted to make sure you were aware of this.
>
> Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "O'Donnell, Denise"
Date:07/31/2014 11:37 AM (GMT-05:00)
To: "Leary, Marylou"
Subject: FW: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

The answer…

From: Solomon, Amy
Sent: Thursday, July 31, 2014 11:35 AM
To: O'Donnell, Denise; Darden, Silas; Qazilbash, Ruby
Cc: Mason, Karol V.; McGarry, Beth
Subject: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

I wanted to make sure you all saw this. (b) (5) [redacted] Today's my last day in office for two weeks and I'm running around… but wanted to flag this. I'm sure our stakeholders are going to have questions…. Amy

Time: Attorney General Eric Holder to Oppose Data-Driven Sentencing

Exclusive: Attorney General Eric Holder to Oppose Data-Driven Sentencing: Statistics can predict criminal risk. Can they deliver equal justice?
By Massimo Calabresi

Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

Over the past 10 years, states have increasingly used large databases of information about criminals to identify dozens of risk factors associated with those who continue to commit crimes, like prior convictions, hostility to law enforcement and substance abuse. Those factors are then weighted and used to rank criminals as being a high, medium or low risk to offend again. Judges, corrections officials and parole officers in turn use those rankings to help determine how long a convict should spend in jail.

Holder says if such rankings are used broadly, they could have a disparate and adverse impact on the poor, on socially disadvantaged offenders, and on minorities. "I'm really concerned that this could lead us back to a place we don't want to go," Holder said on Tuesday.

Virtually every state has used such risk assessments to varying degrees over the past decade, and many have made them mandatory for sentencing and corrections as a way to reduce soaring prison populations, cut recidivism and save money. But the federal government has yet to require

them for the more than 200,000 inmates in its prisons. Bipartisan legislation requiring risk assessments is moving through Congress and appears likely to reach the President's desk for signature later this year.

Using background information like educational levels and employment history in the sentencing phase of a trial, Holder told TIME, will benefit "those on the white collar side who may have advanced degrees and who may have done greater societal harm — if you pull back a little bit — than somebody who has not completed a master's degree, doesn't have a law degree, is not a doctor."

Holder says using static factors from a criminal's background could perpetuate racial bias in a system that already delivers 20% longer sentences for young black men than for other offenders. Holder supports assessments that are based on behavioral risk factors that inmates can amend, like drug addiction or negative attitudes about the law. And he supports in-prison programs — or back-end assessments — as long as all convicts, including high-risk ones, get the chance to reduce their prison time.

But supporters of the broad use of data in criminal-justice reform — and there are many — say Holder's approach won't work. "If you wait until the back end, it becomes exponentially harder to solve the problem," says former New Jersey attorney general Anne Milgram, who is now at the nonprofit Laura and John Arnold Foundation, where she is building risk-assessment tools for law enforcement. For example, prior convictions and the age of first arrest are among the most powerful risk factors for reoffending and should be used to help accurately determine appropriate prison time, experts say.

And data-driven risk assessments are just part of the overall process of determining the lengths of time convicts spend in prison, supporters argue. Professor Edward Latessa, who consulted for Congress on the pending federal legislation and has produced broad studies showing the effectiveness of risk assessment in corrections, says concerns about disparity are overblown. "Bernie Madoff may score low risk, but we're never letting him out," Latessa says.

Another reason Holder may have a hard time persuading states of his concerns is that data-driven corrections have been good for the bottom line. Arkansas's 2011 Public Safety Improvement Act, which requires risk assessments in corrections, is projected to help save the state $875 million through 2020, while similar reforms in Kentucky are projected to save it $422 million over 10 years, according to the Pew Center on the States. Rhode Island has seen its prison population drop 19% in the past five years, thanks in part to risk-assessment programs, according to the state's director of corrections, A.T. Wall.

The spread of data analysis in criminal justice is a relatively new phenomenon: not long ago, reckoning a criminal's debt to society was the work of men. For much of the 20th century judges, parole boards and probation officers made subjective decisions about when and whether a criminal was ready to return to society. Then in the 1970s and '80s, as lawmakers sought to eradicate racial bias and accommodate victims' rights, jail terms increasingly became a matter of a fixed formula set by law in a process that boiled down to the adage, "Do the crime, do the time."

The result was a huge surge in prison populations, jail for low-risk offenders and often freedom for unrehabilitated inmates. The number of U.S. prisoners has risen 500% since 1980, to more than 2.2 million in 2012; 95% of them will be released at some point. Evidence collected everywhere from conservative Texas to liberal Vermont shows that statistical analysis used to

rank prisoners according to their risk of recidivism can reduce prison populations and reduce repeat offending.

Holder says he wants to ensure the bills that are moving through Congress account for potential social, economic and racial disparities in sentencing. "Our hope would be to work with any of the Senators or Congressmen who are involved and who have introduced bills here so that we get to a place we ought to be," Holder said.

— With reporting by Tessa Berenson and Maya Rhodan / Washington

From: COCHS MediaScan [mailto:cochsmediascan@cochs.org]
Sent: Thursday, July 31, 2014 6:02 AM
To: COCHS MediaScan
Subject: Fwd: COCHS Media Scan for July 31, 2014

COCHS Media Scan for July 31, 2014

1. **Alliance for Health Reform:** Health Care Behind Bars: A Key to Population Health? (Event is August 1)

2. **The Crime Report:** Medicaid and the Incarceration of Schizophrenia Patients

3. **The Nation:** Why Does This Nation of Immigrants Always Imprison 'The Other'?

4. **Lumina News (NC):** Treatment available for inmates with mental illness

5. **Associated Press:** Idaho scales back claim of problems at prison

6. **Capitol Media Services (AZ):** Judge asked to toss prisoner-care lawsuit

7. **Alabama.com:** Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says

8. **The Huffington Post:** Policymakers Must Include Incarcerated People in Jail Reform Process

9. **The Daily (U of Washington):** Resources and treatment, not jail: A health-oriented approach to drug policy

10. **Time:** Attorney General Eric Holder to Oppose Data-Driven Sentencing

1. **Alliance for Health Reform**

HEADLINE: Health Care Behind Bars: A Key to Population Health?

BYLINE: Meeting Advisory
DATELINE: NA
DATE: July 31, 2014
URL: http://www.allhealth.org/event_reg.asp?bi_327
This briefing will explore innovations and challenges in delivering health care to a growing population of inmates, and also the prospect of health care in the correctional setting as a key to improving population health. This is an expensive group because of the large number of people with mental illness, addiction disorders, conditions associated with aging and Hepatitis C. Indeed, corrections spending is the second fastest-growing state expenditure, behind Medicaid, according to the Pew Charitable Trusts. Panel 1 participants include Steve Rosenberg of COCHS, inmate advocate Debra Rowe, and Jacqueline Craig-Bey, a Washington, DC resident, will describe her personal experiences receiving health care while incarcerated. WHEN: Friday, August 1, 12:00 PM to 1:30 PM (Lunch available at 11:45am
) WHERE: Senate Russell Office Building, room 325

2. **The Crime Report**

HEADLINE: Medicaid and the Incarceration of Schizophrenia Patients
BYLINE: NA
DATELINE: NA
DATE: July 31, 2014
URL: http://www.thecrimereport.org/news/inside-criminal-justice/2014-07-medicaid-policies-and-the-incarceration-of-schizophr
A study in The American Journal of Managed Care finds state regulations of certain antipsychotic drugs are associated with higher rates of imprisonment of those with severe psychiatric disorders. Read the full study HERE.

3. **The Nation**

HEADLINE: Why Does This Nation of Immigrants Always Imprison 'The Other'?
BYLINE: Erin Corbett
DATELINE: NA
DATE: July 30, 2014

URL: http://www.thenation.com/blog/180819/why-does-nation-immigrants-always-imprison-other

Over a decade has passed since the United States began its "Global War on Terror," a campaign of dragnet surveillance, mass incarceration, drone attacks on individuals overseas and numerous other actions, many illegal according to domestic and international law. These policies are all deemed necessary, of course, for the sake of national security. The United States has always been known as a "nation of immigrants," a destination for the tired, the poor, the huddled masses to pursue the so-called American dream. But it has been repeatedly consumed by fear of the other. From the Native Americans to late nineteenth-century Chinese immigrants to the Central Americans crossing the Southern border today, there has been a longstanding aversion to and even hatred of ethnic and racial minorities.

4. **Lumina News**

HEADLINE: Treatment available for inmates with mental illness
BYLINE: Miriah Hamrick
DATELINE: NA

DATE: July 31, 2014
URL: http://luminanews.com/2014/07/treatment-available-for-inmates-with-mental-illness-2/
Claims made in New Hanover County Commissioner Brian Berger's pending probationviolation case may shine a spotlight on mental health treatment for inmates in the New Hanover County jail, but officers from the sheriff's department and detention facility maintain the issue of receiving health care as well as medication while in the jail is commonly and properly handled.

5. **Associated Press**

HEADLINE: Idaho scales back claim of problems at prison
BYLINE: Rebecca Boone
DATELINE: Boise
DATE: July 31, 2014
URL: http://www.bradenton.com/2014/07/30/5279142/idaho-scales-back-claim-of-problems.html
Idaho Department of Correction officials on Wednesday dramatically scaled back their assessment of problems encountered when they took over the running of the state's largest prison from Corrections Corporation of America this month.

6. **Capitol Media Services**

HEADLINE: Judge asked to toss prisoner-care lawsuit
BYLINE: Howard Fischer
DATELINE: Phoenix
DATE: July 31, 2014
URL: http://www.yourwestvalley.com/valleyandstate/article_b19d2614-183c-11e4-903b-001a4bcf887a.html
The state is asking federal judge to throw out a lawsuit filed on behalf of more than 34,000 inmates, saying there's no evidence each and every prisoner is at risk.

7. **Alabama.com**

HEADLINE: Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says
BYLINE: Casey Toner
DATELINE: NA
DATE: July 31, 2014
URL: http://www.al.com/news/index.ssf/2014/07/moodys_parent_company_of_adocs.html
The firm that owns the company the Alabama Department of Corrections hired to supply health care to its 25,000 inmates was labeled "speculative" and given a negative rating outlook last year by Moody's Investor Service. A Moody's report from September 2013 says that Valitas Health Services, the owner of ADOC health care supplier Corizon, faces "earnings pressure" following prison contract losses in Maine, Maryland, Tennessee (excluding mental health), and Pennsylvania. It says Valitas' financial obligations are "subject to high credit risk."

8. **The Huffington Post**

HEADLINE: Policymakers Must Include Incarcerated People in Jail Reform Process
BYLINE: Nick Malinowski, Brooklyn Defender Services
DATELINE: NA
DATE: July 30, 2014
URL: http://www.huffingtonpost.com/brooklyn-defender-services/policymakers-must-include-prison-reform_b_5631895.html
The New York City Council is investigating mental health services and violence on Rikers Island and in other city jails as recent media reports have renewed the public's interest on this topic. At a recent oversight hearing conducted by the council, mayoral officials, union leaders, corrections officers, civilians working in city jails and other advocates testified to their experiences. Notably absent from the discussion were people with personal experience inside the cell blocks; with 120,000 people each year churning through city jails -- over 1 million over the past ten years -- it seemed incongruous that the Criminal Justice and Mental Health Committees of the City Council had not included these voices. The City Council legal department has declined to provide us with the list of official invitees to the hearing.

9. **The Daily**

HEADLINE: Resources and treatment, not jail: A health-oriented approach to drug policy
BYLINE: Olivia Spokoiny
DATELINE: NA
DATE: July 30, 2014
URL: http://dailyuw.com/archive/2014/07/30/opinion/resources-and-treatment-not-jail-health-oriented-approach-drug-policy
Earlier this month, the World Health Organization (WHO) called on countries around the globe to consider decriminalizing all illicit substances. This recommendation is part of a policy brief entitled "Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations," however, the effects of changing drug laws extend far beyond the scope of minimizing HIV breakouts. The idea behind the WHO's suggestion for decriminalizing drug use is that it would shift the focus away from punishing people for petty crimes, and more toward ensuring that they have access to adequate health resources and treatment programs.

10. **Time**

HEADLINE: Attorney General Eric Holder to Oppose Data-Driven Sentencing
BYLINE: Massimo Calabresi
DATELINE: NA
DATE: July 31, 2014
URL: http://time.com/3061893/holder-to-oppose-data-driven-sentencing/
Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

--
Click here to subscribe
Click here to unsubscribe

From: Leary, Marylou
Sent: Thursday, July 31, 2014 12:57 PM
To: Fallon, Brian (OPA); Leary, Marylou; Phillips, Channing D. (OAG); Werner, Sharon (OAG)
Cc: O'Donnell, Denise
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Thanks souch, Brian. This information is very helpful. Too bad Time got it wrong.

MLL

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "Fallon, Brian (OPA) (JMD)"
Date:07/31/2014 12:18 PM (GMT-05:00)
To: "Leary, Marylou" ,"Phillips, Channing D. (OAG) (JMD)" ,"Werner, Sharon (OAG) (JMD)"
Cc: "O'Donnell, Denise"
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Hello. Are you all familiar with the Criminal Division's report to the Sentencing Commission? That is what the speech tomorrow is based upon. In the report/speech, the Dept does not take issue with risk assessments per se or data-driven approaches generally; the speech/report notes that risk assessments have for years been considered in parole board decisionmaking and data has great potential to aid in making reentry programs more efficient and effective. He raises concerns, however, about the use of risk assessments in front-end sentencing, worrying that certain state laws mandating this would lead to people getting different sentences for the same crimes, with minority defendants going to prison more often and for longer periods.

(b) (5)
We are clarifying it for the other reporters covering this ahead of tomorrow and have been following up with TIME

From: Leary, Marylou
Sent: Thursday, July 31, 2014 12:14 PM
To: Phillips, Channing D. (OAG); Leary, Marylou; Werner, Sharon (OAG)
Cc: O'Donnell, Denise; Fallon, Brian (OPA)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data Driven Sentencing"

Thanks. It is causing a stir among our constituents who count on do to support data driven approaches.

Brian, if you need to talk, please send ma an email and I'll step out of my meeting to call. Or you can contact denise odonnell at bja

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "Phillips, Channing D. (OAG) (JMD)"
Date:07/31/2014 11:56 AM (GMT-05:00)
To: "Leary, Marylou" ,"Werner, Sharon (OAG) (JMD)"
Cc: "O'Donnell, Denise" ,"Fallon, Brian (OPA) (JMD)"
Subject: Re: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Looping in Brian who should be able to assist in responding.

Channing Phillips
Sent from BlackBerry

From: Leary, Marylou
Sent: Thursday, July 31, 2014 11:45 AM Eastern Standard Time
To: Werner, Sharon (OAG); Phillips, Channing D. (OAG)
Cc: O'Donnell, Denise
Subject: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data Driven Sentencing"

Just got this. It must be the basis of a call that Adam gel got yesterday from a reporter saying that the AG is going to speak this week and state that he is opposed to risk assessment in criminal justice.

(b) (5) [redacted]

Wanted to make sure you were aware of this.

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "O'Donnell, Denise"
Date:07/31/2014 11:37 AM (GMT-05:00)
To: "Leary, Marylou"
Subject: FW: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

The answer…

From: Solomon, Amy
Sent: Thursday, July 31, 2014 11:35 AM
To: O'Donnell, Denise; Darden, Silas; Qazilbash, Ruby
Cc: Mason, Karol V.; McGarry, Beth
Subject: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

I wanted to make sure you all saw this. (b) (5) [redacted]). Today's my last day in office for two weeks and I'm running around… but wanted to flag this. I'm sure our stakeholders are going to have questions…. Amy

Time: Attorney General Eric Holder to Oppose Data-Driven Sentencing

Exclusive: Attorney General Eric Holder to Oppose Data-Driven Sentencing: Statistics can predict criminal risk. Can they deliver equal justice?
By Massimo Calabresi

Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

Over the past 10 years, states have increasingly used large databases of information about criminals to identify dozens of risk factors associated with those who continue to commit crimes, like prior convictions, hostility to law enforcement and substance abuse. Those factors are then weighted and used to rank criminals as being a high, medium or low risk to offend again. Judges, corrections officials and parole officers in turn use those rankings to help determine how long a convict should spend in jail.

Holder says if such rankings are used broadly, they could have a disparate and adverse impact on the poor, on socially disadvantaged offenders, and on minorities. “I’m really concerned that this could lead us back to a place we don’t want to go,” Holder said on Tuesday.

Virtually every state has used such risk assessments to varying degrees over the past decade, and many have made them mandatory for sentencing and corrections as a way to reduce soaring prison populations, cut recidivism and save money. But the federal government has yet to require them for the more than 200,000 inmates in its prisons. Bipartisan legislation requiring risk assessments is moving through Congress and appears likely to reach the President’s desk for signature later this year.

Using background information like educational levels and employment history in the sentencing phase of a trial, Holder told TIME, will benefit “those on the white collar side who may have advanced degrees and who may have done greater societal harm — if you pull back a little bit — than somebody who has not completed a master’s degree, doesn’t have a law degree, is not a doctor.”

Holder says using static factors from a criminal’s background could perpetuate racial bias in a system that already delivers 20% longer sentences for young black men than for other offenders. Holder supports assessments that are based on behavioral risk factors that inmates can amend, like drug addiction or negative attitudes about the law. And he supports in-prison programs — or back-end assessments — as long as all convicts, including high-risk ones, get the chance to reduce their prison time.

But supporters of the broad use of data in criminal-justice reform — and there are many — say Holder’s approach won’t work. “If you wait until the back end, it becomes exponentially harder to solve the problem,” says former New Jersey attorney general Anne Milgram, who is now at the nonprofit Laura and John Arnold Foundation, where she is building risk-assessment tools for law enforcement. For example, prior convictions and the age of first arrest are among the most powerful risk factors for reoffending and should be used to help accurately determine appropriate prison time, experts say.

And data-driven risk assessments are just part of the overall process of determining the lengths of time convicts spend in prison, supporters argue. Professor Edward Latessa, who consulted for Congress on the pending federal legislation and has produced broad studies showing the effectiveness of risk assessment in corrections,

says concerns about disparity are overblown. “Bernie Madoff may score low risk, but we’re never letting him out,” Latessa says.

Another reason Holder may have a hard time persuading states of his concerns is that data-driven corrections have been good for the bottom line. Arkansas’s 2011 Public Safety Improvement Act, which requires risk assessments in corrections, is projected to help save the state $875 million through 2020, while similar reforms in Kentucky are projected to save it $422 million over 10 years, according to the Pew Center on the States. Rhode Island has seen its prison population drop 19% in the past five years, thanks in part to risk-assessment programs, according to the state’s director of corrections, A.T. Wall.

The spread of data analysis in criminal justice is a relatively new phenomenon: not long ago, reckoning a criminal’s debt to society was the work of men. For much of the 20th century judges, parole boards and probation officers made subjective decisions about when and whether a criminal was ready to return to society. Then in the 1970s and ’80s, as lawmakers sought to eradicate racial bias and accommodate victims’ rights, jail terms increasingly became a matter of a fixed formula set by law in a process that boiled down to the adage, “Do the crime, do the time.”

The result was a huge surge in prison populations, jail for low-risk offenders and often freedom for unrehabilitated inmates. The number of U.S. prisoners has risen 500% since 1980, to more than 2.2 million in 2012; 95% of them will be released at some point. Evidence collected everywhere from conservative Texas to liberal Vermont shows that statistical analysis used to rank prisoners according to their risk of recidivism can reduce prison populations and reduce repeat offending.

Holder says he wants to ensure the bills that are moving through Congress account for potential social, economic and racial disparities in sentencing. “Our hope would be to work with any of the Senators or Congressmen who are involved and who have introduced bills here so that we get to a place we ought to be,” Holder said.

— With reporting by Tessa Berenson and Maya Rhodan / Washington

From: COCHS MediaScan [mailto:cochsmediascan@cochs.org]
Sent: Thursday, July 31, 2014 6:02 AM
To: COCHS MediaScan
Subject: Fwd: COCHS Media Scan for July 31, 2014

COCHS Media Scan for July 31, 2014

1. **Alliance for Health Reform:** Health Care Behind Bars: A Key to Population Health? (Event is August 1)
2. **The Crime Report:** Medicaid and the Incarceration of Schizophrenia Patients
3. **The Nation:** Why Does This Nation of Immigrants Always Imprison ‘The Other’?
4. **Lumina News (NC):** Treatment available for inmates with mental illness
5. **Associated Press:** Idaho scales back claim of problems at prison

6. **Capitol Media Services (AZ):** Judge asked to toss prisoner-care lawsuit

7. **Alabama.com:** Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says

8. **The Huffington Post:** Policymakers Must Include Incarcerated People in Jail Reform Process

9. **The Daily (U of Washington):** Resources and treatment, not jail: A health-oriented approach to drug policy

10. **Time:** Attorney General Eric Holder to Oppose Data-Driven Sentencing

1. **Alliance for Health Reform**

HEADLINE: Health Care Behind Bars: A Key to Population Health?
BYLINE: Meeting Advisory
DATELINE: NA
DATE: July 31, 2014
URL: http://www.allhealth.org/event_reg.asp?bi_327
This briefing will explore innovations and challenges in delivering health care to a growing population of inmates, and also the prospect of health care in the correctional setting as a key to improving population health. This is an expensive group because of the large number of people with mental illness, addiction disorders, conditions associated with aging and Hepatitis C. Indeed, corrections spending is the second fastest-growing state expenditure, behind Medicaid, according to the Pew Charitable Trusts. Panel 1 participants include Steve Rosenberg of COCHS, inmate advocate Debra Rowe, and Jacqueline Craig-Bey, a Washington, DC resident, will describe her personal experiences receiving health care while incarcerated. WHEN: Friday, August 1, 12:00 PM to 1:30 PM (Lunch available at 11:45am) WHERE: Senate Russell Office Building, room 325

2. **The Crime Report**

HEADLINE: Medicaid and the Incarceration of Schizophrenia Patients
BYLINE: NA
DATELINE: NA
DATE: July 31, 2014
URL: http://www.thecrimereport.org/news/inside-criminal-justice/2014-07-medicaid-policies-and-the-incarceration-of-schizophr
A study in The American Journal of Managed Care finds state regulations of certain antipsychotic drugs are associated with higher rates of imprisonment of those with severe psychiatric disorders. Read the full study HERE.

3. **The Nation**

HEADLINE: Why Does This Nation of Immigrants Always Imprison 'The Other'?
BYLINE: Erin Corbett
DATELINE: NA
DATE: July 30, 2014

URL: http://www.thenation.com/blog/180819/why-does-nation-immigrants-always-imprison-other

Over a decade has passed since the United States began its "Global War on Terror," a campaign of dragnet surveillance, mass incarceration, drone attacks on individuals overseas and numerous other actions, many illegal according to domestic and international law. These policies are all deemed necessary, of course, for the sake of national security. The United States has always been known as a "nation of immigrants," a destination for the tired, the poor, the huddled masses to pursue the so-called American dream. But it has been repeatedly consumed by fear of the other. From the Native Americans to late nineteenth-century Chinese immigrants to the Central Americans crossing the Southern border today, there has been a longstanding aversion to and even hatred of ethnic and racial minorities.

4. **Lumina News**

HEADLINE: Treatment available for inmates with mental illness
BYLINE: Miriah Hamrick
DATELINE: NA
DATE: July 31, 2014
URL: http://luminanews.com/2014/07/treatment-available-for-inmates-with-mental-illness-2/
Claims made in New Hanover County Commissioner Brian Berger's pending probationviolation case may shine a spotlight on mental health treatment for inmates in the New Hanover County jail, but officers from the sheriff's department and detention facility maintain the issue of receiving health care as well as medication while in the jail is commonly and properly handled.

5. **Associated Press**

HEADLINE: Idaho scales back claim of problems at prison
BYLINE: Rebecca Boone
DATELINE: Boise
DATE: July 31, 2014
URL: http://www.bradenton.com/2014/07/30/5279142/idaho-scales-back-claim-of-problems.html
Idaho Department of Correction officials on Wednesday dramatically scaled back their assessment of problems encountered when they took over the running of the state's largest prison from Corrections Corporation of America this month.

6. **Capitol Media Services**

HEADLINE: Judge asked to toss prisoner-care lawsuit
BYLINE: Howard Fischer
DATELINE: Phoenix
DATE: July 31, 2014
URL: http://www.yourwestvalley.com/valleyandstate/article_b19d2614-183c-11e4-903b-001a4bcf887a.html
The state is asking federal judge to throw out a lawsuit filed on behalf of more than 34,000 inmates, saying there's no evidence each and every prisoner is at risk.

7. **Alabama.com**

HEADLINE: Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says
BYLINE: Casey Toner
DATELINE: NA

DATE: July 31, 2014
URL: http://www.al.com/news/index.ssf/2014/07/moodys_parent_company_of_adocs.html
The firm that owns the company the Alabama Department of Corrections hired to supply health care to its 25,000 inmates was labeled "speculative" and given a negative rating outlook last year by Moody's Investor Service. A Moody's report from September 2013 says that Valitas Health Services, the owner of ADOC health care supplier Corizon, faces "earnings pressure" following prison contract losses in Maine, Maryland, Tennessee (excluding mental health), and Pennsylvania. It says Valitas' financial obligations are "subject to high credit risk."

8. **The Huffington Post**

HEADLINE: Policymakers Must Include Incarcerated People in Jail Reform Process
BYLINE: Nick Malinowski, Brooklyn Defender Services
DATELINE: NA
DATE: July 30, 2014
URL: http://www.huffingtonpost.com/brooklyn-defender-services/policymakers-must-include-prison-reform_b_5631895.html
The New York City Council is investigating mental health services and violence on Rikers Island and in other city jails as recent media reports have renewed the public's interest on this topic. At a recent oversight hearing conducted by the council, mayoral officials, union leaders, corrections officers, civilians working in city jails and other advocates testified to their experiences. Notably absent from the discussion were people with personal experience inside the cell blocks; with 120,000 people each year churning through city jails -- over 1 million over the past ten years -- it seemed incongruous that the Criminal Justice and Mental Health Committees of the City Council had not included these voices. The City Council legal department has declined to provide us with the list of official invitees to the hearing.

9. **The Daily**

HEADLINE: Resources and treatment, not jail: A health-oriented approach to drug policy
BYLINE: Olivia Spokoiny
DATELINE: NA
DATE: July 30, 2014
URL: http://dailyuw.com/archive/2014/07/30/opinion/resources-and-treatment-not-jail-health-oriented-approach-drug-policy
Earlier this month, the World Health Organization (WHO) called on countries around the globe to consider decriminalizing all illicit substances. This recommendation is part of a policy brief entitled “Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations,” however, the effects of changing drug laws extend far beyond the scope of minimizing HIV breakouts.
The idea behind the WHO’s suggestion for decriminalizing drug use is that it would shift the focus away from punishing people for petty crimes, and more toward ensuring that they have access to adequate health resources and treatment programs.

10. **Time**

HEADLINE: Attorney General Eric Holder to Oppose Data-Driven Sentencing
BYLINE: Massimo Calabresi
DATELINE: NA
DATE: July 31, 2014
URL: http://time.com/3061893/holder-to-oppose-data-driven-sentencing/
Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective

method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

--
Click here to subscribe
Click here to unsubscribe

From: Solomon, Amy
Sent: Thursday, July 31, 2014 4:13 PM
To: Fallon, Brian (OPA)
Cc: Mason, Karol V.; Werner, Sharon (OAG); O'Donnell, Denise
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

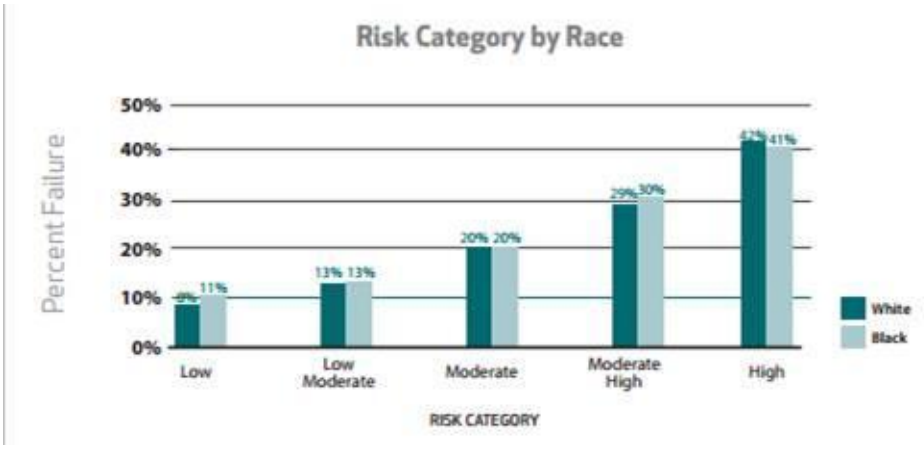
Thanks, Brian. We'll read thru this now. Is it possible to review relevant sections of the speech too?

Also, I just received key data points from BJA, below. It appears that the best risk instruments (even for use at pretrial and sentencing) can construct statistically sound and useful tools that do not exacerbate racial disparity.

Best practice in developing and validating risk assessment tools includes ensuring that they are race- and gender-neutral (among other categories). For example, Virginia has used risk-informed sentencing since the 1990s. An NIJ-funded evaluation of the Virginia Criminal Sentencing Commission's Risk Assessment Instrument noted that the developers of the instrument ensured it was race-neutral. See *Offender Risk Assessment in Virginia* (2002) at 27-28 & n.10, available at http://www.vcsc.virginia.gov/risk_off_rpt.pdf.

Pretrial instruments provide other helpful examples. Neither the Kentucky Public Safety Assessment (PSA)—Court nor the Virginia Pretrial Risk Assessment Instrument, to name two, use static predictors that strongly correlate with race, e.g., arrest. Instead, they use factors that do not correlate with race but that accurately predict new criminal activity.

This neutrality was confirmed in a recent summary report on the Kentucky PSA found that the tool categorizes defendants such that "black and white defendants at each risk level fail at virtually indistinguishable rates, which demonstrates that the PSA-Court is assessing risk equally well for both whites and blacks, and is not discriminating on the basis of race." See *Results from the First Six Months of the Public Safety Assessment – Court™ in Kentucky* (July 2014) at 4, available at http://www.arnoldfoundation.org/sites/default/files/pdf/PSA-Court%20Kentucky%206-Month%20Report.pdf. The chart below is copied from the report.



This is not to say that all risk assessments are created equal. Many fail this test of neutrality, and do result in overclassification of men of color, or women, or some other group. However, the examples above demonstrate that it is possible to construct statistically sound and useful tools that do not exacerbate racial disparity.

(b) (5) [redacted]

Please let me know if I can provide any other information that would be helpful.

Best,

Julie

Juliene James
Senior Policy Advisor
Bureau of Justice Assistance
U.S. Department of Justice
Washington, D.C.
W: 202-353-9248 | M (b) (6) [redacted]

From: Fallon, Brian (OPA) (JMD)
Sent: Thursday, July 31, 2014 4:04 PM
To: Solomon, Amy
Cc: Mason, Karol V.; Werner, Sharon (OAG) (JMD)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

See the report attached. CRM has already submitted it to the Commission.

Here is the relevant portion of the report that expresses concern about risk assessment tools in sentencing:

While we are excited about the promise of using analytics in risk and needs assessments and otherwise in furtherance of effective reentry, we are troubled by another use of these tools in sentencing and corrections: the increasing role of risk assessment tools in the sentencing phase of criminal cases, specifically in determining how long an individual will be imprisoned for a criminal conviction. As we noted, risk assessments - through the Salient Factor Score - had a prominent place in the federal parole system in place prior to the Sentencing Reform Act and were a determinant of the amount of time a federal offender served in federal prison for an offense. The Sentencing Reform Act was enacted to reduce the role of such assessments and to base imprisonment terms largely, but not entirely, on the crime committed and proven in court. In recent years, states are increasingly adding risk assessments to the criminal sentencing process. Pennsylvania[15] and Tennessee,[16] for example, have enacted legislation mandating the use of risk assessments to inform sentencing decisions. Vermont[17] and Kentucky[18] use sex offense recidivism risk instruments in sentencing defendants convicted of sex crimes. For many years now, Virginia has mandated the use of an actuarial risk tool to identify low-risk offenders for diversion from prison for certain criminal convictions and high-risk sex offenders for an

increased sentencing range. The Model Penal Code is in the process of being revised to include actuarial risk tools in the sentencing process. The revisions would direct sentencing commissions to -

Develop actuarial instruments or processes, supported by current and ongoing recidivism research, that will estimate the relative risk that individual offenders pose to public safety through their future criminal conduct. When these instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.[20]

In the federal system, legislation pending in both the House and Senate would make risk assessment once again a major determinant of imprisonment terms served by federal offenders.[21] The legislation would regulate the portion of an imposed term of imprisonment ordered by a court that would actually be served by a federal offender. While the goals of improving reentry programming and efficacy are laudable and while there is much we support in the legislation, we are concerned by these key provisions that would base imprisonment periods to be served on the results of a yet-to-be-created risk assessment instrument that will evolve over time as data analytics develop and make their way into such instruments. We think these provisions - and the larger emerging trends around risk assessments and sentencing - raise many concerns the Commission ought to study and address.

First, most current risk assessments - and in particular the PCRA, which is specifically mentioned in the pending federal legislation - determine risk levels based on static, historical offender characteristics such as education level, employment history, family circumstances and demographic information. We think basing criminal sentences, and particularly imprisonment terms, primarily on such data - rather than the crime committed and surrounding circumstances - is a dangerous concept that will become much more concerning over time as other far reaching sociological and personal information unrelated to the crimes at issue are incorporated into risk tools. This phenomenon ultimately raises constitutional questions because of the use of groupbased characteristics and suspect classifications in the analytics. Criminal accountability should be primarily about prior bad acts proven by the government before a court of law and not some future bad behavior predicted to occur by a risk assessment instrument.

Second, experience and analysis of current risk assessment tools demonstrate that utilizing such tools for determining prison sentences to be served will have a disparate and adverse impact on offenders from poor communities already struggling with many social ills. The touchstone of our justice system is equal justice, and we think sentences based excessively on risk assessment instruments will likely undermine this principle.

Third, use of risk assessments to determine sentences erodes certainty in sentencing, thus diminishing the deterrent value of a strong, consistent sentencing system that is seen by the community as fair and tough. Our brothers and sisters in the defense and research communities have repeatedly cited research to the Commission about the value and efficacy of certainty of apprehension and certainty of punishment in deterring crime. Swift, certain and fair sanctions are what work to deter crime, both individually and across society. We know that certainty in sentencing - certainty in the imposition of a particular sentence for a particular crime, and certainty in the time to be served for a sentence imposed - simultaneously improves public safety and reduces unwarranted sentencing disparities. We are concerned that excessive reliance on risk tools will greatly undermine what has been achieved around certainty of sentencing in the federal system.

Determining imprisonment terms should be primarily about accountability for past criminal behavior. While any effective sentencing and corrections policy will take account of future behavior to some extent - incapacitating those more likely to recidivate and utilizing effective reentry efforts to reduce the likelihood of recidivism - we believe the length of imprisonment terms should mostly be about accounting for past conduct. As analytics evolve, we are concerned about the implications of sentencing policy moving away from this precept.

From: Solomon, Amy
Sent: Thursday, July 31, 2014 2:57 PM

To: Fallon, Brian (OPA)
Cc: Mason, Karol V.; Werner, Sharon (OAG)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data Driven Sentencing"

Brian – We haven't seen the report or the speech draft – would be great if we could review them today. As you may know, our emphasis on risk assessment is broader than the reentry context. It includes pre-trial and sentencing as well. I think there's preliminary research showing that risk assessment – even at sentencing – both serves a public safety function and does not exacerbate racial disparity. And many of our justice reinvestment states, which rely heavily on risk/needs assessment at various stages in the system, have seen decreases in prison numbers -- particularly for men of color. We're tracking down the data on all this, but happy to discuss in the meantime – and it would be great if we could do a quick review of the speech. There is already a lot of reaction to this one… Thanks. Amy

Amy L. Solomon
Senior Advisor to the Assistant Attorney General
Office of Justice Programs/U.S. Department of Justice
810 7th Street, NW
Washington, DC 20531
202.307.2986
amy.solomon@usdoj.gov

-------- Original message --------
From: "Fallon, Brian (OPA) (JMD)"
Date:07/31/2014 12:18 PM (GMT-05:00)
To: "Leary, Marylou" ,"Phillips, Channing D. (OAG) (JMD)" ,"Werner, Sharon (OAG) (JMD)"
Cc: "O'Donnell, Denise"
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Hello. Are you all familiar with the Criminal Division's report to the Sentencing Commission? That is what the speech tomorrow is based upon. In the report/speech, the Dept does not take issue with risk assessments per se or data-driven approaches generally; the speech/report notes that risk assessments have for years been considered in parole board decisionmaking and data has great potential to aid in making reentry programs more efficient and effective. He raises concerns, however, about the use of risk assessments in front-end sentencing, worrying that certain state laws mandating this would lead to people getting different sentences for the same crimes, with minority defendants going to prison more often and for longer periods.

(b) (5) [redacted]. We are clarifying it for the other reporters covering this ahead of tomorrow and have been following up with TIME

From: Leary, Marylou
Sent: Thursday, July 31, 2014 12:14 PM
To: Phillips, Channing D. (OAG); Leary, Marylou; Werner, Sharon (OAG)
Cc: O'Donnell, Denise; Fallon, Brian (OPA)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data Driven Sentencing"

Thanks. It is causing a stir among our constituents who count on do to support data driven approaches.

Brian, if you need to talk, please send ma an email and I'll step out of my meeting to call. Or you can contact denise odonnell at bja

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "Phillips, Channing D. (OAG) (JMD)"
Date:07/31/2014 11:56 AM (GMT-05:00)
To: "Leary, Marylou" ,"Werner, Sharon (OAG) (JMD)"
Cc: "O'Donnell, Denise" ,"Fallon, Brian (OPA) (JMD)"
Subject: Re: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Looping in Brian who should be able to assist in responding.

Channing Phillips
Sent from BlackBerry

From: Leary, Marylou
Sent: Thursday, July 31, 2014 11:45 AM Eastern Standard Time
To: Werner, Sharon (OAG); Phillips, Channing D. (OAG)
Cc: O'Donnell, Denise
Subject: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data Driven Sentencing"

Just got this. It must be the basis of a call that Adam gel got yesterday from a reporter saying that the AG is going to speak this week and state that he is opposed to risk assessment in criminal justice.

(b) (5) [redacted]

Wanted to make sure you were aware of this.

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "O'Donnell, Denise"
Date:07/31/2014 11:37 AM (GMT-05:00)
To: "Leary, Marylou"
Subject: FW: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

The answer…

From: Solomon, Amy
Sent: Thursday, July 31, 2014 11:35 AM
To: O'Donnell, Denise; Darden, Silas; Qazilbash, Ruby
Cc: Mason, Karol V.; McGarry, Beth
Subject: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

I wanted to make sure you all saw this. (b) (5) [redacted] Today's my last day in office for two weeks and I'm running around… but wanted to flag this. I'm sure our stakeholders are going to have questions…. Amy

Time: Attorney General Eric Holder to Oppose Data-Driven Sentencing

Exclusive: Attorney General Eric Holder to Oppose Data-Driven Sentencing: Statistics can predict criminal risk. Can they deliver equal justice?
By Massimo Calabresi

Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

Over the past 10 years, states have increasingly used large databases of information about criminals to identify dozens of risk factors associated with those who continue to commit crimes, like prior convictions, hostility to law enforcement and substance abuse. Those factors are then weighted and used to rank criminals as being a high, medium or low risk to offend again. Judges, corrections officials and parole officers in turn use those rankings to help determine how long a convict should spend in jail.

Holder says if such rankings are used broadly, they could have a disparate and adverse impact on the poor, on socially disadvantaged offenders, and on minorities. "I'm really concerned that this could lead us back to a place we don't want to go," Holder said on Tuesday.

Virtually every state has used such risk assessments to varying degrees over the past decade, and many have made them mandatory for sentencing and corrections as a way to reduce soaring prison populations, cut recidivism and save money. But the federal government has yet to require them for the more than 200,000 inmates in its prisons. Bipartisan legislation requiring risk assessments is moving through Congress and appears likely to reach the President's desk for signature later this year.

Using background information like educational levels and employment history in the sentencing phase of a trial, Holder told TIME, will benefit "those on the white collar side who may have advanced degrees and who may have done greater societal harm — if you pull back a little bit — than somebody who has not completed a master's degree, doesn't have a law degree, is not a doctor."

Holder says using static factors from a criminal's background could perpetuate racial bias in a system that already delivers 20% longer sentences for young black men than for other offenders. Holder supports assessments that are based on behavioral risk factors that inmates can amend, like drug addiction or negative attitudes about the law. And he supports in-prison programs — or back-end assessments — as long as all convicts, including high-risk ones, get the chance to reduce their prison time.

But supporters of the broad use of data in criminal-justice reform — and there are many — say Holder's approach won't work. "If you wait until the back end, it becomes exponentially harder to solve the problem," says former New Jersey attorney general Anne Milgram, who is now at the nonprofit Laura and John Arnold Foundation, where she is building risk-assessment tools for law enforcement. For example, prior convictions

and the age of first arrest are among the most powerful risk factors for reoffending and should be used to help accurately determine appropriate prison time, experts say.

And data-driven risk assessments are just part of the overall process of determining the lengths of time convicts spend in prison, supporters argue. Professor Edward Latessa, who consulted for Congress on the pending federal legislation and has produced broad studies showing the effectiveness of risk assessment in corrections, says concerns about disparity are overblown. "Bernie Madoff may score low risk, but we're never letting him out," Latessa says.

Another reason Holder may have a hard time persuading states of his concerns is that data-driven corrections have been good for the bottom line. Arkansas's 2011 Public Safety Improvement Act, which requires risk assessments in corrections, is projected to help save the state $875 million through 2020, while similar reforms in Kentucky are projected to save it $422 million over 10 years, according to the Pew Center on the States. Rhode Island has seen its prison population drop 19% in the past five years, thanks in part to risk-assessment programs, according to the state's director of corrections, A.T. Wall.

The spread of data analysis in criminal justice is a relatively new phenomenon: not long ago, reckoning a criminal's debt to society was the work of men. For much of the 20th century judges, parole boards and probation officers made subjective decisions about when and whether a criminal was ready to return to society. Then in the 1970s and '80s, as lawmakers sought to eradicate racial bias and accommodate victims' rights, jail terms increasingly became a matter of a fixed formula set by law in a process that boiled down to the adage, "Do the crime, do the time."

The result was a huge surge in prison populations, jail for low-risk offenders and often freedom for unrehabilitated inmates. The number of U.S. prisoners has risen 500% since 1980, to more than 2.2 million in 2012; 95% of them will be released at some point. Evidence collected everywhere from conservative Texas to liberal Vermont shows that statistical analysis used to rank prisoners according to their risk of recidivism can reduce prison populations and reduce repeat offending.

Holder says he wants to ensure the bills that are moving through Congress account for potential social, economic and racial disparities in sentencing. "Our hope would be to work with any of the Senators or Congressmen who are involved and who have introduced bills here so that we get to a place we ought to be," Holder said.

— With reporting by Tessa Berenson and Maya Rhodan / Washington

From: COCHS MediaScan [mailto:cochsmediascan@cochs.org]
Sent: Thursday, July 31, 2014 6:02 AM
To: COCHS MediaScan
Subject: Fwd: COCHS Media Scan for July 31, 2014

COCHS Media Scan for July 31, 2014

1. **Alliance for Health Reform:** Health Care Behind Bars: A Key to Population Health? (Event is August 1)

2. **The Crime Report:** Medicaid and the Incarceration of Schizophrenia Patients

3. **The Nation:** Why Does This Nation of Immigrants Always Imprison 'The Other'?

4. **Lumina News (NC):** Treatment available for inmates with mental illness

5. **Associated Press:** Idaho scales back claim of problems at prison

6. **Capitol Media Services (AZ):** Judge asked to toss prisoner-care lawsuit

7. **Alabama.com:** Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says

8. **The Huffington Post:** Policymakers Must Include Incarcerated People in Jail Reform Process

9. **The Daily (U of Washington):** Resources and treatment, not jail: A health-oriented approach to drug policy

10. **Time:** Attorney General Eric Holder to Oppose Data-Driven Sentencing

1. **Alliance for Health Reform**

HEADLINE: Health Care Behind Bars: A Key to Population Health?
BYLINE: Meeting Advisory
DATELINE: NA
DATE: July 31, 2014
URL: http://www.allhealth.org/event_reg.asp?bi_327
This briefing will explore innovations and challenges in delivering health care to a growing population of inmates, and also the prospect of health care in the correctional setting as a key to improving population health. This is an expensive group because of the large number of people with mental illness, addiction disorders, conditions associated with aging and Hepatitis C. Indeed, corrections spending is the second fastest-growing state expenditure, behind Medicaid, according to the Pew Charitable Trusts. Panel 1 participants include Steve Rosenberg of COCHS, inmate advocate Debra Rowe, and Jacqueline Craig-Bey, a Washington, DC resident, will describe her personal experiences receiving health care while incarcerated. WHEN: Friday, August 1, 12:00 PM to 1:30 PM (Lunch available at 11:45am) WHERE: Senate Russell Office Building, room 325

2. **The Crime Report**

HEADLINE: Medicaid and the Incarceration of Schizophrenia Patients
BYLINE: NA
DATELINE: NA
DATE: July 31, 2014
URL: http://www.thecrimereport.org/news/inside-criminal-justice/2014-07-medicaid-policies-and-the-incarceration-of-schizophr
A study in The American Journal of Managed Care finds state regulations of certain antipsychotic drugs are associated with higher rates of imprisonment of those with severe psychiatric disorders. Read the full study HERE.

3. **The Nation**

HEADLINE: Why Does This Nation of Immigrants Always Imprison 'The Other'?

BYLINE: Erin Corbett
DATELINE: NA
DATE: July 30, 2014

URL: http://www.thenation.com/blog/180819/why-does-nation-immigrants-always-imprison-other

Over a decade has passed since the United States began its "Global War on Terror," a campaign of dragnet surveillance, mass incarceration, drone attacks on individuals overseas and numerous other actions, many illegal according to domestic and international law. These policies are all deemed necessary, of course, for the sake of national security. The United States has always been known as a "nation of immigrants," a destination for the tired, the poor, the huddled masses to pursue the so-called American dream. But it has been repeatedly consumed by fear of the other. From the Native Americans to late nineteenth-century Chinese immigrants to the Central Americans crossing the Southern border today, there has been a longstanding aversion to and even hatred of ethnic and racial minorities.

4. **Lumina News**

HEADLINE: Treatment available for inmates with mental illness
BYLINE: Miriah Hamrick
DATELINE: NA
DATE: July 31, 2014
URL: http://luminanews.com/2014/07/treatment-available-for-inmates-with-mental-illness-2/
Claims made in New Hanover County Commissioner Brian Berger's pending probationviolation case may shine a spotlight on mental health treatment for inmates in the New Hanover County jail, but officers from the sheriff's department and detention facility maintain the issue of receiving health care as well as medication while in the jail is commonly and properly handled.

5. **Associated Press**

HEADLINE: Idaho scales back claim of problems at prison
BYLINE: Rebecca Boone
DATELINE: Boise
DATE: July 31, 2014
URL: http://www.bradenton.com/2014/07/30/5279142/idaho-scales-back-claim-of-problems.html
Idaho Department of Correction officials on Wednesday dramatically scaled back their assessment of problems encountered when they took over the running of the state's largest prison from Corrections Corporation of America this month.

6. **Capitol Media Services**

HEADLINE: Judge asked to toss prisoner-care lawsuit
BYLINE: Howard Fischer
DATELINE: Phoenix
DATE: July 31, 2014
URL: http://www.yourwestvalley.com/valleyandstate/article_b19d2614-183c-11e4-903b-001a4bcf887a.html
The state is asking federal judge to throw out a lawsuit filed on behalf of more than 34,000 inmates, saying there's no evidence each and every prisoner is at risk.

7. **Alabama.com**

HEADLINE: Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says
BYLINE: Casey Toner
DATELINE: NA
DATE: July 31, 2014
URL: http://www.al.com/news/index.ssf/2014/07/moodys_parent_company_of_adocs.html
The firm that owns the company the Alabama Department of Corrections hired to supply health care to its 25,000 inmates was labeled "speculative" and given a negative rating outlook last year by Moody's Investor Service. A Moody's report from September 2013 says that Valitas Health Services, the owner of ADOC health care supplier Corizon, faces "earnings pressure" following prison contract losses in Maine, Maryland, Tennessee (excluding mental health), and Pennsylvania. It says Valitas' financial obligations are "subject to high credit risk."

8. **The Huffington Post**

HEADLINE: Policymakers Must Include Incarcerated People in Jail Reform Process
BYLINE: Nick Malinowski, Brooklyn Defender Services
DATELINE: NA
DATE: July 30, 2014
URL: http://www.huffingtonpost.com/brooklyn-defender-services/policymakers-must-include-prison-reform_b_5631895.html
The New York City Council is investigating mental health services and violence on Rikers Island and in other city jails as recent media reports have renewed the public's interest on this topic. At a recent oversight hearing conducted by the council, mayoral officials, union leaders, corrections officers, civilians working in city jails and other advocates testified to their experiences. Notably absent from the discussion were people with personal experience inside the cell blocks; with 120,000 people each year churning through city jails -- over 1 million over the past ten years -- it seemed incongruous that the Criminal Justice and Mental Health Committees of the City Council had not included these voices. The City Council legal department has declined to provide us with the list of official invitees to the hearing.

9. **The Daily**

HEADLINE: Resources and treatment, not jail: A health-oriented approach to drug policy
BYLINE: Olivia Spokoiny
DATELINE: NA
DATE: July 30, 2014
URL: http://dailyuw.com/archive/2014/07/30/opinion/resources-and-treatment-not-jail-health-oriented-approach-drug-policy
Earlier this month, the World Health Organization (WHO) called on countries around the globe to consider decriminalizing all illicit substances. This recommendation is part of a policy brief entitled “Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations,” however, the effects of changing drug laws extend far beyond the scope of minimizing HIV breakouts.
The idea behind the WHO’s suggestion for decriminalizing drug use is that it would shift the focus away from punishing people for petty crimes, and more toward ensuring that they have access to adequate health resources and treatment programs.

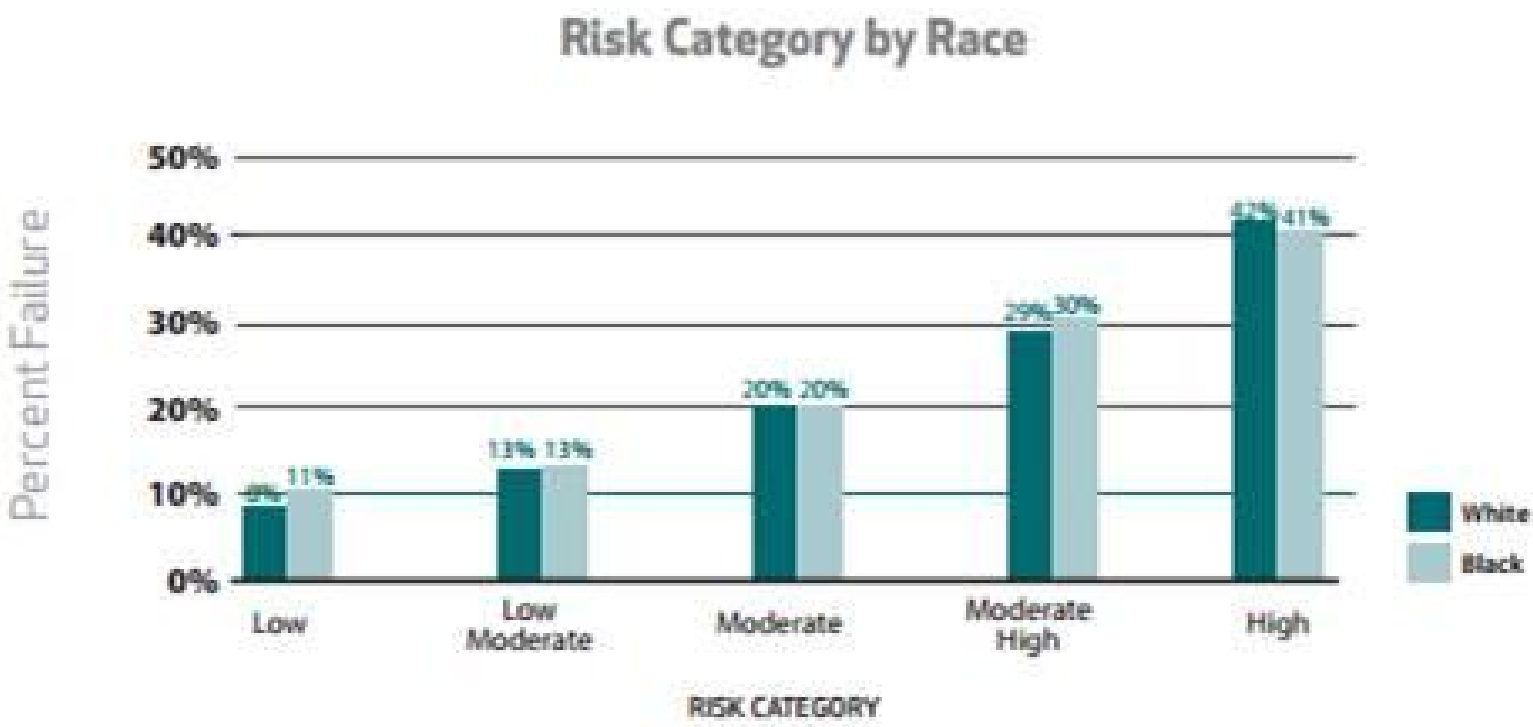
10. **Time**

HEADLINE: Attorney General Eric Holder to Oppose Data-Driven Sentencing

BYLINE: Massimo Calabresi
DATELINE: NA
DATE: July 31, 2014
URL: http://time.com/3061893/holder-to-oppose-data-driven-sentencing/
Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

--

Click here to subscribe
Click here to unsubscribe



Document ID: 0.7.11378.11258-000001 20170906 - 0000696

Solomon, Amy

From:	Solomon, Amy
Sent:	Thursday, July 31, 2014 4:15 PM
To:	Fallon, Brian (OPA)
Cc:	Mason, Karol V.; Werner, Sharon (OAG)
Subject:	RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Thanks, Brian. Reviewing now.

From: Fallon, Brian (OPA) (JMD)
Sent: Thursday, July 31, 2014 4:12 PM
To: Solomon, Amy
Cc: Mason, Karol V.; Werner, Sharon (OAG) (JMD)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

The speech is attached. Here is the excerpt drawn from the report about use of risk assessments in sentencing:

(b) (5)

(b) (5)

[redacted]

From: Solomon, Amy
Sent: Thursday, July 31, 2014 2:57 PM
To: Fallon, Brian (OPA)
Cc: Mason, Karol V.; Werner, Sharon (OAG)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Brian – We haven't seen the report or the speech draft – would be great if we could review them today. As you may know, our emphasis on risk assessment is broader than the reentry context. It includes pre-trial and sentencing as well. I think there's preliminary research showing that risk assessment – even at sentencing – both serves a public safety function and does not exacerbate racial disparity. And many of our justice reinvestment states, which rely heavily on risk/needs assessment at various stages in the system, have seen decreases in prison numbers -- particularly for men of color. We're tracking down the data on all this, but happy to discuss in the meantime – and it would be great if we could do a quick review of the speech. There is already a lot of reaction to this one... Thanks. Amy

Amy L. Solomon
Senior Advisor to the Assistant Attorney General
Office of Justice Programs/U.S. Department of Justice
810 7th Street, NW

Washington, DC 20531
202.307.2986
amy.solomon@usdoj.gov

-------- Original message --------
From: "Fallon, Brian (OPA) (JMD)"
Date:07/31/2014 12:18 PM (GMT-05:00)
To: "Leary, Marylou" ,"Phillips, Channing D. (OAG) (JMD)" ,"Werner, Sharon (OAG) (JMD)"
Cc: "O'Donnell, Denise"
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Hello. Are you all familiar with the Criminal Division's report to the Sentencing Commission? That is what the speech tomorrow is based upon. In the report/speech, the Dept does not take issue with risk assessments per se or data-driven approaches generally; the speech/report notes that risk assessments have for years been considered in parole board decisionmaking and data has great potential to aid in making reentry programs more efficient and effective. He raises concerns, however, about the use of risk assessments in front-end sentencing, worrying that certain state laws mandating this would lead to people getting different sentences for the same crimes, with minority defendants going to prison more often and for longer periods.

(b) (5)
(b) (5) We are clarifying it for the other reporters covering this ahead of tomorrow—and have been following up with TIME

From: Leary, Marylou
Sent: Thursday, July 31, 2014 12:14 PM
To: Phillips, Channing D. (OAG); Leary, Marylou; Werner, Sharon (OAG)
Cc: O'Donnell, Denise; Fallon, Brian (OPA)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Thanks. It is causing a stir among our constituents who count on do to support data driven approaches.

Brian, if you need to talk, please send ma an email and I'll step out of my meeting to call. Or you can contact denise odonnell at bja

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "Phillips, Channing D. (OAG) (JMD)"
Date:07/31/2014 11:56 AM (GMT-05:00)
To: "Leary, Marylou" ,"Werner, Sharon (OAG) (JMD)"
Cc: "O'Donnell, Denise" ,"Fallon, Brian (OPA) (JMD)"
Subject: Re: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Looping in Brian who should be able to assist in responding.

Channing Phillips
Sent from BlackBerry

From: Leary, Marylou
Sent: Thursday, July 31, 2014 11:45 AM Eastern Standard Time
To: Werner, Sharon (OAG); Phillips, Channing D. (OAG)
Cc: O'Donnell, Denise
Subject: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Just got this. It must be the basis of a call that Adam gel got yesterday from a reporter saying that the AG is going to speak this week and state that he is opposed to risk assessment in criminal justice.

(b) (5)
[redacted]

Wanted to make sure you were aware of this.

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "O'Donnell, Denise"
Date:07/31/2014 11:37 AM (GMT-05:00)
To: "Leary, Marylou"
Subject: FW: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

The answer...

From: Solomon, Amy
Sent: Thursday, July 31, 2014 11:35 AM
To: O'Donnell, Denise; Darden, Silas; Qazilbash, Ruby
Cc: Mason, Karol V.; McGarry, Beth
Subject: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

I wanted to make sure you all saw this. (b) (5)
(b) (5) [redacted] Today's my last day in office for two weeks and I'm running around... but wanted to flag this. I'm sure our stakeholders are going to have questions.... Amy

Time: Attorney General Eric Holder to Oppose Data-Driven Sentencing

Exclusive: Attorney General Eric Holder to Oppose Data-Driven Sentencing: Statistics can predict criminal risk. Can they deliver equal justice?
By Massimo Calabresi

Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective method for managing prison populations. Holder laid out his position in an interview with

TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

Over the past 10 years, states have increasingly used large databases of information about criminals to identify dozens of risk factors associated with those who continue to commit crimes, like prior convictions, hostility to law enforcement and substance abuse. Those factors are then weighted and used to rank criminals as being a high, medium or low risk to offend again. Judges, corrections officials and parole officers in turn use those rankings to help determine how long a convict should spend in jail.

Holder says if such rankings are used broadly, they could have a disparate and adverse impact on the poor, on socially disadvantaged offenders, and on minorities. "I'm really concerned that this could lead us back to a place we don't want to go," Holder said on Tuesday.

Virtually every state has used such risk assessments to varying degrees over the past decade, and many have made them mandatory for sentencing and corrections as a way to reduce soaring prison populations, cut recidivism and save money. But the federal government has yet to require them for the more than 200,000 inmates in its prisons. Bipartisan legislation requiring risk assessments is moving through Congress and appears likely to reach the President's desk for signature later this year.

Using background information like educational levels and employment history in the sentencing phase of a trial, Holder told TIME, will benefit "those on the white collar side who may have advanced degrees and who may have done greater societal harm — if you pull back a little bit — than somebody who has not completed a master's degree, doesn't have a law degree, is not a doctor."

Holder says using static factors from a criminal's background could perpetuate racial bias in a system that already delivers 20% longer sentences for young black men than for other offenders. Holder supports assessments that are based on behavioral risk factors that inmates can amend, like drug addiction or negative attitudes about the law. And he supports in-prison programs — or back-end assessments — as long as all convicts, including high-risk ones, get the chance to reduce their prison time.

But supporters of the broad use of data in criminal-justice reform — and there are many — say Holder's approach won't work. "If you wait until the back end, it becomes exponentially harder to solve the problem," says former New Jersey attorney general Anne Milgram, who is now at the nonprofit Laura and John Arnold Foundation, where she is building risk-assessment tools for law enforcement. For example, prior convictions and the age of first arrest are among the most powerful risk factors for reoffending and should be used to help accurately determine appropriate prison time, experts say.

And data-driven risk assessments are just part of the overall process of determining the lengths of time convicts spend in prison, supporters argue. Professor Edward Latessa, who consulted for Congress on the pending federal legislation and has produced broad studies showing the effectiveness of risk assessment in corrections, says concerns about disparity are overblown. "Bernie Madoff may score low risk, but we're never letting him out," Latessa says.

Another reason Holder may have a hard time persuading states of his concerns is that data-driven corrections have been good for the bottom line. Arkansas's 2011 Public Safety Improvement Act, which requires risk assessments in corrections, is projected to help save the state $875 million through 2020, while similar reforms in Kentucky are projected to save it $422 million over 10 years, according to the Pew Center on the States. Rhode Island has seen its prison population drop 19% in the past five years, thanks in part to risk-assessment programs, according to the state's director of corrections, A.T. Wall.

The spread of data analysis in criminal justice is a relatively new phenomenon: not long ago, reckoning a

The spread of data analysis in criminal justice is a relatively new phenomenon. Not long ago, reckoning a criminal's debt to society was the work of men. For much of the 20th century judges, parole boards and probation officers made subjective decisions about when and whether a criminal was ready to return to society. Then in the 1970s and '80s, as lawmakers sought to eradicate racial bias and accommodate victims' rights, jail terms increasingly became a matter of a fixed formula set by law in a process that boiled down to the adage, "Do the crime, do the time."

The result was a huge surge in prison populations, jail for low-risk offenders and often freedom for unrehabilitated inmates. The number of U.S. prisoners has risen 500% since 1980, to more than 2.2 million in 2012; 95% of them will be released at some point. Evidence collected everywhere from conservative Texas to liberal Vermont shows that statistical analysis used to rank prisoners according to their risk of recidivism can reduce prison populations and reduce repeat offending.

Holder says he wants to ensure the bills that are moving through Congress account for potential social, economic and racial disparities in sentencing. "Our hope would be to work with any of the Senators or Congressmen who are involved and who have introduced bills here so that we get to a place we ought to be," Holder said.

— With reporting by Tessa Berenson and Maya Rhodan / Washington

From: COCHS MediaScan [mailto:cochsmediascan@cochs.org]
Sent: Thursday, July 31, 2014 6:02 AM
To: COCHS MediaScan
Subject: Fwd: COCHS Media Scan for July 31, 2014

COCHS Media Scan for July 31, 2014

1. **Alliance for Health Reform:** Health Care Behind Bars: A Key to Population Health? (Event is August 1)

2. **The Crime Report:** Medicaid and the Incarceration of Schizophrenia Patients

3. **The Nation:** Why Does This Nation of Immigrants Always Imprison 'The Other'?

4. **Lumina News (NC):** Treatment available for inmates with mental illness

5. **Associated Press:** Idaho scales back claim of problems at prison

6. **Capitol Media Services (AZ):** Judge asked to toss prisoner-care lawsuit

7. **Alabama.com:** Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says

8. **The Huffington Post:** Policymakers Must Include Incarcerated People in Jail Reform Process

9. **The Daily (U of Washington):** Resources and treatment, not jail: A health-oriented approach to drug policy

10. **Time:** Attorney General Eric Holder to Oppose Data-Driven Sentencing

==========

1. **Alliance for Health Reform**

==========

HEADLINE: Health Care Behind Bars: A Key to Population Health?
BYLINE: Meeting Advisory
DATELINE: NA
DATE: July 31, 2014
URL: http://www.allhealth.org/event_reg.asp?bi=327
This briefing will explore innovations and challenges in delivering health care to a growing population of inmates, and also the prospect of health care in the correctional setting as a key to improving population health. This is an expensive group because of the large number of people with mental illness, addiction disorders, conditions associated with aging and Hepatitis C. Indeed, corrections spending is the second fastest-growing state expenditure, behind Medicaid, according to the Pew Charitable Trusts. Panel 1 participants include Steve Rosenberg of COCHS, inmate advocate Debra Rowe, and Jacqueline Craig-Bey, a Washington, DC resident, will describe her personal experiences receiving health care while incarcerated. WHEN: Friday, August 1, 12:00 PM to 1:30 PM (Lunch available at 11:45am) WHERE: Senate Russell Office Building, room 325

==========

2. **The Crime Report**

==========

HEADLINE: Medicaid and the Incarceration of Schizophrenia Patients
BYLINE: NA
DATELINE: NA
DATE: July 31, 2014
URL: http://www.thecrimereport.org/news/inside-criminal-justice/2014-07-medicaid-policies-and-the-incarceration-of-schizophr
A study in The American Journal of Managed Care finds state regulations of certain antipsychotic drugs are associated with higher rates of imprisonment of those with severe psychiatric disorders. Read the full study HERE.

==========

3. **The Nation**

==========

HEADLINE: Why Does This Nation of Immigrants Always Imprison 'The Other'?
BYLINE: Erin Corbett
DATELINE: NA
DATE: July 30, 2014
URL: http://www.thenation.com/blog/180819/why-does-nation-immigrants-always-imprison-other

Over a decade has passed since the United States began its "Global War on Terror," a campaign of dragnet surveillance, mass incarceration, drone attacks on individuals overseas and numerous other actions, many illegal according to domestic and international law. These policies are all deemed necessary, of course, for the sake of national security. The United States has always been known as a "nation of immigrants," a destination for the tired, the poor, the huddled masses to pursue the so-called American dream. But it has been repeatedly consumed by fear of the other. From the Native Americans to late nineteenth-century Chinese immigrants to the Central Americans crossing the Southern border today, there has been a longstanding aversion to and even hatred of ethnic and racial minorities.

==========

Document ID: 0.7.11378.11242 20170906 - 0000703

4. **Lumina News**

==========

HEADLINE: Treatment available for inmates with mental illness
BYLINE: Miriah Hamrick
DATELINE: NA
DATE: July 31, 2014
URL: http://luminanews.com/2014/07/treatment-available-for-inmates-with-mental-illness-2/
Claims made in New Hanover County Commissioner Brian Berger's pending probationviolation case may shine a spotlight on mental health treatment for inmates in the New Hanover County jail, but officers from the sheriff's department and detention facility maintain the issue of receiving health care as well as medication while in the jail is commonly and properly handled.

==========

5. **Associated Press**

==========

HEADLINE: Idaho scales back claim of problems at prison
BYLINE: Rebecca Boone
DATELINE: Boise
DATE: July 31, 2014
URL: http://www.bradenton.com/2014/07/30/5279142/idaho-scales-back-claim-of-problems.html
Idaho Department of Correction officials on Wednesday dramatically scaled back their assessment of problems encountered when they took over the running of the state's largest prison from Corrections Corporation of America this month.

==========

6. **Capitol Media Services**

==========

HEADLINE: Judge asked to toss prisoner-care lawsuit
BYLINE: Howard Fischer
DATELINE: Phoenix
DATE: July 31, 2014
URL: http://www.yourwestvalley.com/valleyandstate/article_b19d2614-183c-11e4-903b-001a4bcf887a.html
The state is asking federal judge to throw out a lawsuit filed on behalf of more than 34,000 inmates, saying there's no evidence each and every prisoner is at risk.

==========

7. **Alabama.com**

==========

HEADLINE: Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says
BYLINE: Casey Toner
DATELINE: NA
DATE: July 31, 2014
URL: http://www.al.com/news/index.ssf/2014/07/moodys_parent_company_of_adocs.html
The firm that owns the company the Alabama Department of Corrections hired to supply health care to its 25,000 inmates was labeled "speculative" and given a negative rating outlook last year by Moody's Investor Service. A Moody's report from September 2013 says that Valitas Health Services, the owner of ADOC health care supplier Corizon, faces "earnings pressure" following prison contract losses in Maine, Maryland, Tennessee (excluding mental health), and Pennsylvania. It says Valitas' financial obligations are "subject to high credit risk."

==========

8. **The Huffington Post**

8. The Huffington Post

==========

HEADLINE: Policymakers Must Include Incarcerated People in Jail Reform Process
BYLINE: Nick Malinowski, Brooklyn Defender Services
DATELINE: NA
DATE: July 30, 2014
URL: http://www.huffingtonpost.com/brooklyn-defender-services/policymakers-must-include-prison-reform_b_5631895.html
The New York City Council is investigating mental health services and violence on Rikers Island and in other city jails as recent media reports have renewed the public's interest on this topic. At a recent oversight hearing conducted by the council, mayoral officials, union leaders, corrections officers, civilians working in city jails and other advocates testified to their experiences. Notably absent from the discussion were people with personal experience inside the cell blocks; with 120,000 people each year churning through city jails -- over 1 million over the past ten years -- it seemed incongruous that the Criminal Justice and Mental Health Committees of the City Council had not included these voices. The City Council legal department has declined to provide us with the list of official invitees to the hearing.

==========

9. **The Daily**

==========

HEADLINE: Resources and treatment, not jail: A health-oriented approach to drug policy
BYLINE: Olivia Spokoiny
DATELINE: NA
DATE: July 30, 2014
URL: http://dailyuw.com/archive/2014/07/30/opinion/resources-and-treatment-not-jail-health-oriented-approach-drug-policy
Earlier this month, the World Health Organization (WHO) called on countries around the globe to consider decriminalizing all illicit substances. This recommendation is part of a policy brief entitled "Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations," however, the effects of changing drug laws extend far beyond the scope of minimizing HIV breakouts.
The idea behind the WHO's suggestion for decriminalizing drug use is that it would shift the focus away from punishing people for petty crimes, and more toward ensuring that they have access to adequate health resources and treatment programs.

=========

10. **Time**

=========

HEADLINE: Attorney General Eric Holder to Oppose Data-Driven Sentencing
BYLINE: Massimo Calabresi
DATELINE: NA
DATE: July 31, 2014
URL: http://time.com/3061893/holder-to-oppose-data-driven-sentencing/
Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

--

Click here to subscribe
Click here to unsubscribe

Mason, Karol V.

From:	Mason, Karol V.
Sent:	Thursday, July 31, 2014 4:44 PM
To:	Solomon, Amy
Cc:	Leary, Marylou; Werner, Sharon (OAG); Mason, Karol V.
Subject:	RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Thank you for helping us get this right.

Karol V. Mason
Assistant Attorney General
Office of Justice Programs
U.S. Department of Justice
Ph: 202-307-5933

From: Solomon, Amy
Sent: Thursday, July 31, 2014 4:38 PM
To: Mason, Karol V.
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

I've spoken to Brian and am reviewing material now. Likely to speak to Jonathan at 5. (b) (5) (b) (5) (b) (5) (b) (5) Bigger conversation – I'm turning to speech now – very limited time.

From: Fallon, Brian (OPA) (JMD)
Sent: Thursday, July 31, 2014 4:26 PM
To: Solomon, Amy
Cc: Mason, Karol V.; Werner, Sharon (OAG) (JMD)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Pasted below is a Reuters story from this afternoon. (b) (5) (b) (5)

U.S. attorney general to condemn use of demographics in sentencing

Source: Reuters - Thu, 31 Jul 2014 17:16 GMT
Author: Reuters
By Julia Edwards

WASHINGTON, July 31 (Reuters) - One year into his effort to lower prison sentences for nonviolent criminals, Attorney General Eric Holder on Friday will condemn states that consider demographic data

Document ID: 0.7.11378.11230 20170906 - 0000706

before determining sentencing for convicted individuals, according to Justice Department officials.

Factors such as education level, neighborhood and employment status are increasingly used by states to determine the risk level a convicted person will pose upon release. A bill introduced by Senator John Cornyn, a Republican of Texas, attempts to bring the same practice into federal courts.

Holder will argue in a speech to criminal defense lawyers and in a report to the U.S. Sentencing Commission that two people who commit the same crime should not serve unequal time based on those factors alone.

Holder's "Smart on Crime" initiative launched last year with the goal of reining in spending on prisons and abolishing what Holder sees as racial disparities within the criminal justice system.

"There is concern over these data-based approaches to sentencing. Because while they do share the goal of reducing the prison population, they could contribute to the very disparities in that prison population that the attorney general's initiative was also meant to address," a Justice Department official said.

Speaking at a county correctional facility in Maryland on Monday, Holder told reporters that any executive changes or recommendations on sentencing reform made by the Obama administration will "need the support of Congress to make sure that they will last beyond this administration."

Pending legislation in Congress that would ban the use of mandatory minimum sentences for drug offenders has support from members of both political parties, but it is unlikely to pass before November's midterm elections. (Reporting by Julia Edwards; Editing by Leslie Adler)

From: Solomon, Amy
Sent: Thursday, July 31, 2014 2:57 PM
To: Fallon, Brian (OPA)
Cc: Mason, Karol V.; Werner, Sharon (OAG)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Brian – We haven't seen the report or the speech draft – would be great if we could review them today. As you may know, our emphasis on risk assessment is broader than the reentry context. It includes pre-trial and sentencing as well. I think there's preliminary research showing that risk assessment – even at sentencing – both serves a public safety function and does not exacerbate racial disparity. And many of our justice reinvestment states, which rely heavily on risk/needs assessment at various stages in the system, have seen decreases in prison numbers -- particularly for men of color. We're tracking down the data on all this, but happy to discuss in the meantime – and it would be great if we could do a quick review of the speech. There is already a lot of reaction to this one... Thanks. Amy

Amy L. Solomon
Senior Advisor to the Assistant Attorney General
Office of Justice Programs/U.S. Department of Justice

810 7th Street, NW
Washington, DC 20531
202.307.2986
amy.solomon@usdoj.gov

-------- Original message --------
From: "Fallon, Brian (OPA) (JMD)"
Date:07/31/2014 12:18 PM (GMT-05:00)
To: "Leary, Marylou" ,"Phillips, Channing D. (OAG) (JMD)" ,"Werner, Sharon (OAG) (JMD)"
Cc: "O'Donnell, Denise"
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Hello. Are you all familiar with the Criminal Division's report to the Sentencing Commission? That is what the speech tomorrow is based upon. In the report/speech, the Dept does not take issue with risk assessments per se or data-driven approaches generally; the speech/report notes that risk assessments have for years been considered in parole board decisionmaking and data has great potential to aid in making reentry programs more efficient and effective. He raises concerns, however, about the use of risk assessments in front-end sentencing, worrying that certain state laws mandating this would lead to people getting different sentences for the same crimes, with minority defendants going to prison more often and for longer periods.

(b) (5) [redacted]

(b) (5) [redacted] We are clarifying it for the other reporters covering this ahead of tomorrow—and have been following up with TIME

From: Leary, Marylou
Sent: Thursday, July 31, 2014 12:14 PM
To: Phillips, Channing D. (OAG); Leary, Marylou; Werner, Sharon (OAG)
Cc: O'Donnell, Denise; Fallon, Brian (OPA)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Thanks. It is causing a stir among our constituents who count on do to support data driven approaches.

Brian, if you need to talk, please send ma an email and I'll step out of my meeting to call. Or you can contact denise odonnell at bja

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "Phillips, Channing D. (OAG) (JMD)"
Date:07/31/2014 11:56 AM (GMT-05:00)
To: "Leary, Marylou" ,"Werner, Sharon (OAG) (JMD)"
Cc: "O'Donnell, Denise" ,"Fallon, Brian (OPA) (JMD)"
Subject: Re: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Looping in Brian who should be able to assist in responding.

Channing Phillips
Sent from BlackBerry

From: Leary, Marylou
Sent: Thursday, July 31, 2014 11:45 AM Eastern Standard Time
To: Werner, Sharon (OAG); Phillips, Channing D. (OAG)
Cc: O'Donnell, Denise
Subject: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Just got this. It must be the basis of a call that Adam gel got yesterday from a reporter saying that the AG is going to speak this week and state that he is opposed to risk assessment in criminal justice.

(b) (5)
[redacted]

Wanted to make sure you were aware of this.

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "O'Donnell, Denise"
Date:07/31/2014 11:37 AM (GMT-05:00)
To: "Leary, Marylou"
Subject: FW: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

The answer...

From: Solomon, Amy
Sent: Thursday, July 31, 2014 11:35 AM
To: O'Donnell, Denise; Darden, Silas; Qazilbash, Ruby
Cc: Mason, Karol V.; McGarry, Beth
Subject: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

I wanted to make sure you all saw this. (b) (5)
(b) (5) [redacted] Today's my last day in office for two weeks and I'm running around... but wanted to flag this. I'm sure our stakeholders are going to have questions.... Amy

Time: Attorney General Eric Holder to Oppose Data-Driven Sentencing

Exclusive: Attorney General Eric Holder to Oppose Data-Driven Sentencing: Statistics can predict criminal risk. Can they deliver equal justice?
By Massimo Calabresi

Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and

Document ID: 0.7.11378.11230 20170906 - 0000709

increasingly effective method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

Over the past 10 years, states have increasingly used large databases of information about criminals to identify dozens of risk factors associated with those who continue to commit crimes, like prior convictions, hostility to law enforcement and substance abuse. Those factors are then weighted and used to rank criminals as being a high, medium or low risk to offend again. Judges, corrections officials and parole officers in turn use those rankings to help determine how long a convict should spend in jail.

Holder says if such rankings are used broadly, they could have a disparate and adverse impact on the poor, on socially disadvantaged offenders, and on minorities. "I'm really concerned that this could lead us back to a place we don't want to go," Holder said on Tuesday.

Virtually every state has used such risk assessments to varying degrees over the past decade, and many have made them mandatory for sentencing and corrections as a way to reduce soaring prison populations, cut recidivism and save money. But the federal government has yet to require them for the more than 200,000 inmates in its prisons. Bipartisan legislation requiring risk assessments is moving through Congress and appears likely to reach the President's desk for signature later this year.

Using background information like educational levels and employment history in the sentencing phase of a trial, Holder told TIME, will benefit "those on the white collar side who may have advanced degrees and who may have done greater societal harm — if you pull back a little bit — than somebody who has not completed a master's degree, doesn't have a law degree, is not a doctor."

Holder says using static factors from a criminal's background could perpetuate racial bias in a system that already delivers 20% longer sentences for young black men than for other offenders. Holder supports assessments that are based on behavioral risk factors that inmates can amend, like drug addiction or negative attitudes about the law. And he supports in-prison programs — or back-end assessments — as long as all convicts, including high-risk ones, get the chance to reduce their prison time.

But supporters of the broad use of data in criminal-justice reform — and there are many — say Holder's approach won't work. "If you wait until the back end, it becomes exponentially harder to solve the problem," says former New Jersey attorney general Anne Milgram, who is now at the nonprofit Laura and John Arnold Foundation, where she is building risk-assessment tools for law enforcement. For example, prior convictions and the age of first arrest are among the most powerful risk factors for reoffending and should be used to help accurately determine appropriate prison time, experts say.

And data-driven risk assessments are just part of the overall process of determining the lengths of time convicts spend in prison, supporters argue. Professor Edward Latessa, who consulted for Congress on the pending federal legislation and has produced broad studies showing the effectiveness of risk assessment in corrections, says concerns about disparity are overblown. "Bernie Madoff may score low risk, but we're never letting him out," Latessa says.

Another reason Holder may have a hard time persuading states of his concerns is that data-driven corrections have been good for the bottom line. Arkansas's 2011 Public Safety Improvement Act, which requires risk assessments in corrections, is projected to help save the state $875 million through 2020, while similar reforms in Kentucky are projected to save it $422 million over 10 years, according to the Pew Center on the States. Rhode Island has seen its prison population drop 19% in the past five years, thanks in part to risk-assessment programs, according to the state's director of corrections, A.T. Wall.

The spread of data analysis in criminal justice is a relatively new phenomenon: not long ago, reckoning a criminal's debt to society was the work of men. For much of the 20th century judges, parole boards and probation officers made subjective decisions about when and whether a criminal was ready to return to society. Then in the 1970s and '80s, as lawmakers sought to eradicate racial bias and accommodate victims' rights, jail terms increasingly became a matter of a fixed formula set by law in a process that boiled down to the adage, "Do the crime, do the time."

The result was a huge surge in prison populations, jail for low-risk offenders and often freedom for unrehabilitated inmates. The number of U.S. prisoners has risen 500% since 1980, to more than 2.2 million in 2012; 95% of them will be released at some point. Evidence collected everywhere from conservative Texas to liberal Vermont shows that statistical analysis used to rank prisoners according to their risk of recidivism can reduce prison populations and reduce repeat offending.

Holder says he wants to ensure the bills that are moving through Congress account for potential social, economic and racial disparities in sentencing. "Our hope would be to work with any of the Senators or Congressmen who are involved and who have introduced bills here so that we get to a place we ought to be," Holder said.

— With reporting by Tessa Berenson and Maya Rhodan / Washington

From: COCHS MediaScan [mailto:cochsmediascan@cochs.org]
Sent: Thursday, July 31, 2014 6:02 AM
To: COCHS MediaScan
Subject: Fwd: COCHS Media Scan for July 31, 2014

COCHS Media Scan for July 31, 2014

1. **Alliance for Health Reform:** Health Care Behind Bars: A Key to Population Health? (Event is August 1)

2. **The Crime Report:** Medicaid and the Incarceration of Schizophrenia Patients

3. **The Nation:** Why Does This Nation of Immigrants Always Imprison 'The Other'?

4. **Lumina News (NC):** Treatment available for inmates with mental illness

5. **Associated Press:** Idaho scales back claim of problems at prison

6. **Capitol Media Services (AZ):** Judge asked to toss prisoner-care lawsuit

7. **Alabama.com:** Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says

8. **The Huffington Post:** Policymakers Must Include Incarcerated People in Jail Reform Process

9. **The Daily (U of Washington):** Resources and treatment, not jail: A health-oriented approach to drug policy

10. **Time:** Attorney General Eric Holder to Oppose Data-Driven Sentencing

==========

1. **Alliance for Health Reform**

==========

HEADLINE: Health Care Behind Bars: A Key to Population Health?
BYLINE: Meeting Advisory
DATELINE: NA
DATE: July 31, 2014
URL: http://www.allhealth.org/event_reg.asp?bi=327
This briefing will explore innovations and challenges in delivering health care to a growing population of inmates, and also the prospect of health care in the correctional setting as a key to improving population health. This is an expensive group because of the large number of people with mental illness, addiction disorders, conditions associated with aging and Hepatitis C. Indeed, corrections spending is the second fastest-growing state expenditure, behind Medicaid, according to the Pew Charitable Trusts. Panel 1 participants include Steve Rosenberg of COCHS, inmate advocate Debra Rowe, and Jacqueline Craig-Bey, a Washington, DC resident, will describe her personal experiences receiving health care while incarcerated. WHEN: Friday, August 1, 12:00 PM to 1:30 PM (Lunch available at 11:45am) WHERE: Senate Russell Office Building, room 325

==========

2. **The Crime Report**

==========

HEADLINE: Medicaid and the Incarceration of Schizophrenia Patients
BYLINE: NA
DATELINE: NA
DATE: July 31, 2014
URL: http://www.thecrimereport.org/news/inside-criminal-justice/2014-07-medicaid-policies-and-the-incarceration-of-schizophr
A study in The American Journal of Managed Care finds state regulations of certain antipsychotic drugs are associated with higher rates of imprisonment of those with severe psychiatric disorders. Read the full study HERE.

==========

3. **The Nation**

==========

HEADLINE: Why Does This Nation of Immigrants Always Imprison 'The Other'?
BYLINE: Erin Corbett
DATELINE: NA
DATE: July 30, 2014
URL: http://www.thenation.com/blog/180819/why-does-nation-immigrants-always-imprison-other

Over a decade has passed since the United States began its "Global War on Terror," a campaign of dragnet surveillance, mass incarceration, drone attacks on individuals overseas and numerous other actions, many illegal according to domestic and international law. These policies are all deemed necessary, of course, for the sake of national security. The United States has always been known as a "nation of immigrants," a destination for the tired, the poor, the huddled masses to pursue the so-called American dream. But it has been repeatedly consumed by fear of the other. From the Native Americans to late nineteenth-century Chinese immigrants to the Central Americans crossing the Southern border today, there has been a longstanding aversion to and even hatred of ethnic and racial minorities.

Document ID: 0.7.11378.11230 20170906 - 0000712

==========

4. **Lumina News**

==========

HEADLINE: Treatment available for inmates with mental illness
BYLINE: Miriah Hamrick
DATELINE: NA
DATE: July 31, 2014
URL: http://luminanews.com/2014/07/treatment-available-for-inmates-with-mental-illness-2/
Claims made in New Hanover County Commissioner Brian Berger's pending probationviolation case may shine a spotlight on mental health treatment for inmates in the New Hanover County jail, but officers from the sheriff's department and detention facility maintain the issue of receiving health care as well as medication while in the jail is commonly and properly handled.

==========

5. **Associated Press**

==========

HEADLINE: Idaho scales back claim of problems at prison
BYLINE: Rebecca Boone
DATELINE: Boise
DATE: July 31, 2014
URL: http://www.bradenton.com/2014/07/30/5279142/idaho-scales-back-claim-of-problems.html
Idaho Department of Correction officials on Wednesday dramatically scaled back their assessment of problems encountered when they took over the running of the state's largest prison from Corrections Corporation of America this month.

==========

6. **Capitol Media Services**

==========

HEADLINE: Judge asked to toss prisoner-care lawsuit
BYLINE: Howard Fischer
DATELINE: Phoenix
DATE: July 31, 2014
URL: http://www.yourwestvalley.com/valleyandstate/article_b19d2614-183c-11e4-903b-001a4bcf887a.html
The state is asking federal judge to throw out a lawsuit filed on behalf of more than 34,000 inmates, saying there's no evidence each and every prisoner is at risk.

==========

7. **Alabama.com**

==========

HEADLINE: Parent company of Alabama prisons' health care provider 'speculative' investment, investor service says
BYLINE: Casey Toner
DATELINE: NA
DATE: July 31, 2014
URL: http://www.al.com/news/index.ssf/2014/07/moodys_parent_company_of_adocs.html
The firm that owns the company the Alabama Department of Corrections hired to supply health care to its 25,000 inmates was labeled "speculative" and given a negative rating outlook last year by Moody's Investor Service. A Moody's report from September 2013 says that Valitas Health Services, the owner of ADOC health care supplier Corizon, faces "earnings pressure" following prison contract losses in Maine, Maryland, Tennessee (excluding mental health), and Pennsylvania. It says Valitas' financial obligations are "subject to high credit risk."

---

8. **The Huffington Post**

==========

HEADLINE: Policymakers Must Include Incarcerated People in Jail Reform Process
BYLINE: Nick Malinowski, Brooklyn Defender Services
DATELINE: NA
DATE: July 30, 2014
URL: http://www.huffingtonpost.com/brooklyn-defender-services/policymakers-must-include-prison-reform_b_5631895.html
The New York City Council is investigating mental health services and violence on Rikers Island and in other city jails as recent media reports have renewed the public's interest on this topic. At a recent oversight hearing conducted by the council, mayoral officials, union leaders, corrections officers, civilians working in city jails and other advocates testified to their experiences. Notably absent from the discussion were people with personal experience inside the cell blocks; with 120,000 people each year churning through city jails -- over 1 million over the past ten years -- it seemed incongruous that the Criminal Justice and Mental Health Committees of the City Council had not included these voices. The City Council legal department has declined to provide us with the list of official invitees to the hearing.

==========

9. **The Daily**

==========

HEADLINE: Resources and treatment, not jail: A health-oriented approach to drug policy
BYLINE: Olivia Spokoiny
DATELINE: NA
DATE: July 30, 2014
URL: http://dailyuw.com/archive/2014/07/30/opinion/resources-and-treatment-not-jail-health-oriented-approach-drug-policy
Earlier this month, the World Health Organization (WHO) called on countries around the globe to consider decriminalizing all illicit substances. This recommendation is part of a policy brief entitled "Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations," however, the effects of changing drug laws extend far beyond the scope of minimizing HIV breakouts.
The idea behind the WHO's suggestion for decriminalizing drug use is that it would shift the focus away from punishing people for petty crimes, and more toward ensuring that they have access to adequate health resources and treatment programs.

=========

10. **Time**

=========

HEADLINE: Attorney General Eric Holder to Oppose Data-Driven Sentencing
BYLINE: Massimo Calabresi
DATELINE: NA
DATE: July 31, 2014
URL: http://time.com/3061893/holder-to-oppose-data-driven-sentencing/
Citing concerns about equal justice in sentencing, Attorney General Eric Holder has decided to oppose certain statistical tools used in determining jail time, putting the Obama Administration at odds with a popular and increasingly effective method for managing prison populations. Holder laid out his position in an interview with TIME on Tuesday and will call for a review of the issue in his annual report to the U.S. Sentencing Commission Thursday, Justice department officials familiar with the report say.

--

Click here to subscribe
Click here to unsubscribe

Click here to unsubscribe

From: Solomon, Amy
Sent: Thursday, July 31, 2014 6:44 PM
To: Fallon, Brian (OPA)
Cc: Mason, Karol V.; Werner, Sharon (OAG); Leary, Marylou
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Brian One last comment (b) (5)

(b) (5)

From: Solomon, Amy
Sent: Thursday, July 31, 2014 5:57 PM
To: Fallon, Brian (OPA) (JMD)
Cc: Mason, Karol V.; Werner, Sharon (OAG) (JMD); Wroblewski, Jonathan (CRM); Leary, Marylou
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"
Importance: High

Brian Thanks so much for the opportunity to review. We've attempted a few edits Jonathan has reviewed them and thinks they're fair. He's cc'd here as well. I'm available this evening and early tomorrow if there are questions. Thanks again, Amy

From: Fallon, Brian (OPA) (JMD)
Sent: Thursday, July 31, 2014 4:12 PM
To: Solomon, Amy
Cc: Mason, Karol V.; Werner, Sharon (OAG) (JMD)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

The speech is attached. Here is the excerpt drawn from the report about use of risk assessments in sentencing:

(b) (5)

(b) (5)

[redacted]

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000084

Document ID: 0.7.11378.10259 20170906 - 0000726

From: Solomon, Amy
Sent: Thursday, July 31, 2014 2:57 PM
To: Fallon, Brian (OPA)
Cc: Mason, Karol V.; Werner, Sharon (OAG)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data Driven Sentencing"

Brian – We haven't seen the report or the speech draft – would be great if we could review them today. As you may know, our emphasis on risk assessment is broader than the reentry context. It includes pre-trial and sentencing as well. I think there's preliminary research showing that risk assessment – even at sentencing – both serves a public safety function and does not exacerbate racial disparity. And many of our justice reinvestment states, which rely heavily on risk/needs assessment at various stages in the system, have seen decreases in prison numbers -- particularly for men of color. We're tracking down the data on all this, but happy to discuss in the meantime – and it would be great if we could do a quick review of the speech. There is already a lot of reaction to this one… Thanks. Amy

Amy L. Solomon
Senior Advisor to the Assistant Attorney General
Office of Justice Programs/U.S. Department of Justice
810 7th Street, NW
Washington, DC 20531
202.307.2986
amy.solomon@usdoj.gov

Roberts, Riley (OPA)

From: Roberts, Riley (OPA)
Sent: Thursday, July 31, 2014 6:56 PM
To: Alcindor, Lew Attorney General Holder's official email address
Cc: Richardson, Margaret (OAG); Mosier, Jenny (OAG); Phillips, Channing D. (OAG); Fallon, Brian (OPA); Maccoby, Jacob D (OPA); Bradley, Annie (OAG); Lewis, Kevin S. (OPA); Meadows, Bessie L (OAG)
Subject: NACDL speech
Attachments: NACDL Annual Meeting 2014 DRAFT5.doc

Sir,

Your draft remarks for tomorrow's NACDL event in Philadelphia are attached.

You will have a teleprompter for this event.

Please let us know any edits.

Thank you,
Riley

From: Roberts, Riley (OPA) *Attorney General Holder's official email address
Sent: Friday, August 01, 2014 12:42 AM
To: Alcindor, Lew*; Maccoby, Jacob D (OPA); Lewis, Kevin S. (OPA); Fallon, Brian (OPA); Bradley, Annie (OAG); Mosier, Jenny (OAG); Phillips, Channing D. (OAG)
Cc: Richardson, Margaret (OAG)
Subject: RE: NACDL Annual Meeting 2014 DRAFT5
Attachments: NACDL Annual Meeting 2014 FINAL.doc

No, sir we're in good shape.

Here's the version with page numbers for the teleprompter. Will send to the prompter shortly.

From: Alcindor, Lew
Sent: Thursday, July 31, 2014 11:34 PM
To: Roberts, Riley (OPA); Maccoby, Jacob D (OPA); Lewis, Kevin S. (OPA); Fallon, Brian (OPA); Bradley, Annie (OAG); Mosier, Jenny (OAG); Phillips, Channing D. (OAG)
Cc: Richardson, Margaret (OAG)
Subject: Re: NACDL Annual Meeting 2014 DRAFT5

(b) (5) [redacted]

From: Roberts, Riley (OPA)
Sent: Thursday, July 31, 2014 11:41 PM
To: Alcindor, Lew; Maccoby, Jacob D (OPA); Lewis, Kevin S. (OPA); Fallon, Brian (OPA); Bradley, Annie (OAG); Mosier, Jenny (OAG); Phillips, Channing D. (OAG)
Cc: Richardson, Margaret (OAG)
Subject: RE: NACDL Annual Meeting 2014 DRAFT5

Yes, sir you'll have a teleprompter.

(b) (5) [redacted]

From: Alcindor, Lew
Sent: Thursday, July 31, 2014 10:38 PM
To: Roberts, Riley (OPA); Maccoby, Jacob D (OPA); Lewis, Kevin S. (OPA); Fallon, Brian (OPA); Bradley, Annie (OAG); Mosier, Jenny (OAG); Phillips, Channing D. (OAG)
Cc: Richardson, Margaret (OAG)
Subject: Fw: NACDL Annual Meeting 2014 DRAFT5

Made a few changes

Teleprompter?

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000087

Document ID: 0.7.11378.6236 20170906 - 0000870

From (b) (6) Attorney General Holder's personal email address
Sent: Thursday, July 31, 2014 11:34 PM
To: Alcindor, Lew
Subject: NACDL Annual Meeting 2014 DRAFT5

Sent from my iPad Mini

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000088

Document ID: 0.7.11378.6236 20170906 - 0000871

Remarks of Attorney General Eric H. Holder, Jr.
National Association of Criminal Defense Lawyers 57th Annual Meeting and
13th Annual State Criminal Justice Network Conference
Friday, August 1, 2014
Philadelphia, Pennsylvania

Thank you, Norman [Reimer], for those kind words and for your exemplary leadership as Executive Director of the National Association of Criminal Defense Lawyers. It's a pleasure to share the stage with you this morning. **1** And it's a great privilege to stand with dedicated leaders like NACDL President Jerry Cox and so many distinguished jurists, passionate

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000089

Document ID: 0.7.11378.6236-000001 20170906 - 0000872

public servants, members of the defense bar, and engaged citizens.

I want to thank this organization's entire leadership team, staff, and membership for bringing us together this morning and for everything this group has done, in the 57 years since your founding, to help expand access to justice; to strengthen the rule of law; and to draw America's legal system ever closer to the values of equality, opportunity, and justice **2** that have

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000090

Document ID: 0.7.11378.6236-000001 20170906 - 0000873

defined our profession, and shaped this nation, for more than two and a quarter centuries.

Since 1958, the attorneys and staff of NACDL have exemplified the finest traditions of service and advocacy, striving to ensure justice and due process for those who stand accused of crime and misconduct. You've long stood at the forefront of our efforts to improve the administration of justice for all litigants. **3** And you've

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000091

Document ID: 0.7.11378.6236-000001 20170906 - 0000874

worked tirelessly to educate practitioners, the public, and the judiciary about matters ranging from mass incarceration to the indigent defense crisis consistently standing up and speaking out for populations that are too often overlooked and too often underserved. **4**

Especially today, as we commemorate the 50th anniversary of the Criminal Justice Act of 1964 a landmark measure President Lyndon Johnson signed into law half a

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000092

Document ID: 0.7.11378.6236-000001 20170906 - 0000875

century ago this month to codify the Sixth Amendment right to counsel it's appropriate that we pause to reflect on the invaluable contributions, and the many sacrifices, that this Association's members and so many others have made to ensure equality under the law. **5** But it's just as important that we mark this anniversary, and honor the legacy of the Supreme Court's historic decision in *Gideon v. Wainwright*, by recommitting ourselves to the work that

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000093

Document ID: 0.7.11378.6236-000001 20170906 - 0000876

remains unfinished and the significant challenges now before us.

As we speak more than five decades after *Gideon*, and 50 years after the Criminal Justice Act established a framework for compensating attorneys who serve indigent federal defendants millions of Americans remain unable to access or afford the legal assistance they need. **6** Far too many hardworking public defenders are overwhelmed by crushing caseloads or

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000094

Document ID: 0.7.11378.6236-000001 20170906 - 0000877

undermined by a shameful lack of resources. And it's clear that, despite the progress we've seen over the years, a persistent and unacceptable "justice gap" remains all too real. It poses a significant threat to the integrity of our criminal justice system. And meeting this threat will require bold action and renewed efforts from legal professionals of all stripes. **7**

As my predecessor, Attorney General Robert F. Kennedy, reminded a gathering of

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000095

Document ID: 0.7.11378.6236-000001 20170906 - 0000878

legal professionals 50 years ago next week, it's incumbent upon us to ensure that "the scales of our legal system measure justice, not wealth." That's why this Administration and this Justice Department in particular is committed to doing everything in our power to address the indigent defense crisis. **8** Over the last four years, in spite of sequestration and other deep budget cuts, the Department of Justice has committed more than $24 million in grants, initiatives, and

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000096

Document ID: 0.7.11378.6236-000001 20170906 - 0000879

direct assistance to support indigent defense work around the country. The President's budget request for Fiscal Year 2015 would do even more in this regard. And thanks to the hardworking men and women of the Department's Access to Justice Initiative an office I launched over four years ago to improve access to counsel, increase legal assistance, and bolster justice delivery systems **9** we're working closely with state, local, tribal and federal officials,

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000097

Document ID: 0.7.11378.6236-000001 20170906 - 0000880

as well as members of the bench and bar, to extend our outreach efforts; and to broaden access to quality representation in both the criminal and civil justice systems.

Last summer, we took a significant step forward by filing a Statement of Interest in a class action lawsuit *Wilbur v. City of Mount Vernon* asserting that the federal government has a strong interest in ensuring that all jurisdictions are fulfilling their obligations under *Gideon*. **10** In

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000098

Document ID: 0.7.11378.6236-000001 20170906 - 0000881

December, in a pivotal decision, the U.S. District Court found that there had, in fact, been a systemic deprivation of the right to counsel and mandated the appointment of a public defender supervisor to monitor the quality of indigent defense representation. **11** These and similar efforts will help us meet our constitutional and moral obligations to administer a legal system that matches its demands for accountability with

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000099

Document ID: 0.7.11378.6236-000001 20170906 - 0000882

a commitment to due process. And they are only the beginning.

Moving forward, we must continue to come together across aisles that divide counsel tables and political parties to ensure that America has a criminal justice system that's worthy of its highest ideals. To make certain that those who pay their debts to society have fair opportunities to become productive, law-abiding citizens. **12** And to empower justice

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000100

Document ID: 0.7.11378.6236-000001 20170906 - 0000883

professionals to meet 21st-century crime challenges with 21st-century solutions.

With this goal in mind one year ago I launched a new "Smart on Crime" initiative, which includes a series of targeted, data-driven reforms that are designed to advance these goals. **13** Since that time, my colleagues and I have implemented a range of meaningful changes by increasing our focus on proven diversion and reentry strategies; by making criminal justice

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000101

Document ID: 0.7.11378.6236-000001 20170906 - 0000884

expenditures both smarter and more productive; and by moving decisively away from outdated and overly-stringent sentencing regimes.

I want to be very clear: we will never stop being vigilant in our pursuit of justice and our determination to ensure that those who break the law are held rigorously to account. **14** But years of intensive study and decades of professional experience have shown that we will never

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000102

Document ID: 0.7.11378.6236-000001 20170906 - 0000885

be able to prosecute and incarcerate our way to becoming a safer nation.

As you know, the Smart on Crime initiative has led us to revise the Justice Department's charging policies with regard to mandatory minimum sentences for certain federal, drug-related crimes so that sentences will be determined based on the facts, the law, and the conduct at issue in each individual case. **15** This means that the toughest penalties will now be

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000103

Document ID: 0.7.11378.6236-000001 20170906 - 0000886

reserved for the most serious criminals. Over the last few months with the Department's urging the U.S. Sentencing Commission has taken additional steps to codify this approach, amending federal sentencing guidelines for low-level drug trafficking crimes to reduce the average sentence by nearly 18 percent. Going forward, these new guidelines will impact almost 70 percent of people who are convicted of these offenses. **16** And

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000104

Document ID: 0.7.11378.6236-000001 20170906 - 0000887

last month, the Commission voted to allow judges to apply these revised guidelines retroactively in cases where reductions are warranted.

Now, some have suggested that these modest changes might somehow undermine the ability of law enforcement and prosecutors to induce cooperation from defendants in federal drug cases. But the reality is that nothing could be further from the truth. **17**

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000105

Document ID: 0.7.11378.6236-000001 20170906 - 0000888

Like anyone who served as a prosecutor in the days before sentencing guidelines existed and mandatory minimums took effect, I know from experience that defendant cooperation depends on the certainty of swift and fair punishment, *not* on the disproportionate length of a mandatory minimum sentence. **18** As veteran prosecutors and defense attorneys surely recall and as our U.S. Attorney for the Western District of Wisconsin, John

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000106

Document ID: 0.7.11378.6236-000001 20170906 - 0000889

Vaudreuil, has often reminded his colleagues sentencing guidelines essentially systematized the kinds of negotiations that routinely took place in cases where defendants cooperated with the government in exchange for reduced sentences. With or without the threat of a mandatory minimum, it remains in the interest of these defendants to cooperate. **19** It remains in the mutual interest of defense attorneys and prosecutors to engage

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000107

Document ID: 0.7.11378.6236-000001 20170906 - 0000890

in these discussions. And any suggestion that defendant cooperation is somehow dependent on mandatory minimums is plainly inconsistent with the facts and with history.

Far from impeding the work of federal prosecutors, these sentencing reforms that I have mandated represent the ultimate expression of confidence in their judgment and discretion. **20** That's why I've called on Congress to expand upon and

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000108

Document ID: 0.7.11378.6236-000001 20170906 - 0000891

further institutionalize the changes we've put in place so we can better promote public safety, deterrence, and rehabilitation while saving billions of dollars *and* reducing our overreliance on incarceration.

Beyond this work, my colleagues and I are also striving to restore justice, fairness, and proportionality to those currently involved with our justice system through an improved approach to the executive clemency process. **21** In April, the

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000109

Document ID: 0.7.11378.6236-000001 20170906 - 0000892

Department announced new criteria that we will consider when recommending clemency applications for President Obama's review. This will allow us to consider requests from a larger field of eligible individuals who have clean prison records, who do not present threats to public safety, and who were sentenced under out-of-date laws that are no longer seen as appropriate. **22**

I'm pleased to report that we've already established an extensive and rigorous

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000110

Document ID: 0.7.11378.6236-000001 20170906 - 0000893

screening mechanism. We've facilitated efforts to engage assistance from *pro bono* attorneys, including many in this bar. We have detailed a number of lawyers within the Justice Department to temporary assignments in the Pardon Attorney's Office. **23** And we've taken important steps to establish a process by which we will consult with the U.S. Attorney's Office and the trial judges who handled each original

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000111

Document ID: 0.7.11378.6236-000001 20170906 - 0000894

case so we can evaluate every clemency application in the appropriate context.

I am particularly grateful for the assistance of dedicated criminal defense attorneys in and beyond this room as well as nonprofit lawyers who have stepped forward to answer the call for experienced *pro bono* counsel. **24** As our process unfolds, these associated groups, including NACDL, and individuals who stand more than a thousand attorneys strong, and call

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000112

Document ID: 0.7.11378.6236-000001 20170906 - 0000895

themselves "Clemency Project 2014" will work with incarcerated people who appear to meet our criteria and request the assistance of a lawyer.

Your efforts in this regard and your partnership in strengthening our criminal justice system across the board have been in keeping with the most critical obligation entrusted to every member of our profession: **25** not merely to represent clients or win cases, but to see that justice is

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000113

Document ID: 0.7.11378.6236-000001 20170906 - 0000896

done. Every day, in courtrooms from coast to coast, criminal defense attorneys take on cases that are fraught with difficulty and often controversy because you understand that, for our criminal justice system to function *at all*, every accused individual must have effective representation. And every defendant's right to due process must be guaranteed. **26**

Yet with the integral role that defense attorneys play in our justice system comes a

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000114

Document ID: 0.7.11378.6236-000001 20170906 - 0000897

tremendous responsibility: to uphold the highest standards of conduct in every single case. Prosecutors and defense lawyers can agree that we all must act in good faith in discovery, including refraining from alleging discovery violations as a routine practice. Our overburdened court system is ill-served by such unfounded tactics.

27 And the interests of justice demand that legal professionals look to their ultimate obligations: to strengthen the system as a

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000115

Document ID: 0.7.11378.6236-000001 20170906 - 0000898

whole; to address the disparities and divides that harm our society; to confront conditions and choices that breed crime and violence; and to harness innovative tools and new technologies in effective and responsible ways.

Over the past decade, we've seen an explosion in the practice of using aggregate data to observe trends and anticipate outcomes. **28** In fields ranging from professional sports, to marketing, to

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000116

Document ID: 0.7.11378.6236-000001 20170906 - 0000899

medicine; from genomics to agriculture; from banking to criminal justice, this increased reliance on empirical data has the potential to transform entire industries and, in the process, countless lives depending on how this data is harnessed and put to use. **29**

With programs like CompStat the New York City Police Department's management tool, which has been replicated and deployed in a number of police departments

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000117

Document ID: 0.7.11378.6236-000001 20170906 - 0000900

across the country we've seen that data gathering can lead to better allocation of police resources. On the federal level, we know that the development of risk assessments has, for years, successfully aided in parole boards' decision-making about candidates for early release. **30** Data can also help design paths for federal inmates to lower these risk assessments, and earn their way towards a reduced sentence, based on participation in programs that

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000118

Document ID: 0.7.11378.6236-000001 20170906 - 0000901

research shows can dramatically improve the odds of successful reentry. Such evidence-based strategies show promise in allowing us to more effectively reduce recidivism. And ultimately, they hold the potential to revolutionize community corrections and make our system far more effective than it is today by better matching services with needs; **31** by providing early warnings whenever supervised individuals stray from their

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000119

Document ID: 0.7.11378.6236-000001 20170906 - 0000902

reentry plans; by incorporating faster responses from probation officers to get people back on track; and by yielding feedback and results in real-time.

It's increasingly clear that, in the context of directing law enforcement resources and improving reentry programs, intensive analysis and data-driven solutions can help us achieve significant successes while reducing costs. **32** But particularly when it comes to front-end applications

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000120

Document ID: 0.7.11378.6236-000001 20170906 - 0000903

such as sentencing decisions, where a handful of states are now attempting to employ this methodology we need to be sure the use of aggregate data analysis won't have unintended consequences. **33**

Here in Pennsylvania and elsewhere, legislators have introduced the concept of "risk assessments" that seek to assign a probability to an individual's likelihood of committing future crimes and, based on those risk assessments, make sentencing

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000121

Document ID: 0.7.11378.6236-000001 20170906 - 0000904

determinations. Although these measures were crafted with the best of intentions, I am concerned that they may inadvertently undermine our efforts to ensure individualized and equal justice. **34** By basing sentencing decisions on static factors and immutable characteristics like the defendant's education level, socioeconomic background, or neighborhood they may exacerbate unwarranted and unjust disparities that are

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000122

Document ID: 0.7.11378.6236-000001 20170906 - 0000905

already far too common in our criminal justice system and in our society.

Criminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case, and the defendant's history of criminal conduct. They should *not* be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place.

35 Equal justice *can only* mean

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000123

Document ID: 0.7.11378.6236-000001 20170906 - 0000906

individualized justice, with charges, convictions, and sentences befitting the conduct of each defendant and the particular crime he or she commits. And that's why, this week, the Justice Department is taking the important step of urging the Sentencing Commission to study the use of data-driven analysis in front-end sentencing and to issue policy recommendations based on this careful, independent analysis. **36**

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000124

Document ID: 0.7.11378.6236-000001 20170906 - 0000907

At the state level, data-driven reforms are resulting in reduced prison populations and importantly, those reductions are disproportionately impacting men of color. We should celebrate this milestone a turning point and hope that front-end applications can also result in both public safety and racial justice. Careful study of the issue is warranted. **37**

We are at a watershed in the debate over how to reform our sentencing laws. A

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000125

Document ID: 0.7.11378.6236-000001 20170906 - 0000908

generation ago, the "truth in sentencing" movement of the 1970s and 80s sought to mete out equal sentences across the board, but sent the prison population soaring. By contrast, the idea of sentencing defendants based on risk factors may help to reduce the prison population, but in certain circumstances it may run the risk of imposing drastically different punishments for the same crimes. Neither approach may, by itself, provide the answer. **38**

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000126

Document ID: 0.7.11378.6236-000001 20170906 - 0000909

Instead, policymakers should consider taking the good parts of each model. The legacy of the truth-in-sentencing era is the lesson that the certainty of imposing some sanction for criminal behavior can indeed change behavior. And the "Big Data" movement has immense potential to make the corrections process more effective and efficient when it comes to reducing recidivism rates. **39** A blending of

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000127

Document ID: 0.7.11378.6236-000001 20170906 - 0000910

these approaches may represent the best path forward.

Of course, whatever the outcome of this debate, there's no doubt that these are complicated questions that implicate extraordinarily difficult issues. We seek and we are bringing about nothing less than a paradigm shift in our approach to criminal justice challenges. **40** Ultimately, we're striving to turn the page on an era, and an approach, that relied on

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000128

Document ID: 0.7.11378.6236-000001 20170906 - 0000911

incarceration over rehabilitation; that emphasized punishment over outcomes; and that too often discounted the ability of our justice system to prepare criminal defendants to reenter their communities as productive members of society. Through the Smart on Crime initiative, we have already achieved a tremendous amount. **41** As we move forward together, my colleagues and I will continue to rely on

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000129

Document ID: 0.7.11378.6236-000001 20170906 - 0000912

leaders like you to advance, to hone, and to grow this work.

This morning, as I look around this crowd of passionate professionals and dedicated public servants, I cannot help but feel confident in our ability to do just that; to develop smart solutions to the toughest problems we face; to protect the rights of *everyone* in this country, no matter their salary or their skin color; **42** and to further enshrine the ideals of American

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000130

Document ID: 0.7.11378.6236-000001 20170906 - 0000913

justice into the annals of American law. The very existence of organizations like NACDL reminds us that no matter how complex the challenges or how contentious the debate there will always be men and women who do not shrink from the responsibility to bring this country closer to its highest principles and deepest values. **43**

Even in the face of great trial and challenge, despite criticism and public scrutiny, you have for nearly six decades

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000131

Document ID: 0.7.11378.6236-000001 20170906 - 0000914

remained faithful to your mission to ensure justice, foster integrity, and promote the fair administration of our criminal justice system. I thank you, once again, for your inspiring commitment to these efforts. I applaud your dedication to principled and inclusive leadership of America's legal community. And I look forward to all that we'll achieve together in our ongoing efforts to deliver on the promise of equal justice under law. **44**

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000132

Document ID: 0.7.11378.6236-000001 20170906 - 0000915

Thank you.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000133

Document ID: 0.7.11378.6236-000001 20170906 - 0000916

From: Fallon, Brian (OPA)
Sent: Friday, August 01, 2014 8:52 AM
To: Solomon, Amy
Cc: Mason, Karol V.; Werner, Sharon (OAG); Wroblewski, Jonathan; Leary, Marylou
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Importance: High

Thank you. The AG's final draft reflects these edits.

-----Original Message-----
From: Solomon, Amy [Amy.Solomon@ojp.usdoj.gov]
Received: Thursday, 31 Jul 2014, 5:57PM
To: Fallon, Brian (OPA) [bfallon@jmd.usdoj.gov]
CC: Mason, Karol V. [Karol.V.Mason@ojp.usdoj.gov]; Werner, Sharon (OAG) [SWerner@jmd.usdoj.gov]; Wroblewski, Jonathan (b) (6) @CRM.USDOJ.GOV]; Leary, Marylou [Marylou.Leary@ojp.usdoj.gov]
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

Brian Thanks so much for the opportunity to review. We've attempted a few edits Jonathan has reviewed them and thinks they're fair. He's cc'd here as well. I'm available this evening and early tomorrow if there are questions. Thanks again, Amy

---

From: Fallon, Brian (OPA) (JMD)
Sent: Thursday, July 31, 2014 4:12 PM
To: Solomon, Amy
Cc: Mason, Karol V.; Werner, Sharon (OAG) (JMD)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

The speech is attached. Here is the excerpt drawn from the report about use of risk assessments in sentencing:

(b) (5)

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000134

Document ID: 0.7.11378.11166 20170906 - 0000917

(b) (5)

[redacted]

From: Solomon, Amy
Sent: Thursday, July 31, 2014 2:57 PM
To: Fallon, Brian (OPA)
Cc: Mason, Karol V.; Werner, Sharon (OAG)
Subject: RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data Driven Sentencing"

Brian – We haven't seen the report or the speech draft – would be great if we could review them today. As you may know, our emphasis on risk assessment is broader than the reentry context. It includes pre-trial and sentencing as well. I think there's preliminary research showing that risk assessment – even at sentencing –

both serves a public safety function and does not exacerbate racial disparity. And many of our justice reinvestment states, which rely heavily on risk/needs assessment at various stages in the system, have seen decreases in prison numbers -- particularly for men of color. We're tracking down the data on all this, but happy to discuss in the meantime – and it would be great if we could do a quick review of the speech. There is already a lot of reaction to this one… Thanks. Amy

Amy L. Solomon
Senior Advisor to the Assistant Attorney General
Office of Justice Programs/U.S. Department of Justice
810 7th Street, NW
Washington, DC 20531
202.307.2986
amy.solomon@usdoj.gov

Roberts, Riley (OPA)

From:	Roberts, Riley (OPA)
Sent:	Friday, August 01, 2014 6:15 PM
To:	Alcindor, Lew; Richardson, Margaret (OAG) Attorney General Holder's official email address
Subject:	Re: Press Clips – AG Speaks at NACDL 57th Annual Meeting

(b) (6) [redacted]

From: Alcindor, Lew
Sent: Friday, August 01, 2014 05:12 PM
To: Roberts, Riley (OPA); Richardson, Margaret (OAG)
Subject: Re: Press Clips – AG Speaks at NACDL 57th Annual Meeting

(b) (6) [redacted]

From: Roberts, Riley (OPA)
Sent: Friday, August 01, 2014 04:11 PM
To: Lewis, Kevin S. (OPA); Alcindor, Lew
Cc: Fallon, Brian (OPA); Richardson, Margaret (OAG); Mosier, Jenny (OAG); Phillips, Channing D. (OAG); Maccoby, Jacob D (OPA); Kefalas, Chrysovalantis (OPA)
Subject: RE: Press Clips – AG Speaks at NACDL 57th Annual Meeting

(b) (6) [redacted]

(b) (6) [redacted]

From: Lewis, Kevin S. (OPA)
Sent: Friday, August 01, 2014 2:30 PM
To: Alcindor, Lew
Cc: Fallon, Brian (OPA); Richardson, Margaret (OAG); Mosier, Jenny (OAG); Phillips, Channing D. (OAG); Roberts, Riley (OPA); Maccoby, Jacob D (OPA); Kefalas, Chrysovalantis (OPA)
Subject: Press Clips – AG Speaks at NACDL 57th Annual Meeting

Sir,

Copied below is a clips package of your speech to the NACDL.

Special thanks to team speechwriting for doing a yet another job well done. (b) (6) [redacted]

Have a great weekend,

-KL

Department of Justice

Press Clips – *AG Speaks at NACDL 57th Annual Meeting*

Associated Press: Holder cautions against use of data in sentencing (Eric Tucker)

Reuters: U.S. attorney general to condemn use of demographics in sentencing (Julia Edwards)

The Wall Street Journal: Holder Cautions on Risk of Bias in Big Data Use in Criminal Justice (Devlin Barrett)

The Washington Post: U.S. Attorney General Eric Holder urges against data analysis in criminal sentencing (Sari Horwitz)

NBC News: Attorney General Holder Warns Against Sentences Based on Predictions (Pete Williams)

Politico: Holder: No 'Moneyball' in sentencing (Josh Gerstein)

Huffington Post: Eric Holder Warns Of Risks In 'Moneyballing' Criminal Justice (Ryan J. Reilly)

Time: How to Predict Future Criminals (Chris Wilson)

ABA Journal: Attorney General Holder says sentencing based on predictive data discriminates (Terry Carter)

August 1, 2014 at 11:36 am

Associated Press: Holder cautions against use of data in sentencing (Eric Tucker)

http://hosted.ap.org/dynamic/stories/U/US_DATA_DRIVEN_SENTENCING?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT

WASHINGTON (AP) -- Attorney General Eric Holder cautioned against the use of data in sentencing criminal defendants, saying judges should base punishment on the facts of a crime rather than on statistical predictions of future behavior that can be unfair to minorities.

In a speech Friday to criminal defense lawyers, Holder said he is concerned that judges in several states have begun factoring in "risk assessments," such as a defendant's education, neighborhood or socioeconomic background, in issuing sentences. Those risk assessments use data analysis in part to predict the likelihood that a particular defendant will commit more crimes.

The attorney general warned that such a calculation, which take into accounts factors that a defendant cannot control, "may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society."

"Criminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case, and the defendant's history of criminal conduct. They should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place," Holder said, according to a copy of his prepared remarks at the annual meeting of the National Association of Criminal Defense Lawyers in Philadelphia.

Document ID: 0.7.11378.6168 20170906 - 0000921

In a separate report given this week to the U.S. Sentencing Commission, the Justice Department identified several states, including Pennsylvania and Tennessee, that it says use risk assessments during the sentencing process. Legislation pending in Congress would also make such assessments part of the process for federal offenders. The department is urging the commission, an independent panel that establishes sentencing policy, to study the use of data-driven analysis in sentencing.

"Equal justice can only mean individualized justice, with charges, convictions, and sentences befitting the conduct of each defendant and the particular crime he or she commits," Holder said.

The speech was intended to mark the one-year anniversary of Holder's announcement of his "Smart on Crime" initiative, in which he instructed federal prosecutors to stop charging many nonviolent drug defendants with offenses that carry mandatory minimum sentences. He said long prison sentences should be reserved for dangerous criminals, not those better suited for rehabilitation.

The country, Holder said, was at a "watershed moment in the debate over how to reform our sentencing laws." In the last year alone, the Sentencing Commission has reduced the sentencing guideline ranges for drug crimes and applied that change retroactively.

July 31, 2014 at 1:36 pm

Reuters: U.S. attorney general to condemn use of demographics in sentencing (Julia Edwards)

http://www.reuters.com/article/2014/07/31/us-usa-justice-sentencing-idUSKBN0G027820140731?feedType=RSS

(Reuters) - One year into his effort to lower prison sentences for nonviolent criminals, Attorney General Eric Holder on Friday will condemn states that consider demographic data before determining sentencing for convicted individuals, according to Justice Department officials.

Factors such as education level, neighborhood and employment status are increasingly used by states to determine the risk level a convicted person will pose upon release. A bill introduced by Senator John Cornyn, a Republican of Texas, attempts to bring the same practice into federal courts.

Holder will argue in a speech to criminal defense lawyers and in a report to the U.S. Sentencing Commission that two people who commit the same crime should not serve unequal time based on those factors alone.

Holder's "Smart on Crime" initiative launched last year with the goal of reining in spending on prisons and abolishing what Holder sees as racial disparities within the criminal justice system.

"There is concern over these data-based approaches to sentencing. Because while they do share the goal of reducing the prison population, they could contribute to the very disparities in that prison population that the attorney general's initiative was also meant to address," a Justice Department official said.

Speaking at a county correctional facility in Maryland on Monday, Holder told reporters that any executive changes or recommendations on sentencing reform made by the Obama administration will "need the support of Congress to make sure that they will last beyond this administration."

Pending legislation in Congress that would ban the use of mandatory minimum sentences for drug offenders has support from members of both political parties, but it is unlikely to pass before November's midterm elections.

August 1, 2014 at 2:10 pm

The Wall Street Journal: Holder Cautions on Risk of Bias in Big Data Use in Criminal Justice (Devlin Barrett)

http://online.wsj.com/articles/u-s-attorney-general-cautions-on-risk-of-bias-in-big-data-use-in-criminal-justice-1406916606

WASHINGTON—Attorney General Eric Holder warned Friday that a new generation of data-driven criminal justice programs could adversely affect poor and minority groups, saying such efforts need to be studied further before they are used to sentence suspects.

In a speech in Philadelphia to a gathering of the National Association of Criminal Defense Lawyers, Mr. Holder cautioned that while such data tools hold promise, they also pose potential dangers.

"By basing sentencing decisions on static factors and immutable characteristics—like the defendant's education level, socioeconomic background, or neighborhood—they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society," Mr. Holder told the defense lawyers. Criminal sentences, he said, "should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place."

The attorney general applauded other uses of aggregate data collection in criminal justice, such as crime mapping pioneered by the New York Police Department, and steering certain defendants toward non-prison rehabilitation programs.

At issue is a trend toward statistical analysis made famous by the book and movie, "Moneyball," about a baseball general manager who used sets of data to better predict which players would succeed.

That approach has since moved into other sports, and other professions, including criminal justice. Some states and localities have begun using risk assessment calculations to help decide which suspects should be released on bail while awaiting trial, and which ones should be sent to jail to await trial.

States are beginning to experiment with data-driven risk assessments to help determine prison sentences. Pennsylvania and Tennessee have passed laws requiring the use of risk assessments in sentencing decisions. Kentucky has a project to apply risk assessments to determine which defendants should be released on bail while awaiting trial.

"No risk assessment should have a racial bias, and if that's what he's saying, I couldn't agree more," said Anne Milgram, a former New Jersey attorney general who now works for the Laura and John Arnold Foundation, which is involved in the Kentucky pretrial project.

The foundation said the risk assessments reduced crime by nearly 15% among the defendants awaiting trial, while at the same time releasing more suspects on bail. And defendants flagged by the program as at risk of being arrested for committing violent crime turned out to be 17 times more likely to do so than defendants who weren't flagged as risks, the foundation said.

"We're not doing anything that has a racial bias, period," said Ms. Milgram, who added that her group does not use risk assessments that use education level or demographic information about defendants in its analysis.

August 1, 2014 at 2:17 pm

The Washington Post: U.S. Attorney General Eric Holder urges against data analysis in criminal sentencing (Sari Horwitz)

http://www.washingtonpost.com/world/national-security/us-attorney-general-eric-holder-urges-against-data-analysis-in-criminal-sentencing/2014/08/01/92d0f7ba-1990-11e4-85b6-c1451e622637_story.html

Attorney General Eric H. Holder Jr. said Friday that he opposes the use of data analysis in criminal sentencing, a practice that has been adopted by several states but that critics say could result in unfairly harsh sentences for minority defendants.

In a speech in Philadelphia to the National Association of Criminal Defense Lawyers, Holder said that though information on education levels, socioeconomic backgrounds and neighborhoods can be useful in some areas of law enforcement, he cautioned against using such data to determine prison sentences.

Sentencing decisions based on "static factors and immutable characteristics," Holder said, "may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society."

Holder also asked the U.S. Sentencing Commission, an independent agency that establishes sentencing policies for the federal courts, to study and issue policy recommendations about the use of "big data" in sentencing decisions.

"Criminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case and the defendant's history of criminal conduct," Holder said. "They should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place."

Holder's request to the Sentencing Commission is his latest action on criminal justice reform, an effort he launched last summer when he announced the department would no longer charge low-level, nonviolent drug offenders with offenses that impose severe mandatory sentences.

Last month, the Sentencing Commission issued a ruling — endorsed by Holder — that will allow nearly 50,000 federal drug offenders currently in prison to be eligible for reduced sentences. The commission made retroactive an earlier change that had lightened potential punishments for most future drug offenders who are sentenced starting in November.

Several states including Pennsylvania and Virginia are now using data to conduct "risk assessments" before handing down criminal sentences. Supporters say that data about a person's past help judges make better sentencing determinations.

The Senate Judiciary Committee has passed bipartisan legislation that would require offenders to undergo risk assessments to determine whether they present a low, medium or high risk of recidivism. The bill, introduced by Sens. John Cornyn (R-Tex.) and Sheldon Whitehouse (D-R.I.), would also allow certain inmates to reduce their sentences through a combination of factors.

In a report to the Sentencing Commission, the Justice Department said basing criminal sentences on data is a "dangerous concept."

The practice "will become much more concerning over time as other far reaching sociological and personal information unrelated to the crimes at issue are incorporated into risk tools," the department said.

August 1, 2014 at 11:24 am

NBC News: Attorney General Holder Warns Against Sentences Based on Predictions (Pete Williams)

http://www.nbcnews.com/news/crime-courts/attorney-general-holder-warns-against-sentences-based-predictions-n170476

Criminal sentences should be based on the nature of the crime a defendant commits, not on data intended to predict the risk of future offenses, Attorney General Eric Holder told the U.S. Sentencing Commission on Friday. In a letter to the Sentencing Commission, the Justice Department said the use of statistical analysis in many industries — and in the criminal justice system — has exploded since the book "Moneyball" explained how the Oakland Athletics used masses of data to recruit new players, based on predictions of how they would perform.

Risk assessment can be valuable, the letter said, in deciding when to release a prison inmate on parole. And it can be useful in evaluating which inmates will need the most attention in helping them readjust to the community. But criminal sentences, it said, should be based primarily on the offender's past conduct and the nature and circumstances of the crime.

"They should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place. Equal justice can only mean individualized justice, with charges, convictions, and sentences befitting the conduct of each defendant," Holder told the Commission. Basing sentences on factors such as education level, employment history, family circumstances, and age will adversely affect offenders from poor communities already struggling with social problems, the letter said. Some states have begun to use risk assessments in sentencing, and bills are pending in Congress that would require it in the federal courts.

August 1, 2014 at 9:00 am

Politico: Holder: No 'Moneyball' in sentencing (Josh Gerstein)

http://www.politico.com/blogs/under-the-radar/2014/08/holder-no-moneyball-in-sentencing-193262.html

As the data-crunching techniques popularized in the movie "Moneyball" make their way into nearly all corners of American life, Attorney General Eric Holder is trying to draw the line in one area: criminal sentencing.

In a speech to criminal defense lawyers Friday and in a report submitted to the U.S. Sentencing Commission, Holder argues that basing sentences on tools which attempt to precisely calculate a criminal's chance of re-offending is likely to increase the sentences of minority offenders, while letting (often white) white-collar criminals off easy.

"It's increasingly clear that, in the context of directing law enforcement resources and improving reentry programs, intensive analysis and data-driven solutions can help us achieve significant successes while reducing

costs. But particularly when it comes to front-end applications – such as sentencing decisions, where a handful of states are now attempting to employ this methodology – we need to be sure the use of aggregate data analysis won't have unintended consequences," Holder told the National Assication of Criminal Defense Lawyers conference in Philadelphia, according to prepared remarks.

"By basing sentencing decisions on static factors and immutable characteristics – like the defendant's education level, socioeconomic background, or neighborhood – they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society," Holder said. "They should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place."

The Justice Department report advances the same argument.

"Most current risk assessments...determine risk levels based on static, historical offender characteristics such as education level, employment history, family circumstances and demographic information. We think basing criminal sentences, and particularly imprisonment terms, primarily on such data - rather than the crime committed and surrounding circumstances - is a dangerous concept that will become much more concerning over time as other far reaching sociological and personal information unrelated to the crimes at issue are incorporated into risk tools," DOJ's annual report to the sentencing commission declares. "This phenomenon ultimately raises constitutional questions because of the use of group-based characteristics and suspect classifications in the analytics. Criminal accountability should be primarily about prior bad acts proven by the government before a court of law and not some future bad behavior predicted to occur by a risk assessment instrument."

"Experience and analysis of current risk assessment tools demonstrate that utilizing such tools for determining prison sentences to be served will have a disparate and adverse impact on offenders from poor communities already struggling with many social ills," the report adds. "The touchstone of our justice system is equal justice, and we think sentences based excessively on risk assessment instruments will likely undermine this principle."

Holder's cautionary stance on data-driven sentencing puts him at odds with a bipartisan group of lawmakers, including some Democrats he's usually closely aligned with. In the House, Reps. Jason Chaffetz (R-Utah) and Bobby Scott (D-Va.) have introduced a bill seeking to bring more data analysis into the criminal justice system. In the Senate, the Senate Judiciary Committee passed a bill in March that seeks to incorporate elements of data analytics in determining eligibility for sentencing credit.

Neither measure appears to directly change sentences imposed at the time of sentencing. However, both contain elements that would classify offenders into various risk groups and allow some to reduce their sentences through involvement in programs seen to reduce risk of recidivism. The result would be some offenders having the opportunity to get out earlier than others due to a variety of factors—some of which may be beyond an individual prisoner's control.

August 1, 2014 at 11:28 am

Huffington Post: Eric Holder Warns Of Risks In 'Moneyballing' Criminal Justice (Ryan J. Reilly)

http://www.huffingtonpost.com/2014/08/01/eric-holder-moneyball-criminal-justice_n_5641420.html

Attorney General Eric Holder on Friday cautioned against using data to determine the length of sentences for criminals, saying such a practice could "exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society."

Document ID: 0.7.11378.6168 20170906 - 0000926

In a speech before the National Association of Criminal Defense Lawyers' 57th annual meeting in Philadelphia, Holder embraced the use of data analysis in predicting where crime is likely to happen and for risk assessments on the "back-end," as when determining how best to prepare inmates to re-enter society.

But Holder also warned that using "static factors and immutable characteristics, like the defendant's education level, socioeconomic background or neighborhood" to determine the length of a person's sentence could have unintended consequences.

"Although these measures were crafted with the best of intentions, I am concerned that they may inadvertently undermine our efforts to ensure individualized and equal justice," Holder said. "Criminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case, and the defendant's history of criminal conduct. They should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place. Equal justice can only mean individualized justice, with charges, convictions, and sentences befitting the conduct of each defendant and the particular crime he or she commits."

Holder's remarks coincide with a request from the Justice Department to the U.S. Sentencing Commission to study how data analysis is currently being used in sentencing, and to issue recommendations on how such analysis should be used. In a letter to the commission, the Justice Department expressed reservations about components of sentencing reform legislation pending in Congress that would base prison sentences on factors such as "education level, employment history, family circumstances and demographic information," calling it a "dangerous concept that will become much more concerning over time as other far reaching sociological and personal information unrelated to the crimes at issue are incorporated into risk tools."

The letter to the commission also takes note of an "explosion in the use of data analytics to identify patterns of human behavior and experience and bring new insights to fields of nearly every kind" since the publication of Moneyball, a book by Michael Lewis about how the Oakland Athletics used statistical data to predict the future performance of baseball players. Former New Jersey Attorney General Anne Milgram first connected the term "moneyball" to the use of data analysis by the criminal justice system.

Now the nation's fourth longest-serving attorney general, Holder has worked to make criminal justice reform a key part of his legacy. In his speech, he said the nation has reached "a watershed in the debate over how to reform our sentencing laws," and that blending the so-called truth in sentencing approach, which has sought more equal sentences (but has also led to a massive growth in the prison population), and data-driven analysis may offer the best approach.

"The legacy of the truth in sentencing era is the lesson that the certainty of imposing some sanction for criminal behavior can indeed change behavior. And the 'Big Data' movement has immense potential to make the corrections process more effective and efficient when it comes to reducing recidivism rates. A blending of these approaches may represent the best path forward," Holder said.

August 1, 2014 at 12:20 pm

Time: How to Predict Future Criminals (Chris Wilson)

http://time.com/3068396/crime-predictor/

When deciding how long to send someone to jail, many states currently use statistical models to determine

Document ID: 0.7.11378.6168 20170906 - 0000927

whether offenders risk committing a future crime if they are let out on probation or parole. In the past several years, researchers have been able to demonstrate that factors like drug and alcohol problems, family life and education can help them predict the likelihood of recidivism.

In a speech before the National Association of Criminal Defense Lawyers Friday, Attorney General Eric Holder warned that this increasingly popular use of data-based methods in determining prison sentences "may run the risk of imposing drastically different punishments for the same crimes." As Holder told TIME this week, he fears that the statistical methods that punish for factors like education will disproportionately affect minority and poor offenders.

Below, you'll find a demonstration of the kind of kind calculator many states use to predict odds of recidivism. Change the responses in the following interactive to see how the odds of re-arrest change with the offender's circumstances. In many states, these odds are being used to determine sentencing lengths.

The actual use of this "post conviction risk assessment" varies widely. This method, developed by criminal justice researcher Christopher T. Lowenkamp and colleagues, is an area of ongoing study. Using standard statistical models, the researchers were able to study a large population of offenders to determine which factors can predict a person's likelihood of future offense and which cannot. Notably, a person's race–left in this interactive for demonstration purposes–has almost no predictive power over future behavior when all other factors are held constant. In other words, a white offender and black offender with the same answers to the above questions are almost equally likely to commit a future crime.

August 1, 2014 at 11:58 am

ABA Journal: Attorney General Holder says sentencing based on predictive data discriminates
(Terry Carter)

http://www.abajournal.com/news/article/attorney_general_holder_says_sentencing_based_on_predictive_data_discrimina/?utm_source=dlvr.it&utm_medium=twitter&utm_campaign=daily_rss

Attorney General Eric Holder says judges rely too much on predictive data in determining criminal sentences, and that it often results in minorities being treated unfairly, the Associated Press reports.

Holder, in a speech Friday at the annual meeting of the National Association of Criminal Defense Lawyers in Philadelphia, said that judges in Pennsylvania and elsewhere are meting out sentences based in part on "risk assessments" that use a defendant's education level and socioeconomic background to predict the likelihood of the defendant committing future crimes.

Sentences should reflect the crimes committed, Holder said in the speech to mark the anniversary of his "Smart on Crime" speech last year before the ABA House of Delegates, when he announced sweeping changes geared to lessening incarceration of low-level, nonviolent offenders, particularly in dug cases.

###

Richardson, Margaret (OAG)

From:	Richardson, Margaret (OAG)
Sent:	Monday, August 11, 2014 12:49 PM
To:	Bradley, Annie (OAG); (b) (6) Alcindor, Lew
Subject:	Re: NY TIMES OPINION

Attorney General Holder's official email address

Attorney General Holder's personal email address

Thank you!

From: Bradley, Annie (OAG)
Sent: Monday, August 11, 2014 12:43 PM Eastern Standard Time
To: (b) (6); Alcindor, Lew
Cc: Richardson, Margaret (OAG)
Subject: FW: NY TIMES OPINION

See her response below

From: Sonja Starr [mailto:sbstarr@umich.edu]
Sent: Monday, August 11, 2014 12:35 PM
To: Bradley, Annie (OAG)
Subject: Re: NY TIMES OPINION

Hi Annie--

Thanks! Terrific speech--I am so glad that the AG has taken this position and is calling attention to this issue. Please tell him and his team on this issue to let me know if there's anything I can do to help as the debate moves forward. For what it's worth, I've got a recent article in the Stanford Law Review laying out constitutional and methodological problems with the risk assessment instruments. Here's a link:

http://www.stanfordlawreview.org/print/article/evidence-based-sentencing-and-scientific-rationalization-discrimination

All the best,
Sonja

Sonja Starr
Professor of Law
University of Michigan
(m) (b) (6)

On Mon, Aug 11, 2014 at 12:01 PM, Bradley, Annie (OAG) <Annie.Bradley@usdoj.gov> wrote:
Good morning – the Attorney General asked that I send to you a copy of his speech that he gave to the National Association of Criminal Defense Lawyers on August 1, 2014. Thank you.

Annie Bradley
Confidential Assistant to the
Attorney General of the United States
annie.bradley@usdoj.gov
202-514-2003

Alcindor, Lew

From: Alcindor, Lew Attorney General Holder's official email address
Sent: Monday, August 11, 2014 1:55 PM
To: Bradley, Annie (OAG); (b) (6) Attorney General Holder's personal email address
Cc: Richardson, Margaret (OAG)
Subject: Re: NY TIMES OPINION

Thanks Annie

From: Bradley, Annie (OAG)
Sent: Monday, August 11, 2014 12:43 PM
To: (b) (6) ; Alcindor, Lew
Cc: Richardson, Margaret (OAG)
Subject: FW: NY TIMES OPINION

See her response below

From: Sonja Starr [mailto:sbstarr@umich.edu]
Sent: Monday, August 11, 2014 12:35 PM
To: Bradley, Annie (OAG)
Subject: Re: NY TIMES OPINION

Hi Annie--

Thanks! Terrific speech--I am so glad that the AG has taken this position and is calling attention to this issue. Please tell him and his team on this issue to let me know if there's anything I can do to help as the debate moves forward. For what it's worth, I've got a recent article in the Stanford Law Review laying out constitutional and methodological problems with the risk assessment instruments. Here's a link:

http://www.stanfordlawreview.org/print/article/evidence-based-sentencing-and-scientific-rationalization-discrimination

All the best,
Sonja

Sonja Starr
Professor of Law
University of Michigan
(m) (b) (6)

On Mon, Aug 11, 2014 at 12:01 PM, Bradley, Annie (OAG) <Annie.Bradley@usdoj.gov> wrote:
Good morning – the Attorney General asked that I send to you a copy of his speech that he gave to the

National Association of Criminal Defense Lawyers on August 1, 2014. Thank you.

Annie Bradley
Confidential Assistant to the
Attorney General of the United States
annie.bradley@usdoj.gov
202-514-2003

Fried, Hannah (OLP)

From: Fried, Hannah (OLP)
Sent: Thursday, September 04, 2014 10:58 AM
To: Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Siger, Steven B. (OLP); Krulic, Alexander (OLP); Tyrangiel, Elana (OLP)
Subject: RE: AG Remarks on Predictive Analytics

I'm free too, whenever works for people.

From: Hecker, Elizabeth (OLP)
Sent: Thursday, September 04, 2014 10:57 AM
To: Pazur, Shannon (OLP); Siger, Steven B. (OLP); Krulic, Alexander (OLP); Tyrangiel, Elana (OLP); Fried, Hannah (OLP)
Subject: RE: AG Remarks on Predictive Analytics

I'm also available anytime.

Do we typically include interns in these meetings? If so I will giv (b) (6) a heads up. She's done a great job summarizing some of the articles on predictive policing. But if not, I'm of course happy to brief her on anything she needs to know later.

From: Pazur, Shannon (OLP)
Sent: Thursday, September 04, 2014 10:40 AM
To: Siger, Steven B. (OLP); Krulic, Alexander (OLP); Tyrangiel, Elana (OLP); Fried, Hannah (OLP); Hecker, Elizabeth (OLP)
Subject: RE: AG Remarks on Predictive Analytics

I'm in now and available anytime that suits others.

From: Siger, Steven B. (OLP)
Sent: Thursday, September 04, 2014 9:58 AM
To: Krulic, Alexander (OLP); Tyrangiel, Elana (OLP); Fried, Hannah (OLP); Hecker, Elizabeth (OLP); Pazur, Shannon (OLP)
Subject: RE: AG Remarks on Predictive Analytics

I was able to track down our submission to the Sentencing Commission: http://www.justice.gov/criminal/foia/docs/2014annual-letter-final-072814.pdf (pp. 1-8 in relevant part). The relevant section of the speech was drawn from this document. Our submission suggests that, in sentencing, analytics can be used for good or ill. The discussion does not get into policing.

Document ID: 0.7.11378.23547

(b) (5) [redacted]

I am available for a half hour at either time you suggested.

Best,
Steve

From: Krulic, Alexander (OLP)
Sent: Thursday, September 04, 2014 9:29 AM
To: Siger, Steven B. (OLP); Tyrangiel, Elana (OLP); Fried, Hannah (OLP); Hecker, Elizabeth (OLP); Pazur, Shannon (OLP)
Subject: RE: AG Remarks on Predictive Analytics

Thank you Steve. This is very helpful perspective.

Would it be possible to know/talk with the person who helped write this part of the speech?

I am shortly to distribute an overview of what we talked about for next steps on Report #2 (predictive analytics).

(b) (5) [redacted]

Other than that, I am available to meet to discuss next steps on #4 whenever the group is. Perhaps 10:30am? Or 1:30pm?

Alex

From: Siger, Steven B. (OLP)
Sent: Thursday, September 04, 2014 9:20 AM
To: Tyrangiel, Elana (OLP); Krulic, Alexander (OLP); Fried, Hannah (OLP); Hecker, Elizabeth (OLP); Pazur, Shannon (OLP)
Subject: AG Remarks on Predictive Analytics

The speech I mentioned the other day was to the National Association of Criminal Defense Lawyers (NACDL), and is available here: http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140801.html. I also think we need to get our hands on whatever we sent to the Sentencing Commission (highlighted below).

The relevant part of the speech follows:

Document ID: 0.7.11378.23547

Yet with the integral role that defense attorneys play in our justice system comes a tremendous responsibility: to uphold the highest standards of conduct in every single case. Prosecutors and defense lawyers can agree that we all must act in good faith in discovery, including refraining from alleging discovery violations as a routine practice. Our overburdened court system is ill-served by such unfounded tactics. And the interests of justice demand that legal professionals look to their ultimate obligations: to strengthen the system as a whole; to address the disparities and divides that harm our society; to confront conditions and choices that breed crime and violence; and to harness innovative tools and new technologies in effective and responsible ways.

Over the past decade, we've seen an explosion in the practice of using aggregate data to observe trends and anticipate outcomes. In fields ranging from professional sports, to marketing, to medicine; from genomics to agriculture; from banking to criminal justice, this increased reliance on empirical data has the potential to transform entire industries and, in the process, countless lives depending on how this data is harnessed and put to use.

With programs like CompStat the New York City Police Department's management tool, which has been replicated and deployed in a number of police departments across the country we've seen that data gathering can lead to better allocation of police resources. On the federal level, we know that the development of risk assessments has, for years, successfully aided in parole boards' decision-making about candidates for early release. Data can also help design paths for federal inmates to lower these risk assessments, and earn their way towards a reduced sentence, based on participation in programs that research shows can dramatically improve the odds of successful reentry. Such evidence-based strategies show promise in allowing us to more effectively reduce recidivism. And ultimately, they hold the potential to revolutionize community corrections and make our system far more effective than it is today by better matching services with needs; by providing early warnings whenever supervised individuals stray from their reentry plans; by incorporating faster responses from probation officers to get people back on track; and by yielding feedback and results in real-time.

It's increasingly clear that, in the context of directing law enforcement resources and improving reentry programs, intensive analysis and data-driven solutions can help us achieve significant successes while reducing costs. But particularly when it comes to front-end applications such as sentencing decisions, where a handful of states are now attempting to employ this methodology we need to be sure the use of aggregate data analysis won't have unintended consequences.

Document ID: 0.7.11378.23547

Here in Pennsylvania and elsewhere, legislators have introduced the concept of "risk assessments" that seek to assign a probability to an individual's likelihood of committing future crimes and, based on those risk assessments, make sentencing determinations. Although these measures were crafted with the best of intentions, I am concerned that they may inadvertently undermine our efforts to ensure individualized and equal justice. By basing sentencing decisions on static factors and immutable characteristics like the defendant's education level, socioeconomic background, or neighborhood they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.

Criminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case, and the defendant's history of criminal conduct. They should *not* be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place. Equal justice can only mean individualized justice, with charges, convictions, and sentences befitting the conduct of each defendant and the particular crime he or she commits. And that's why, this week, the Justice Department is taking the important step of urging the Sentencing Commission to study the use of data-driven analysis in front-end sentencing and to issue policy recommendations based on this careful, independent analysis.

At the state level, data-driven reforms are resulting in reduced prison populations and importantly, those reductions are disproportionately impacting men of color. We should celebrate this milestone a turning point and hope that front-end applications can also result in both public safety and racial justice. Careful study of the issue is warranted.

We are at a watershed in the debate over how to reform our sentencing laws. A generation ago, the "truth in sentencing" movement of the 1970s and 80s sought to mete out equal sentences across the board, but sent the prison population soaring. By contrast, the idea of sentencing defendants based on risk factors may help to reduce the prison population, but in certain circumstances it may run the risk of imposing drastically different punishments for the same crimes. Neither approach may, by itself, provide the answer. Instead, policymakers should consider taking the good parts of each model. The legacy of the truth-in-sentencing era is the lesson that the certainty of imposing some sanction for criminal behavior can indeed change behavior. And the "Big Data" movement has immense potential to make the corrections process more effective and efficient when it comes to reducing recidivism rates. A blending of these approaches may represent the best path forward.

Document ID: 0.7.11378.23547

Pazur, Shannon (OLP)

From: Pazur, Shannon (OLP)
Sent: Tuesday, September 09, 2014 10:04 AM
To: Hecker, Elizabeth (OLP)
Subject: RE: AG bullet point

The Attorney General has asked the U.S. Sentencing Commission to study the use of data-based risk assessment tools in the sentencing and reentry contexts, and to issue a policy statement regarding their proper use.

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, September 09, 2014 9:58 AM
To: Pazur, Shannon (OLP)
Subject: RE: AG bullet point

Thanks!

From: Pazur, Shannon (OLP)
Sent: Tuesday, September 09, 2014 9:56 AM
To: Hecker, Elizabeth (OLP)
Subject: RE: AG bullet point

Right, give me 5 mins or so.

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, September 09, 2014 9:56 AM
To: Pazur, Shannon (OLP)
Subject: AG bullet point

Hi, Shannon! Were you able to draft that bullet point (or points) on the AG's statements? Alex just came by and was asking about the outline. I'm going to try to get it to him by 10:15.

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160

Document ID: 0.7.11378.23697

Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23697

Pronley, Alyssa (JMD)

From: Pronley, Alyssa (JMD)
Sent: Wednesday, September 10, 2014 3:19 PM
To: Krulic, Alexander (OLP); Hecker, Elizabeth (OLP)
Subject: Big Data: Review of Academics
Attachments: Academics in Predictive Analytics_Policing 2.docx

Hello,

Please find a review of the academics, their relevant articles, and what they say about their respective projects attached. I tried to only put bullet points for their own views on what their projects are, and I tried to keep it as to the point as possible. There was a lot of information though. Please let me know if you would like me to do some more research on a specific project or city.

(b) (5) [redacted]

(b) (6) [redacted]

Thanks,
Alyssa

Document ID: 0.7.11378.23749

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Thursday, October 16, 2014 11:53 AM
To: Krulic, Alexander (OLP)
Subject: Federal sentencing and parole

(b) (5) [redacted]

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23870

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Tuesday, October 21, 2014 5:09 PM
To: Hecker, Elizabeth (OLP); Pazur, Shannon (OLP)
Subject: RE: AG on big data in sentencing

(b) (5) [redacted]

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, October 21, 2014 5:06 PM
To: Krulic, Alexander (OLP); Pazur, Shannon (OLP)
Subject: RE: AG on big data in sentencing

Thanks to you both! (b) (5) [redacted]

From: Krulic, Alexander (OLP)
Sent: Tuesday, October 21, 2014 4:38 PM
To: Hecker, Elizabeth (OLP); Pazur, Shannon (OLP)
Subject: AG on big data in sentencing

Beth,

Attached is the overview of the AG's comments on risk assessment tools that Shannon prepared.

(b) (5) [redacted]

Alex

<< File: AG on big data in sentencing.docx >>

Document ID: 0.7.11378.24085

Krulic, Alexander (OLP)

From:	Krulic, Alexander (OLP)
Sent:	Monday, October 27, 2014 10:41 PM
To:	Hecker, Elizabeth (OLP)
Subject:	Conference Materials
Attachments:	CriminalJustice.pdf; ATT00001.txt

For your reference. I will give you some context in the morning.

Alex

>

Document ID: 0.7.11378.24121

Data&Society RESEARCH INSTITUTE

The Leadership Conference

OPEN TECHNOLOGY INSTITUTE

Data & Civil Rights: Criminal Justice Primer

DRAFT WORKSHOP VERSION

by Alex Rosenblat, Kate Wikelius, danah boyd, Seeta Peña Gangadharan, and Corrine Yu

Produced for Data & Civil Rights Conference / October 30, 2014

Discrimination and racial disparities persist at every stage of the U.S. criminal justice system, from policing to trials to sentencing. The United States incarcerates a higher percentage of its population than any of its peer countries, with 2.2 million people behind bars. The criminal justice system disproportionately harms communities of color: while they make up 30 percent of the U.S. population, they represent 60 percent of the incarcerated population. There has been some discussion of how "big data" can be used to remedy inequalities in the criminal justice system; civil rights advocates recognize potential benefits but remained fundamentally concerned that data-oriented approaches are being designed and applied in ways that also disproportionately harms those who are already marginalized by criminal justice processes.

Like any other powerful tool of governance, data mining can empower or disempower groups. The values that go into an algorithm, and the metrics it optimizes for, are baked into its design. Data could be used to identify discrimination in current practices, or to predict where certain combinations of data points are likely to lead to an erroneous conviction. When algorithms are designed to improve how law enforcement regimes are deployed, the question that data analytics raises is, which efficiencies are we optimizing for? Who are the stakeholders, and where do they stand to gain or lose? How do these applications intersect with core civil rights concerns? Where can we use big data techniques to improve the structural conditions criminal justice system that lead to disparate impacts on marginalized communities? How do we measure that impact, and the factors that lead to it?

Background: Discrimination in Criminal Justice

Major themes and existing challenges in the U.S. criminal justice system:

- *War on Drugs*: Even though racial/ethnic groups use and sell drugs at roughly the same rate, Blacks and Hispanics comprise 62 percent of those in state prisons for drug offenses.[1] According to a 2012 federal report, more than seventy percent of all persons sentenced for federal drug trafficking offenses were either Black (25.9 percent) or Hispanic (46.2 percent), many of whom often face harsh mandatory sentences.[2]
- *Racial Profiling*: Law enforcement actions that single out individuals based not on individual behavior, but instead on the basis of race, ethnicity, national origin, or religion, disproportionately target minorities as criminal suspects, skewing at the outset the racial and ethnic composition of the population ultimately charged, convicted, and incarcerated.
- *Police Misconduct:* While strides have been made in the areas of police misconduct and brutality, incidents such as the shooting of unarmed African-American teenager Michael Brown in Ferguson, Missouri show us that police continue to use force disproportionately (both in terms of frequency and intensity) against people of color.
- *Mandatory Minimums:* The proliferation of mandatory minimum penalties, particularly at

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000160

Document ID: 0.7.11378.24121-000002

the federal level as a result of the War on Drugs, has harmed minority communities and fueled the country's incarceration rates. In an analysis of nearly 80,000 cases in 2010, the U.S. Sentencing Commission found that nearly 25 percent of offenders were sentenced to a mandatory minimum penalty.[3]

- *Barriers to Re-Entry*: Incarcerated individuals, especially racial minorities, face a number of challenges during their imprisonment and upon re-entry, including restrictions on interaction with their families, limited access to medical care, voting rights restoration, and employment discrimination.

"Big Data" and Criminal Justice

Over the last decade, many states have adopted big data technologies and practices, compiling large databases on their populations and deploying risk-assessment tools that analyze this data to set individuals' conditions of confinement, probation, or parole.[4] Other arms of the criminal justice system, like the police, are adopting data-driven techniques for targeting potential offenders, as well as predicting crime "hot spots" or areas of town likely to contain high rates of criminal activity.

The application of big data tools and practices in a criminal justice context raises questions about the kinds of data used for analysis and consequences of error, bias, or inaccuracies, including problems of cumulative disadvantage.[5] Data mining works most effectively with data containing binary characteristics: an email is spam or it's not.[6] The rules of categorization for these two types of email are clear, and the potential consequences of a misclassification are fairly minor: routine scanning of email in the spam box can easily rectify the problem. When an algorithm calculates the profile of a likely or potential criminal, or of someone who deserves a short sentence or a long sentence, classificatory schemes entail complex (non-binary) determinations. Data-driven outcomes represent the potential for bias and error to be systematically propagated on a much larger, non-local scale, and criminal justice professionals may not have the technical expertise to detect or address these risks.

Data mining techniques use past data to "train" algorithms and generate predictions about new situations. As a result, biases in the training data can lead to biases in algorithmically p outcomes. For instance, as law professor Frank Pasquale observes, "Drug or gun possession is as likely among whites as it is among racial minorities, but in New York City, racial minorities comprise the vast majority of persons who are stopped and frisked. Disproportionately more nonwhites than whites, therefore, will end up with criminal records for gun or drug possession."[7] If an algorithm uses this data on drug or gun possession to predict who is likely to be in possession of these in future, than these disproportions could be reflected in how an algorithm learns to predict which characteristics, like race, are indicators of potential criminal activity. However, an algorithm that is constantly updating probabilities based on new data inputs could potentially weaken the prejudicial element, if it was not present in the evolving data set.

More broadly, incarceration rates tend to affect disadvantaged communities, and particularly communities of color. The rate of incarceration per 100,000 people in 2005 was 412 for Whites, 742 for Hispanics, and 2,290 for Blacks.[8] Approximately half of all imprisoned offenders are incarcerated again within three years of their release.[9] When algorithms rely on the characteristics of convicted or arrested populations to predict persons who are likely to commit crime, they

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000161

Document ID: 0.7.11378.24121-000002

solidify a history of bias against those already disproportionately targeted by the criminal justice system. Similarly, a data-driven sentencing algorithm may reflect that past presumptions of criminal justice professionals about which traits best correlate with crime. Algorithms designed to find correlations from these prejudiced data would produce discriminatory outcomes.

Human and Machine Bias

Though inaccurate classifications (false positives and false negatives)[10] can result from both human-driven assessment systems and data-driven ones, society-wide faith in machine based-judgment can often overshadow problems of error, bias, and inaccuracies in automated decisions. Proponents often tout data analytics as a way of removing human bias from a range of law enforcement activities. Predictive analytics suggest that if a prosecutor or a probation officer can punch in the characteristics or actions of the subject in question, the algorithm can provide probabilities about that subject's future actions based on how similar previous known individuals have responded to interventions. In theory, such an approach could serve to standardize results across the board and equalize the treatment of different populations. This is particularly important because there is tremendous evidence that shows unequal treatment and remedies. For example, a recent Justice Department investigation into the Shelby County juvenile court system in Memphis that found that black children were consistently punished more harshly than white children.[11]

When algorithmic determinations are flawed, and individuals can manually override computer decisions, they may be hesitant to do so. "The algorithm told me to" can become a guiding rationale for people as they become more reliant on technology, to the point that acting contrary to algorithmic suggestions produces anxieties about being held liable for doing the wrong thing. For example, police held an African-American woman at gunpoint when an automated license-plate reader misidentified her vehicle as stolen. Though an officer noticed a discrepancy, police arrested the woman for possessing a stolen vehicle on the basis of the red flag generated by the license plate reader.[12] While manual overrides of computerized results and individualized decisions are not necessarily more fair, it is important to consider how automated decisions often come with an implicit, technophilic promise of accuracy and fairness that they do not necessarily deliver (even if the users are cautioned about their limitations by the designers). Given that any machine learning system will produce results that have error rates, how do we ensure that the people applying these technologies understand their limitations? How do we balance between the biases introduced by people and those introduced by technology?

Algorithmic analysis can also outpace a human's ability to accurately categorize patterns of behavior, raising questions about whether, when, and how algorithmic determinations should complement or replace human judgment. Since 1994, the New York City Police Department has been using a data-driven management system called CompStat, which organizes all of the data the police receive from official sources on crime development efficiently; it has a geographical component that produces maps of crime hot spots. The program has been adopted widely by other U.S. cities.[13] There is some evidence that computerized geographic mapping of crime hotspots have made policing more effective, partially because there was a significant drop in violent crime after CompStat, and other similar systems, were deployed, though it is not conclusive, and other factors might better explain the reductions in crime.[14] Generally, causal connections are hard to draw in this area because there is a small body of research into the kinds of policing strategies that are the most effective in reducing crime in the long-term, particularly with a focus on hotspots,

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000162

Document ID: 0.7.11378.24121-000002

and because confounding variables make it difficult to compare the effectiveness of different policing strategies.[15] However, its proponents do assert that data-driven policing improves public safety.[16]

Currently, individuals have few means to confront or challenge flawed algorithmic determinations. Chicago's police department recently took the mapping process a step further, adopting an algorithm that generates a 'heat map' not of places, but of *people* deemed at risk for perpetrating violent offenses.[17] Research by sociologist Andrew Papachristos suggests that the people who are more at risk for violent crime are visible through their social networks (e.g. within a given neighborhood, or even a hotspot, some people are more at risk than others). Violent crime is 'thicker' around certain nodes of a network, and thus, predictions can be made around who is likely to be at risk for involvement in a violent crime.[18] When a member of the police department showed up at the house of Robert McDaniel to announce that police had identified him as at risk and placed him under informal police supervision, McDaniel was incredulous: he had never committed a violent offense, nor interacted with the police recently, and yet the algorithm pointed to him as a likely culprit.[19] How does an individual like McDaniel challenge that algorithmic calculation? Is an algorithmic profiling mechanism preferable to other forms of profiling? How does social-graph mapping interact with our notions of justice, fairness, and safety? In defining the power that algorithms have, we can locate culpability and responsibility in ways that are meaningful and provide channels of recourse to the people affected by algorithmic outputs.

Selecting Attributes for Analysis

Some of the factors now used in criminal justice algorithms put pressure on basic notions of justice, fairness and due process. In examining sentencing algorithms, law professor Sonja B. Starr describes, "The basic problem is that the risk scores are not based on the defendant's crime. They are primarily or wholly based on prior characteristics: criminal history (a legitimate criterion), but also factors unrelated to conduct. Specifics vary across states, but common factors include unemployment, marital status, age, education, finances, neighborhood, and family background, including family members' criminal history."[20] When a sentencing algorithm translates these other factors into a risk score, it can impose disproportionate punishment on those who carry the socio-economic markers of poverty, relative to others convicted of the same crime. Even when such an algorithm excludes protected class characteristics from its calculations, other factors or characteristics can act as accurate proxies for these, which can pick out the same populations of color for special disadvantage.[21]

However, not all data-driven risk assessments involve suspect variables. For instance, researchers at the Laura and John Arnold Foundation found that low-risk defendants are frequently imprisoned to await trials, and that higher-risk defendants accused of violent crimes are often released.[22] After developing a pretrial risk-assessment tool called the Public Safety Assessment-Court (PSA-Court)—one which excluded education, socio-economic status, and neighborhood from its calculations—researchers found that a defendant's criminal history and the charges pending against them most reliably predict future criminal behavior.[23] (Nevertheless, disproportionately racialized arrest and incarceration rates mean that communities of color will still be systematically penalized by any risk assessment tool that uses criminal history as a legitimate criterion.)

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000163

Document ID: 0.7.11378.24121-000002

A risk assessment tool that avoids using obvious markers of socio-economic status may reduce disparities in patterns of imprisonment. For instance, a low-risk offender who is sitting in jail awaiting his trial likely does not have the money to pay bail or obtain a good lawyer who can articulate to a judge that her client is not a flight risk. If an algorithm makes up for a defendant not having resources to contest their pre-trial standing, does this make our justice system more efficient? Alternately, does this use of data perpetuate a broken system that otherwise might be reformed to avoid such errors?

Potential Uses of Big Data for Civil Rights

Currently, the focus of data analytics and its application to the criminal justice system is on predictive policing algorithms and data-driven sentencing. However, these applications do not solely define the application of big data techniques to the field of criminal justice. Some see data analytics solutions as a method for removing the human bias factor from a range of law enforcement activities. As indicated above, the possibility of standardizing results and equalizing the treatment of different populations is a significant and important driver in developing big data techniques.

There are also tremendous opportunities to use large-scale data to better understand dynamics of racial profiling and police misconduct. In the state of North Carolina, the Southern Coalition for Social Justice has worked with police data on traffic law enforcement stops, a dataset that reaches back to 2000 (for state highway patrol) and 2002 (for all other police agencies), to discern patterns of racial profiling.[24] By standardizing data collection practices and increasing certain types of data collection, there are increased opportunities to perform comparative analysis. For example, Measures for Justice (MFJ) designs tools to assess the comparative performance of criminal justice system across jurisdictions; the goal is to aggregate data from local criminal justice systems to get the big picture on systematic inefficiencies and inequalities.[25] For MJF, the absence of empirical data with which to compare the performances of each part of the system—including prosecutors, administrators, defense attorneys, etc.—is a major barrier to identifying nodes in the network that could benefit most from intervention. MFJ is using big data to create transparency, such that anyone, rather than an expert, can look at the data and identify widespread problems; and policymakers can see more easily envision roadmaps for change.[26]

Beyond their enforcement capacities, law enforcement can also use inferential models to protect vulnerable groups. For instance, in the finance sector, banks have started inferring patterns of human trafficking from the financial transactions they process, and sharing that information with law enforcement.[27] JP Morgan Chase reasoned that since both human trafficking and money laundering involve hidden transactions, they can apply analytics technology to detect both kinds of criminal behavior. Palantir Technologies and the National Center for Missing and Exploited Children work together to analyze persons, businesses, and websites that potentially involve human trafficking and automate the identification of red flags.[28] The same mobile technologies that generate 'big' data and facilitate trafficking can also inform law enforcement strategies to combat it and to support the civil rights of vulnerable people.[29]

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000164

Document ID: 0.7.11378.24121-000002

Data&Society RESEARCH INSTITUTE

The Leadership Conference

OPEN TECHNOLOGY INSTITUTE

Questions for Data, Civil Rights, and Criminal Justice

1. Where is anti-discrimination law unable to meet the challenges presented by data mining and networked data outputs?
2. Where do automated systems create efficiencies, and what are the potential costs and benefits of these efficiencies for marginalized communities?
3. How can data analytics be used to correct historical biases in the criminal justice system, minimize inequities, or to reduce high rates of incarcerations overall?
4. How can data analytics be used to measure which variables lead to the most or least discriminatory impact on marginalized communities?
5. What policies or tools can we have in place to remedy errors, or to hold data-driven decision-making processes accountable? How can individuals confront flawed algorithmic determinations?
6. How do we identify which part of an algorithmic calculation leads to a discriminatory result? What are the technical and policy issues at play?
7. What incentives are driving the development of different technologies? How do we evaluate and debate these incentives before they are built into the tools that are deployed?
8. If we are going to make changes to our criminal justice system using big data techniques, should we be optimizing to equalize rates of incarceration so that there is an evenly proportioned across races?
    a. Should we aim to reduce incarceration rates overall?
    b. Can data analytics help us identify new variables that have a maximum impact on racial and minority disparities in criminal justice?
9. Should we eliminate the use of certain factors altogether (such as education, socio-economic status or outside information like social media information) or conversely only use certain factors (like type of offense) in making determinations?

---

[1] E. Ann Carson And Daniela Golinelli, Bureau Of Justice Statistics, Prisoners In 2012 Advance Counts, Table 10 (July 2013).
[2] U.S. Sentencing Comm'n, Annual Report, Table 34, Race of Drug Offenders in Each Drug Type, available at http://www.ussc.gov/sites/default/files/pdf/research_and_publications/annual_reports_and_sourcebooks/2012/Table34.pdf
[3] U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (October 2011), available at http://www.ussc.gov/sites/default/files/pdf/news/congressional_testimony_and_reports/mandatory_minimum_penalties/20111031_rtc_pdf/Executive_Summary.pdf
[4] Calabresi, Massimo. "Statistics Can Predict Criminal Risk. Can They Deliver Equal Justice?" *TIME.com*. Accessed September 9, 2014. http://time.com/3061893/holder_to_oppose_data_driven_sentencing/
[5] Gandy, Oscar. Coming to Terms with Chance: Engaging Rational Discrimination and Cumulative Disadvantage (Burlington, VT: Ashgate, 2009).
[6] Barocas, Solon and Selbst, Andrew D., Big Data's Disparate Impact (September 14, 2014). Available at SSRN: http://ssrn.com/abstract=2477899 ,p. 8
[7] Pasquale, Frank. *The Black Box Society,* (book, Cambridge, MA: Harvard University Press, 2015), p. 48
[8] Mauer, Marc and Ryan S. King. "Uneven Justice: State Rates of Incarceration By Race and Ethnicity." July 2007. http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf, p. 6

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000165

Document ID: 0.7.11378.24121-000002

[9] "Center on Sentencing and Corrections." Accessed September 9, 2014. http://www.vera.org/centers/center_sentencing_and_corrections?qt_centers_sentencing_and=8&qt_centers_center_on_sentencing_and=8#qt_centers_center_on_sentencing_and
[10] Barocas,& Selbst,p. 10
[11] Johnson, Carrie. Aug. 06, 2014. "After Discrimination Finding, Jury's Out On Memphis Juvenile Courts." NPR. Accessed Aug. 18, 2014, http://www.npr.org/2014/08/06/338086226/after_discrimination_finding_jurys_out_on_memphis_juvenile_courts
[12] Reporting, Ali Winston, Center for Investigative. "Privacy, Accuracy Concerns as License Plate Readers Expand." *SFGate*, June 17, 2014. http://www.sfgate.com/crime/article/Privacy_accuracy_concerns_as_license_plate_5557429.php
[13] "What is CompStat?" *Implementing and Institutionalizing CompStat in Maryland*. University of Maryland. http://www.compstat.umd.edu/what_is_cs.php
[14] Levitt, Steven D. "Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not." *Journal of Economic Perspectives* Vol. 18, No. 1, Winter 2004, p. 163 190. http://pricetheory.uchicago.edu/levitt/Papers/LevittUnderstandingWhyCrime2004.pdf
[15] Kille, Leighton Walter. "Hot spots policing and crime prevention strategies: Ongoing research." *Journalist's Resource,* July 11, 2013. http://journalistsresource.org/studies/government/criminal_justice/hot_spot_policing_strategies#
[16] Friend, Zach. "Predictive Policing: Using Technology to Reduce Crime." *FBI*, April 09, 2013. http://www.fbi.gov/stats_services/publications/law_enforcement_bulletin/2013/April/predictive_policing_using_technology_to_reduce_crime
[17] Reel, Monte. "Chronicle of a Death Foretold." *Harper's Magazine*, March 2014. http://harpers.org/archive/2014/03/chronicle_of_a_death_foretold_2/
[18] Moser, Whet. "The Small Social Networks at the Heart of Chicago Violence." *Chicago Magazine*, Dec. 09, 2013. http://www.chicagomag.com/city_life/December_2013/The_Small_Social_Networks_at_the_Heart_of_Chicago_Violence/
[19] "The Minority Report: Chicago's New Police Computer Predicts Crimes, but Is It Racist?" *The Verge*. Accessed September 10, 2014. http://www.theverge.com/2014/2/19/5419854/the_minority_report_this_computer_predicts_crime_but_is_it_racist
[20] Starr, Sonja B. "Sentencing, by the Numbers NYTimes.com." Accessed September 4, 2014. http://www.nytimes.com/2014/08/11/opinion/sentencing_by_the_numbers.html
[21] Barocas and Selbst, p. 23
[22] Milgram, Anne. "To Minimize Injustice, Use Big Data | Laura and John Arnold Foundation," August 20, 2014. http://www.arnoldfoundation.org/news/minimize_injustice_use_big_data
[23] Ibid.
[24] Johnson, Kimberly, "Driving While Black; Carolina City Crafts Racial Awareness Policy Policy," *Al Jazeera America* , September 9, 2014, http://america.aljazeera.com/articles/2014/9/9/racial_profilingnorthcarolina.html; see also, North Carolina General Statute 114 10.01, http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_114/GS_114_10.01.html
[25] "Our Mission and Approach." Measures of Justice. 2014. http://measuresforjustice.org/know_more/the_measures
[26] "The Measures." Measures of Justice. 2014. http://measuresforjustice.org/know_more/the_measures
[27] "Expert Seminar on Leveraging Anti Money Laundering Regimes to Combat Human Trafficking" http://www.osce.org/secretariat/107665
[28] Nixon, Judge Herbert B., Jr. "Human Trafficking and the Internet* (*and Other Technologies, too)." *The Judge's Journal*. Vol. 52, No. 1. 2013, http://www.americanbar.org/publications/judges_journal/2013/winter/human_trafficking_and_internet_and_other_technologies_too.html
[29] Latonero, Mark et al. "The Rise of Mobile and the Diffusion of Technology Facilitated Tracking." *Research Series on Technology and Human Trafficking*. USC Annenberg Center on Communication, Leadership & Policy. November 2012 https://technologyandtrafficking.usc.edu/files/2012/11/HumanTrafficking2012_Nov12.pdf

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000166

Document ID: 0.7.11378.24121-000002

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Thursday, May 28, 2015 11:53 AM
To: Hecker, Elizabeth (OLP)
Cc: Pazur, Shannon (OLP)
Subject: Predictive - Lunch Presentation
Attachments: Predictive - Lunch Presentation.pptx

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.26316

Tyrangiel, Elana (OLP)

From:	Tyrangiel, Elana (OLP)
Sent:	Thursday, September 04, 2014 2:46 PM
To:	Jackson, Wykema C (OLP)
Subject:	FW: Big Data Materials
Attachments:	big_data_privacy_report_5.1.14_final_print.pdf; Big Data Memo 7 28 14 (3).pdf; (b) (5) [redacted]

From: Siger, Steven B. (OLP)
Sent: Tuesday, September 02, 2014 4:41 PM
To: Pazur, Shannon (OLP); Hecker, Elizabeth (OLP); Fried, Hannah (OLP)
Cc: Tyrangiel, Elana (OLP); Krulic, Alexander (OLP)
Subject: Big Data Materials

All,

Here are the materials I mentioned at the meeting – the electronic copies of the big data report and follow-up memo and then the (b) (5) [redacted] I will send around the draft data mining report whenever I can track it down.

best,
Steve

--
Steven Siger
Chief of Staff and Acting Deputy Asssistant Attorney General
Department of Justice, Office of Legal Policy
(w) 202-305-0071
(c) (b) (6) [redacted]

Document ID: 0.7.11378.29374

BIG DATA:
SEIZING OPPORTUNITIES, PRESERVING VALUES

Executive Office of the President

MAY 2014

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000169

May 1, 2014

DEAR MR. PRESIDENT:

We are living in the midst of a social, economic, and technological revolution. How we communicate, socialize, spend leisure time, and conduct business has moved onto the Internet. The Internet has in turn moved into our phones, into devices spreading around our homes and cities, and into the factories that power the industrial economy. The resulting explosion of data and discovery is changing our world.

In January, you asked us to conduct a 90-day study to examine how big data will transform the way we live and work and alter the relationships between government, citizens, businesses, and consumers. This review focuses on how the public and private sectors can maximize the benefits of big data while minimizing its risks. It also identifies opportunities for big data to grow our economy, improve health and education, and make our nation safer and more energy efficient.

While big data unquestionably increases the potential of government power to accrue unchecked, it also hold within it solutions that can enhance accountability, privacy, and the rights of citizens. Properly implemented, big data will become an historic driver of progress, helping our nation perpetuate the civic and economic dynamism that has long been its hallmark.

Big data technologies will be transformative in every sphere of life. The knowledge discovery they make possible raises considerable questions about how our framework for privacy protection applies in a big data ecosystem. Big data also raises other concerns. A significant finding of this report is that big data analytics have the potential to eclipse longstanding civil rights protections in how personal information is used in housing, credit, employment, health, education, and the marketplace. Americans' relationship with data should expand, not diminish, their opportunities and potential.

We are building the future we will inherit. The United States is better suited than any nation on earth to ensure the digital revolution continues to work for individual empowerment and social good. We are pleased to present this report's recommendations on how we can embrace big data technologies while at the same time protecting fundamental values like privacy, fairness, and self-determination. We are committed to the initiatives and reforms it proposes. The dialogue we set in motion today will help us remain true to our values even as big data reshapes the world around us.

JOHN PODESTA
Counselor to the President

PENNY PRITZKER
Secretary of Commerce

ERNEST J. MONIZ
Secretary of Energy

JOHN HOLDREN
Director, Office of Science & Technology Policy

JEFFREY ZIENTS
Director, National Economic Council

Table of Contents

Table of Contents v
I. Big Data and the Individual 1
What is Big Data? 1
What is Different about Big Data? 4
Affirming our Values 9
II. The Obama Administration's Approach to Open Data and Privacy 11
Open Data in the Obama Administration 12
U.S. Privacy Law and International Privacy Frameworks 15
III. Public Sector Management of Data 22
Big Data and Health Care Delivery 22
Learning about Learning: Big Data and Education 24
Big Data at the Department of Homeland Security 27
Upholding our Privacy Values in Law Enforcement 29
Implications of Big Data Technology for Privacy Law 32
IV. Private Sector Management of Data 39
Big Data Benefits for Enterprise and Consumer 39
The Advertising-Supported Ecosystem 40
The Data Services Sector 43
V. Toward a Policy Framework for Big Data 48
Big Data and the Citizen 49
Big Data and the Consumer 50
Big Data and Discrimination 51
Big Data and Privacy 53
Anticipating the Big Data Revolution's Next Chapter 55
VI. Conclusion and Recommendations 58
1. Preserving Privacy Values 61
2. Responsible Educational Innovation in the Digital Age 63
3. Big Data and Discrimination 64
4. Law Enforcement and Security 66
5. Data as a Public Resource 67
Appendix 69

I. Big Data and the Individual

What is Big Data?

Since the first censuses were taken and crop yields recorded in ancient times, data collection and analysis have been essential to improving the functioning of society. Foundational work in calculus, probability theory, and statistics in the 17h and 18th centuries provided an array of new tools used by scientists to more precisely predict the movements of the sun and stars and determine population-wide rates of crime, marriage, and suicide. These tools often led to stunning advances. In the 1800s, Dr. John Snow used early modern data science to map cholera "clusters" in London. By tracing to a contaminated public well a disease that was widely thought to be caused by "miasmatic" air, Snow helped lay the foundation for the germ theory of disease.[1]

Gleaning insights from data to boost economic activity also took hold in American industry. Frederick Winslow Taylor's use of a stopwatch and a clipboard to analyze productivity at Midvale Steel Works in Pennsylvania increased output on the shop floor and fueled his belief that data science could revolutionize every aspect of life.[2] In 1911, Taylor wrote *The Principles of Scientific Management* to answer President Theodore Roosevelt's call for increasing "national efficiency":

> [T]he fundamental principles of scientific management are applicable to all kinds of human activities, from our simplest individual acts to the work of our great corporations…. [W]henever these principles are correctly applied, results must follow which are truly astounding.[3]

Today, data is more deeply woven into the fabric of our lives than ever before. We aspire to use data to solve problems, improve well-being, and generate economic prosperity. The collection, storage, and analysis of data is on an upward and seemingly unbounded trajectory, fueled by increases in processing power, the cratering costs of computation and storage, and the growing number of sensor technologies embedded in devices of all kinds. In 2011, some estimated the amount of information created and replicated would

[1] Scott Crosier, *John Snow: The London Cholera Epidemic of 1854,* Center for Spatially Integrated Social Science, University of California, Santa Barbara, 2007, http://www.csiss.org/classics/content/8.
[2] Simon Head, *The New Ruthless Economy: Work and Power in the Digital Age*, (Oxford University Press, 2005).
[3] Frederick Taylor, *The Principles of Scientific Management* (Harper & Brothers, 1911), p. 7, http://www.eldritchpress.org/fwt/ti.html.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000173

surpass 1.8 zettabytes.[4] In 2013, estimates reached 4 zettabytes of data generated worldwide.[5]

What is a Zettabyte?

A zettabyte is 1,000 000,000,000,000,000,000 bytes, or units of information. Consider that a single byte equals one character of text. The 1,250 pages of Leo Tolstoy's *War and Peace* would fit into a zettabyte 323 trillion times.[6] Or imagine that every person in the United States took a digital photo every second of every day for over a month. All of those photos put together would equal about one zettabyte.

More than 500 million photos are uploaded and shared every day, along with more than 200 hours of video every minute. But the volume of information that people create themselves—the full range of communications from voice calls, emails and texts to uploaded pictures, video, and music—pales in comparison to the amount of digital information created *about* them each day.

These trends will continue. We are only in the very nascent stage of the so-called "Internet of Things," when our appliances, our vehicles and a growing set of "wearable" technologies will be able to communicate with each other. Technological advances have driven down the cost of creating, capturing, managing, and storing information to one-sixth of what it was in 2005. And since 2005, business investment in hardware, software, talent, and services has increased as much as 50 percent, to $4 trillion.

The "Internet of Things"

The "Internet of Things" is a term used to describe the ability of devices to communicate with each other using embedded sensors that are linked through wired and wireless networks. These devices could include your thermostat, your car, or a pill you swallow so the doctor can monitor the health of your digestive tract. These connected devices use the Internet to transmit, compile, and analyze data.

There are many definitions of "big data" which may differ depending on whether you are a computer scientist, a financial analyst, or an entrepreneur pitching an idea to a venture capitalist. Most definitions reflect the growing technological ability to capture, aggregate, and process an ever-greater volume, velocity, and variety of data. In other words, "data is now available faster, has greater coverage and scope, and includes new types of observations and measurements that previously were not available."[7] More precisely, big

[4] John Gantz and David Reinsel, *Extracting Value from Chaos,* IDC, 2011, http://www.emc.com/collateral/analyst-reports/idc-extracting-value-from-chaos-ar.pdf.
[5] Mary Meeker and Liang Yu, *Internet Trends*, Kleiner Perkins Caulfield Byers, 2013, http://www.slideshare.net/kleinerperkins/kpcb-internet-trends-2013.
[6] "2016: The Year of the Zettabyte," Daily Infographic, March 23, 2013, http://dailyinfographic.com/2016-the-year-of-the-zettabyte-infographic.
[7] Liran Einav and Jonathan Levin, "The Data Revolution and Economic Analysis," Working Paper, No. 19035, *National Bureau of Economic Research*, 2013, http://www.nber.org/papers/w19035; Viktor Mayer-

datasets are "large, diverse, complex, longitudinal, and/or distributed datasets generated from instruments, sensors, Internet transactions, email, video, click streams, and/or all other digital sources available today and in the future."[8]

What really matters about big data is what it does. Aside from how we define big data as a technological phenomenon, the wide variety of potential uses for big data analytics raises crucial questions about whether our legal, ethical, and social norms are sufficient to protect privacy and other values in a big data world. Unprecedented computational power and sophistication make possible unexpected discoveries, innovations, and advancements in our quality of life. But these capabilities, most of which are not visible or available to the average consumer, also create an asymmetry of power between those who hold the data and those who intentionally or inadvertently supply it.

Part of the challenge, too, lies in understanding the many different contexts in which big data comes into play. Big data may be viewed as property, as a public resource, or as an expression of individual identity.[9] Big data applications may be the driver of America's economic future or a threat to cherished liberties. Big data may be all of these things. For the purposes of this 90-day study, the review group does not purport to have all the answers to big data. Both the technology of big data and the industries that support it are constantly innovating and changing. Instead, the study focuses on asking the most important questions about the relationship between individuals and those who collect and use data about them.

The Scope of This Review

On January 17, in a speech at the Justice Department about reforming the United States' signals intelligence practices, President Obama tasked his Counselor John Podesta with leading a comprehensive review of the impact big data technologies are having, and will have, on a range of economic, social, and government activities. Podesta was joined in this effort by Secretary of Commerce Penny Pritzker, Secretary of Energy Ernest Moniz, the President's Science Advisor John Holdren, the President's Economic Advisor Jeffrey Zients, and other senior government officials. The President's Council of Advisors for Science & Technology conducted a parallel report to take measure of the underlying technologies. Their findings underpin many of the technological assertions in this report.

This review was conceived as fundamentally a scoping exercise. Over 90 days, the review group engaged with academic experts, industry representatives, privacy advocates,

Schonberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think*, (Houghton Mifflin Harcourt, 2013).

[8] National Science Foundation, Solicitation 12-499: *Core Techniques and Technologies for Advancing Big Data Science & Engineering (BIGDATA),* 2012, http://www.nsf.gov/pubs/2012/nsf12499/nsf12499.pdf.

[9] Harvard Professor of Science & Technology Studies Sheila Jasanoff argues that framing the policy implications of big data is difficult precisely because it manifests in multiple contexts that each call up different operative concerns, including big data as property (who owns it); big data as common pool resources (who manages it and on what principles); and big data as identity (it is us ourselves, and thus its management raises constitutional questions about rights).

civil rights groups, law enforcement agents, and other government agencies. The White House Office of Science and Technology Policy jointly organized three university conferences, at the Massachusetts Institute of Technology, New York University, and the University of California, Berkeley. The White House Office of Science & Technology Policy also issued a "Request for Information" seeking public comment on issues of big data and privacy and received more than 70 responses. In addition, the WhiteHouse.gov platform was used to conduct an unscientific survey of public attitudes about different uses of big data and various big data technologies. A list of the working group's activities can be found in the Appendix.

What is Different about Big Data?

This chapter begins by defining what is truly new and different about big data, drawing on the work of the President's Council of Advisors on Science & Technology (PCAST), which has worked in parallel on a separate report, "Big Data and Privacy: A Technological Perspective."[10]

The "3 Vs": Volume, Variety and Velocity

For purposes of this study, the review group focused on data that is so large in volume, so diverse in variety or moving with such velocity, that traditional modes of data capture and analysis are insufficient—characteristics colloquially referred to as the "3 Vs." The declining cost of collection, storage, and processing of data, combined with new sources of data like sensors, cameras, geospatial and other observational technologies, means that we live in a world of near-ubiquitous data collection. The volume of data collected and processed is unprecedented. This explosion of data—from web-enabled appliances, wearable technology, and advanced sensors to monitor everything from vital signs to energy use to a jogger's running speed—will drive demand for high-performance computing and push the capabilities of even the most sophisticated data management technologies.

There is not only more data, but it also comes from a wider variety of sources and formats. As described in the report by the President's Council of Advisors of Science & Technology, some data is "born digital," meaning that it is created specifically for digital use by a computer or data processing system. Examples include email, web browsing, or GPS location. Other data is "born analog," meaning that it emanates from the physical world, but increasingly can be converted into digital format. Examples of analog data include voice or visual information captured by phones, cameras or video recorders, or physical activity data, such as heart rate or perspiration monitored by wearable devices.[11] With the rising capabilities of "data fusion," which brings together disparate sources of data, big data can lead to some remarkable insights.

[10] President's Council of Advisors on Science & Technology, *Big Data and Privacy: A Technological Perspective*, The White House, May 1, 2014.
[11] The distinction between data that is "born analog" and data that is "born digital" is explored at length in the PCAST report, *Big Data and Privacy*, p 18-22.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000176

What are the sources of big data?

The sources and formats of data continue to grow in variety and complexity. A partial list of sources includes the public web; social media; mobile applications; federal, state and local records and databases; commercial databases that aggregate individual data from a spectrum of commercial transactions and public records; geospatial data; surveys; and traditional offline documents scanned by optical character recognition into electronic form. The advent of the more Internet-enabled devices and sensors expands the capacity to collect data from physical entities, including sensors and radio-frequency identification (RFID) chips. Personal location data can come from GPS chips, cell-tower triangulation of mobile devices, mapping of wireless networks, and in-person payments.[12]

Furthermore, data collection and analysis is being conducted at a velocity that is increasingly approaching real time, which means there is a growing potential for big data analytics to have an immediate effect on a person's surrounding environment or decisions being made about his or her life. Examples of high-velocity data include click-stream data that records users' online activities as they interact with web pages, GPS data from mobile devices that tracks location in real time, and social media that is shared broadly. Customers and companies are increasingly demanding that this data be analyzed to benefit them instantly. Indeed, a mobile mapping application is essentially useless if it cannot immediately and accurately identify the phone's location, and real-time processing is critical in the computer systems that ensure the safe operation of our cars.

New Opportunities, New Challenges

Big data technologies can derive value from large datasets in ways that were previously impossible—indeed, big data can generate insights that researchers didn't even think to seek. But the technical capabilities of big data have reached a level of sophistication and pervasiveness that demands consideration of how best to balance the opportunities afforded by big data against the social and ethical questions these technologies raise.

The power and opportunity of big data applications

Used well, big data analysis can boost economic productivity, drive improved consumer and government services, thwart terrorists, and save lives. Examples include:

- Big data and the growing "Internet of Things" have made it possible to merge the industrial and information economies. Jet engines and delivery trucks can now be outfitted with sensors that monitor hundreds of data points and send automatic

[12] See, e.g., Kapow Software, *Intelligence by Variety - Where to Find and Access Big Data*, http://www.kapowsoftware.com/resources/infographics/intelligence-by-variety-where-to-find-and-access-big-data.php; James Manyika, Michael Chui, Brad Brown, Jacques Bughin, Richard Dobbs, Charles Roxburgh, and Angela Hung Byers, *Big Data: The Next Frontier for Innovation, Competition, and Productivity,* McKinsey Global Institute, 2011, http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation.

alerts when maintenance is needed. [13] This makes repairs smoother, reducing maintenance costs and increasing safety.

- The Centers for Medicare and Medicaid Services have begun using predictive analytics software to flag likely instances of reimbursement fraud before claims are paid. The Fraud Prevention System helps identify the highest risk health care providers for fraud, waste and abuse in real time, and has already stopped, prevented or identified $115 million in fraudulent payments—saving $3 for every $1 spent in the program's first year.[14]
- During the most violent years of the war in Afghanistan, the Defense Advanced Research Projects Agency (DARPA) deployed teams of data scientists and visualizers to the battlefield. In a program called Nexus 7, these teams embedded directly with military units and used their tools to help commanders solve specific operational challenges. In one area, Nexus 7 engineers fused satellite and surveillance data to visualize how traffic flowed through road networks, making it easier to locate and destroy improvised explosive devices.
- One big data study synthesized millions of data samples from monitors in a neonatal intensive care unit to determine which newborns were likely to contract potentially fatal infections. By analyzing all of the data—not just what doctors noted on their rounds—the project was able to identify factors, like increases in temperature and heart rate, that serve as early warning signs that an infection may be taking root. These early signs of infection are not something even an experienced and attentive doctor would catch through traditional practices.[15]

Big data technology also holds tremendous promise for better managing demand across electricity grids, improving energy efficiency, boosting agricultural productivity in the developing world, and projecting the spread of infectious diseases, among other applications.

Finding the needle in the haystack

Computational capabilities now make "finding a needle in a haystack" not only possible, but practical. In the past, searching large datasets required both rationally organized data and a specific research question, relying on choosing the right query to return the correct result. Big data analytics enable data scientists to amass lots of data, including unstructured data, and find anomalies or patterns. A key privacy challenge in this model of

[13] Salesforce.com, "Collaboration helps GE Aviation bring its best inventions to life," http://www.salesforce.com/customers/stories/ge.jsp; Armand Gatdula, "Fleet Tracking Devices will be Installed in 22,000 UPS Trucks to Cut Costs and Improve Driver Efficiency in 2010," FieldLogix.com blog, July 20, 2010, http://www.fieldtechnologies.com/gps-tracking-systems-installed-in-ups-trucks-driver-efficiency.
[14] The Patient Protection and Affordable Care Act provides additional resources for fraud prevention. Centers for Medicare and Medicaid Services, "Fraud Prevention Toolkit," http://www.cms.gov/Outreach-and-Education/Outreach/Partnerships/FraudPreventionToolkit.html.
[15] IBM, "Smarter Healthcare in Canada: Redefining Value and Success," July 2012, http://www.ibm.com/smarterplanet/global/files/ca__en_us__health_care__ca_brochure.pdf.

discovery is that in order to find the needle, you have to have a haystack. To obtain certain insights, you need a certain quantity of data.

For example, a genetic researcher at the Broad Institute found that having a large number of genetic datasets makes the critical difference in identifying the meaningful genetic variant for a disease. In this research, a genetic variant related to schizophrenia was not detectable when analyzed in 3,500 cases, and was only weakly identifiable using 10,000 cases, but was suddenly statistically significant with 35,000 cases. As the researcher observed, "There is an inflection point at which everything changes."[16] The need for vast quantities of data—particularly personally sensitive data like genetic data—is a significant challenge for researchers for a variety of reasons, but notably because of privacy laws that limit access to data.

The data clusters and relationships revealed in large data sets can be unexpected but deliver incisive results. On the other hand, even with lots of data, the information revealed by big data analysis isn't necessarily perfect. Identifying a pattern doesn't establish whether that pattern is significant. Correlation still doesn't equal causation. Finding a correlation with big data techniques may not be an appropriate basis for predicting outcomes or behavior, or rendering judgments on individuals. In big data, as with all data, interpretation is always important.

The benefits and consequences of perfect personalization

The fusion of many different kinds of data, processed in real time, has the power to deliver exactly the right message, product, or service to consumers before they even ask. Small bits of data can be brought together to create a clear picture of a person to predict preferences or behaviors. These detailed personal profiles and personalized experiences are effective in the consumer marketplace and can deliver products and offers to precise segments of the population—like a professional accountant with a passion for knitting, or a home chef with a penchant for horror films.

Unfortunately, "perfect personalization" also leaves room for subtle and not-so-subtle forms of discrimination in pricing, services, and opportunities. For example, one study found web searches involving black-identifying names (e.g., "Jermaine") were more likely to display ads with the word "arrest" in them than searches with white-identifying names (e.g., "Geoffrey"). This research was not able determine exactly why a racially biased result occurred, recognizing that ad display is algorithmically generated based on a number of variables and decision processes.[17] But it's clear that outcomes like these, by serving up different kinds of information to different groups, have the potential to

[16] Manolis Kellis, "Importance of Access to Large Populations," *Big Data Privacy Workshop: Advancing the State of the Art in Technology and Practice*, Cambridge, MA, March 3, 2014, http://web.mit.edu/bigdata-priv/ppt/ManolisKellis_PrivacyBigData_CSAIL-WH.pptx.
[17] Latanya Sweeney, "Discrimination in Online Ad Delivery," 2013, http://dataprivacylab.org/projects/onlineads/1071-1.pdf.

cause real harm to individuals, whether they are pursuing a job, purchasing a home, or simply searching for information.

Another concern is that big data technology could assign people to ideologically or culturally segregated enclaves known as "filter bubbles" that effectively prevent them from encountering information that challenges their biases or assumptions.[18] Extensive profiles about individuals and their preferences are being painstakingly developed by companies that acquire and process increasing amounts of data. Public awareness of the scope and scale of these activities is limited, however, and consumers have few opportunities to control the collection, use, and re-use of these data profiles.

De-identification and re-identification

As techniques like data fusion make big data analytics more powerful, the challenges to current expectations of privacy grow more serious. When data is initially linked to an individual or device, some privacy-protective technology seeks to remove this linkage, or "de-identify" personally identifiable information—but equally effective techniques exist to pull the pieces back together through "re-identification." Similarly, integrating diverse data can lead to what some analysts call the "mosaic effect," whereby personally identifiable information can be derived or inferred from datasets that do not even include personal identifiers, bringing into focus a picture of who an individual is and what he or she likes.

Many technologists are of the view that de-identification of data as a means of protecting individual privacy is, at best, a limited proposition.[19] In practice, data collected and de-identified is protected in this form by companies' commitments to not re-identify the data and by security measures put in place to ensure those protections. Encrypting data, removing unique identifiers, perturbing data so it no longer identifies individuals, or giving users more say over how their data is used through personal profiles or controls are some of the current technological solutions. But meaningful de-identification may strip the data of both its usefulness and the ability to ensure its provenance and accountability. Moreover, it is difficult to predict how technologies to re-identify seemingly anonymized data may evolve. This creates substantial uncertainty about how an individual controls his or her own information and identity, and how he or she disputes decision-making based on data derived from multiple datasets.

The persistence of data

In the past, retaining physical control over one's personal information was often sufficient to ensure privacy. Documents could be destroyed, conversations forgotten, and records

[18] Cynthia Dwork and Deirdre Mulligan, "It's Not Privacy, and It's Not Fair," 66 *Stan. L. Rev. Online* 35 (2013).
[19] See PCAST report, *Big Data and Privacy*; Harvard Law Petrie-Flom Center, *Online Symposium on the Law, Ethics & Science of Re-identification Demonstrations*, http://blogs.law.harvard.edu/billofhealth/2013/05/13/online-symposium-on-the-law-ethics-science-of-re-identification-demonstrations/.

expunged. But in the digital world, information can be captured, copied, shared, and transferred at high fidelity and retained indefinitely. Volumes of data that were once unthinkably expensive to preserve are now easy and affordable to store on a chip the size of a grain of rice. As a consequence, data, once created, is in many cases effectively permanent. Furthermore, digital data often concerns multiple people, making personal control impractical. For example, who owns a photo—the photographer, the people represented in the image, the person who first posted it, or the site to which it was posted? The spread of these new technologies are fundamentally changing the relationship between a person and the data about him or her.

Certainly data is freely shared and duplicated more than ever before. The specific responsibilities of individuals, government, corporations, and the network of friends, partners, and other third parties who may come into possession of personal data have yet to be worked out. The technological trajectory, however, is clear: more and more data will be generated about individuals and will persist under the control of others. Ensuring that data is secure is a matter of the utmost importance. For that reason, models for public-private cooperation, like the Administration's Cybersecurity Framework, launched in February 2014, are a critical part of ensuring the security and resiliency of the critical infrastructure supporting much of the world's data assets.[20]

Affirming our Values

No matter how serious and consequential the questions posed by big data, this Administration remains committed to supporting the digital economy and the free flow of data that drives its innovation. The march of technology always raises questions about how to adapt our privacy and social values in response. The United States has met this challenge through considered debate in the public sphere, in the halls of Congress, and in the courts—and throughout its history has consistently been able to realize the rights enshrined in the Constitution, even as technology changes.

Since the earliest days of President Obama's first term, this Administration has called on both the public and private sector to harness the power of data in ways that boost productivity, improve lives, and serve communities. That said, this study is about more than the capabilities of big data technologies. It is also about how big data may challenge fundamental American values and existing legal frameworks. This report focuses on the federal government's role in assuring that our values endure and our laws evolve as big data technologies change the landscape for consumers and citizens.

In the last year, the public debate on privacy has largely focused on how government, particularly the intelligence community, collects, stores, and uses data. This report largely leaves issues raised by the use of big data in signals intelligence to be addressed through the policy guidance that the President announced in January. However, this re-

[20] President Barack Obama, *International Strategy for Cyberspace*, The White House, May 2011, http://www.whitehouse.gov/the-press-office/2014/02/12/launch-cybersecurity-framework.

port considers many of the other ways government collects and uses large datasets for the public good. Public trust is required for the proper functioning of government, and governments must be held to a higher standard for the collection and use of personal data than private actors. As President Obama has unequivocally stated, "It is not enough for leaders to say: trust us, we won't abuse the data we collect."[21]

Recognizing that big data technologies are used far beyond the intelligence community, this report has taken a broad view of the issues implicated by big data. These new technologies do not only test individual privacy, whether defined as the right to be let alone, the right to control one's identity, or some other variation. Some of the most profound challenges revealed during this review concern how big data analytics may lead to disparate inequitable treatment, particularly of disadvantaged groups, or create such an opaque decision-making environment that individual autonomy is lost in an impenetrable set of algorithms.

These are not unsolvable problems, but they merit deep and serious consideration. The historian Melvin Kranzberg's First Law of Technology is important to keep in mind: "Technology is neither good nor bad; nor is it neutral."[22] Technology can be used for the public good, but so too can it be used for individual harm. Regardless of technological advances, the American public retains the power to structure the policies and laws that govern the use of new technologies in a way that protects foundational values.

Big data is changing the world. But it is not changing Americans' belief in the value of protecting personal privacy, of ensuring fairness, or of preventing discrimination. This report aims to encourage the use of data to advance social good, particularly where markets and existing institutions do not otherwise support such progress, while at the same time supporting frameworks, structures, and research that help protect our core values.

[21] President Barack Obama, Remarks on the Administration's Review of Signals Intelligence, January 17, 2014, http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence.
[22] Melvin Kranzberg, "Technology and History: Kranzberg's Laws," 27.3 *Technology and Culture*, (1986) p. 544-560.

II. The Obama Administration's Approach to Open Data and Privacy

Throughout American history, technology and privacy laws have evolved in tandem. The United States has long been a leader in protecting individual privacy while supporting an environment of innovation and economic prosperity.

The Fourth Amendment to the Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Flowing from this protection of physical spaces and tangible assets is a broader sense of respect for security and dignity that is indispensable both to personal well-being and to the functioning of democratic society.[23] A legal framework for the protection of privacy interests has grown up in the United States that includes constitutional, federal, state, and common law elements. "Privacy" is thus not a narrow concept, but instead addresses a range of concerns reflecting different types of intrusion into a person's sense of self, each requiring different protections.

Data collection—and the use of data to serve the public good—has an equally long history in the United States. Article I, Section 2 of the Constitution mandates a decennial Census in order to apportion the House of Representatives. In practice, the Census has never been conducted as just a simple head count, but has always been used to determine more specific demographic information for public purposes.[24]

Since President Obama took office, the federal government has taken unprecedented steps to make more of its own data available to citizens, companies, and innovators. Since 2009, the Obama Administration has made tens of thousands of datasets public, hosting many of them on Data.gov, the central clearinghouse for U.S. government data. Treating government data as an asset and making it available, discoverable, and usable—in a word, open—strengthens democracy, drives economic opportunity, and improves citizens' quality of life.

---

[23] See, e.g., *City of Ontario v. Quon*, 560 U.S. 746, 755-56 (2010) ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government."); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("They [the Framers] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").

[24] For example, e.g. the 1790 Census counted white men "over 16" and "under 16" separately to determine military eligibility. United States Census Bureau, "History," https://www.census.gov/history/www/through_the_decades/index_of_questions/1790_1.html; Margo Anderson, *The American Census: A Social History*, (Yale University Press, 1988).

Deriving value from open data requires developing the tools to understand and analyze it. So the Obama Administration has also made significant investments in the basic science of data analytics, storage, encryption, cybersecurity, and computing power.

The Obama Administration has made these investments while also recognizing that the collection, use, and sharing of data pose serious challenges. Federal research dollars have supported work to address the technological and ethical issues that arise when handling large-scale data sets. Drawing on the United States' long history of leadership on privacy issues, the Obama Administration also issued a groundbreaking consumer privacy blueprint in 2012 that included a Consumer Privacy Bill of Rights.[25] In 2014, the President announced the Cybersecurity Framework, developed in partnership with the private sector, to strengthen the security of the nation's critical infrastructure.[26]

This chapter charts the intersections of these initiatives—ongoing efforts to harness data for the public good while ensuring the rights of citizens and consumers are protected.

Open Data in the Obama Administration

Open Data Initiatives

The smartphones we carry around in our pockets tell us where we are by drawing on open government data. Decades ago, the federal government first made meteorological data and the Global Positioning System freely available, enabling entrepreneurs to create a wide range of new tools and services, from weather apps to automobile navigation systems.

In the past, data collected by the government mostly stayed in the government agency that collected it. The Obama Administration has launched a series of Open Data Initiatives, each unleashing troves of valuable data that were previously hard to access, in domains including health, energy, climate, education, public safety, finance, and global development. Executive Order 13642, signed by President Obama on May 9, 2013, established an important new principle in federal stewardship of data: going forward, agencies must consider openness and machine-readability as the new defaults for government information, while appropriately safeguarding privacy, confidentiality, and security.[27] Extending these open data efforts is also a core element of the President's Second Term Management Agenda, and the Office of Management and Budget has directed

[25] President Barack Obama, *Consumer Data Privacy In A Networked World: A Framework For Protecting Privacy And Promoting Innovation In The Global Digital Economy*, The White House, February 2012, http://www.whitehouse.gov/sites/default/files/privacy-final.pdf.
[26] National Institute of Standards & Technology, *Framework for Improving Critical Infrastructure Cybersecurity*, February 12, 2014, http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214-final.pdf.
[27] President Barack Obama, Making Open and Machine Readable the New Default for Government Information, Executive Order 13642, May 2013, http://www.whitehouse.gov/the-press-office/2013/05/09/executive-order-making-open-and-machine-readable-new-default-government.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000184

agencies to release more of the administrative information they use to make decisions so it might be useful to others.[28]

At Data.gov the public can find everything from data regarding complaints made to the federal Consumer Financial Protection Bureau about private student loans to 911 service area boundaries for the state of Arkansas. The idea is that anyone can use Data.gov to find the open data they are looking for without having specialized knowledge of government agencies or programs within those agencies. Interested software developers can use simple tools to automatically access the datasets.

Federal agencies must also prioritize their data release efforts in part based on requests from the public. Each agency is required to solicit input through digital feedback mechanisms, like an email address or an online platform. For the first time, any advocate, entrepreneur, or researcher can connect with the federal government and suggest what data should be made available. To further improve feedback and encourage productive use of open government data, Administration officials have hosted and participated in a range of code-a-thons, brainstorming workshops ("Data Jams"), showcase events ("Datapaloozas"), and other meetings about open government data.[29]

Pursuant to the May 2013 Executive Order, the Office of Management and Budget and the Office of Science and Technology Policy released a framework for agencies to manage information as an asset throughout its lifecycle, which includes requirements to continue to protect personal, sensitive, and confidential data.[30] Agencies already categorize data assets into three access levels—public, restricted public, and non-public—and publish only the public catalog. To promote transparency, agencies include information in their external data inventories about technically public data assets that have not yet been posted online.

My Data Initiatives

Making public government data more open and machine-readable is only one element of the Administration's approach to data. The Privacy Act of 1974 grants citizens certain rights of access to their personal information. That access should be easy, secure, and useful. Starting in 2010, the Obama Administration launched a series of My Data initiatives to empower Americans with secure access to their personal data and increase citi-

[28] Office of Management and Budget, Guidance for Providing and Using Administrative Data for Statistical Purposes, (OMB M-144-06), February 14, 2014, http://www.whitehouse.gov/sites/default/files/omb/memoranda/2014/m-14-06.pdf.

[29] These events have helped federal agencies showcase government data resources being made freely available; collaborate with innovators about how open government data can be used to fuel new products, services, and companies; launch new challenges and incentive prizes designed to spur innovative use of data; and highlight how new uses of open government data are making a tangible impact in American lives and advancing the national interest.

[30] Specifically, the Open Data Policy (OMB M-13-13) requires agencies to collect or create information in a way that supports downstream information processing and dissemination; to maintain internal and external data asset inventories; and to clarify information management responsibilities. Agencies must also use machine-readable and open formats, data standards, and common core and extensible metadata.

zens' access to private-sector applications and services that can be used to analyze it. The My Data initiatives include:

- **Blue Button:** The Blue Button allows consumers to securely access their health information so they can better manage their health care and finances and share their information with providers. In 2010, the U.S. Department of Veterans Affairs launched the Blue Button to give veterans the ability to download their health records. Since then, more than 5.4 million veterans have used the Blue Button tool to access their personal health information. More than 500 companies in the private sector have pledged their support to increase patient access to their health data by leveraging Blue Button, and today, more than 150 million Americans have the promise of being able to access their digital health information from health care providers, medical laboratories, retail pharmacy chains, and state immunization registries.
- **Get Transcript:** In 2014, the Internal Revenue Service made it possible for taxpayers to digitally access their last three years of tax information through a tool called Get Transcript. Individual taxpayers can use Get Transcript to download a record of past tax returns, which makes it easier to apply for mortgages, student loans, and business loans, or to prepare future tax filings.
- **Green Button:** The Administration partnered with electric utilities in 2012 to create the Green Button, which provides families and business with easy access to their energy usage information in a consumer-friendly and computer-friendly format. Today, 48 utilities and electricity suppliers serving more than 59 million homes and businesses have committed to giving their customers "Green Button" access to help them save energy. With customers in control of their energy data, they can choose which private sector tools and services can help them better manage their property's energy efficiency.[31]
- **MyStudentData:** The Department of Education makes it possible for students and borrowers to access and download their data from the Free Application for Federal Student Aid and their federal student loan information—including loan, grant, enrollment, and overpayment information. In both cases, the information is available via a user-friendly, machine-readable, plain-text file.

Beyond providing people with easy and secure access to their data, the My Data initiatives helps establish a strong model for personal data accessibility that the Administration hopes will become widely adopted in the private and public sectors. The ability to access one's personal information will be increasingly important in the future, when more aspects of life will involve data transactions between individuals, companies, and institutions.

[31] Aneesh Chopra, "Green Button: Providing Consumers with Access to Their Energy Data," *Office of Science and Technology Policy Blog*, January 2012, http://www.whitehouse.gov/blog/2012/01/18/green-button-providing-consumers-access-their-energy-data.

Big Data Initiative: "Data to Knowledge to Action"

At its core, big data is about being able to move quickly from data to knowledge to action. On March 29, 2012, six federal agencies joined forces to launch the "Big Data Research and Development Initiative," with over $200 million in research funding to improve the tools and techniques needed to access, organize, and glean discoveries from huge volumes of digital data.

Since the launch of this "Data to Knowledge to Action" initiative, DARPA has created an "Open Catalog" of the research publications and open source software generated by its $100 million XDATA program, an effort to process and analyze large sets of imperfect, incomplete data.[32] The National Institutes of Health has supported a $50 million "Big Data to Knowledge" program about biomedical big data. The National Science Foundation has funded big data research projects which have reduced the cost of processing a human genome by a factor of 40. The Department of Energy announced a $25 million Scalable Data Management, Analysis, and Visualization Institute, which produced climate data techniques that have made seasonal hurricane predictions more than 25 percent more accurate. Many other research initiatives have important big data components, including the BRAIN Initiative, announced by President Obama in April 2013. As part of the Administration's big data research initiative, the National Science Foundation has also funded specific projects examining the social, ethical, and policy aspects of big data.

U.S. Privacy Law and International Privacy Frameworks

Development of Privacy Law in the United States

U.S. privacy laws have shaped and been shaped by societal changes, including the waves of technological innovation set in motion by the industrial revolution. The first portable cameras helped catalyze Samuel Warren and Louis Brandeis's seminal 1890 article *The Right to Privacy*, in which they note that "[r]ecent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual … the right 'to be let alone'… numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[33] This prescient work laid the foundation for the common law of privacy in the 20th century, establishing citizens' rights to privacy from the government and from each other.[34]

[32] In November 2013, the White House organized a "Data to Knowledge to Action" event that featured dozens of announcements of new public, private, academic and non-profit initiatives. From transforming how research universities prepare students to become data scientists to allowing more citizens and entrepreneurs to access and analyze the huge amounts of space-based data that NASA collects about the Earth, the commitments promise to spur tremendous progress. The Administration is also working to increase the number of data scientists who are actively engaged in solving hard problems in education, health care, sustainability, informed decision-making, and non-profit effectiveness.
[33] Samuel Warren and Louis Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193, 195 (1890).
[34] See William Prosser, "Privacy," 48 *California Law Review* 383 (1960).

Over the course of the last century, case law about what constitutes a "search" for purposes of the Fourth Amendment to the Constitution has developed with time and technology.[35] In 1928, the U.S. Supreme Court held in *Olmstead v. United States* that placing wiretaps on a phone line located outside of a person's house did not violate the Fourth Amendment, even though the government obtained the content from discussions *inside* the home.[36] But the *Olmstead* decision was arguably more famous for the dissent written by Justice Brandeis, who wrote that the Founders had "conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most favored by civilized men."[37]

The Court's opinion in *Olmstead* remained the law of the land until it was overturned by the Court's 1967 decision in *Katz v. United States.* In *Katz*, the Court held that the FBI's placement of a recording device on the outside of a public telephone booth without a warrant qualified as a search that violated the "reasonable expectation of privacy" of the person using the booth, even though the device did not physically penetrate the booth, his person, or his property. Under *Katz*, an individual's subjective expectations of privacy are protected when society regards them as reasonable.[38]

Civil courts did not immediately acknowledge privacy as justification for one citizen to bring a lawsuit against another—what lawyers call a "cause of action." It wasn't until the 1934 Restatement (First) of Torts that an "unreasonable and serious" invasion of privacy was recognized as a basis to sue.[39] Courts in most states began to recognize privacy as a cause of action, although what emerged from decisions was not a single tort, but instead "a complex of four" potential torts:[40]

1. Intrusion upon a person's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about an individual.
3. Publicity placing one in a false light in the public eye.
4. Appropriation of one's likeness for the advantage of another.[41]

Some contemporary critics argue the "complex of four" does not sufficiently recognize privacy issues that arise from the extensive collection, use, and disclosure of personal information by businesses in the modern marketplace. Others suggest that automated

[35] Wayne Lafave, "Search and Seizure: A Treatise On The Fourth Amendment," §§ 1.1–1.2 (West Publishing, 5th ed. 2011).
[36] *Olmstead v. United States,* 277 U.S. 438 (1928).
[37] Ibid at 478.
[38] *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see also LaFave, supra note 35 § 2.1(b) ("[L]ower courts attempting to interpret and apply Katz quickly came to rely upon the Harlan elaboration, as ultimately did a majority of the Supreme Court.").
[39] Restatement (First) Torts § 867 (1939).
[40] Prosser, supra note 34 at 389 (1960).
[41] Ibid. See also Restatement (Second) Torts § 652A (1977) (Prosser's privacy torts incorporated into the Restatement).

processing should in fact ease privacy concerns because it uses computers operated under precise controls to perform tasks that used to be handled by a person.[42]

The Fair Information Practice Principles

As computing advanced and became more widely used by government and the private sector, policymakers around the world began to tackle the issue of privacy anew. In 1973, the U.S. Department of Health, Education, and Welfare issued a report entitled *Records, Computers, and the Rights of Citizens*.[43] The report analyzed "harmful consequences that might result from automated personal data systems" and recommended certain safeguards for the use of information. Those safeguards, commonly known today as the "Fair Information Practice Principles," or "FIPPs," form the bedrock of modern data protection regimes.

While the principles are instantiated in law and international agreements in different ways, at their core, the FIPPs articulate basic protections for handling personal data. They provide that an individual has a right to know what data is collected about him or her and how it is used. The individual should further have a right to object to some uses and to correct inaccurate information. The organization that collects information has an obligation to ensure that the data is reliable and kept secure. These principles, in turn, served as the basis for the Privacy Act of 1974, which regulates the federal government's maintenance, collection, use, and dissemination of personal information in systems of records.[44]

By the late 1970s, several other countries had also passed national privacy laws.[45] In 1980, the Organization for Economic Cooperation and Development (OECD) issued its "Guidelines Governing the Protection of Privacy and Transborder Flow of Personal Data."[46] Building on the FIPPs, the OECD guidelines have informed national privacy laws, sector-specific laws, and best practices for the past three decades. In 1981, the Council of Europe also completed work on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108), which applied a FIPPs approach to emerging privacy concerns in Europe.

Despite some important differences, the privacy frameworks in the United States and those countries following the EU model are both based on the FIPPs. The European approach, which is based on a view that privacy is a fundamental human right, generally involves top-down regulation and the imposition of across-the-board rules restricting the use of data or requiring explicit consent for that use. The United States, in contrast, em-

---

[42] Ibid.
[43] See, e.g., K.A. Taipale, "Data Mining and Domestic Security: Connecting the Dots to Make Sense of Data," V *The Columbia Science and Technology Review*, (2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=546782.
[44] Pub. L. 93-579 (codified at 5 U.S.C. § 552a).
[45] Organization for Economic Cooperation and Development, *Thirty Years After The OECD Privacy Guidelines*, 2011, p. 17, http://www.oecd.org/sti/ieconomy/49710223.pdf.
[46] Ibid at 27.

ploys a sectoral approach that focuses on regulating specific risks of privacy harm in particular contexts, such as health care and credit. This places fewer broad rules on the use of data, allowing industry to be more innovative in its products and services, while also sometimes leaving unregulated potential uses of information that fall between sectors.

The FIPPs form a common thread through these sectoral laws and a variety of international agreements. They are woven into the 2004 Asia Pacific Economic Cooperation Privacy Principles, which was endorsed by APEC economies, and form the basis for the U.S.-E.U. and U.S.-Switzerland Safe Harbor Frameworks, which harness the global consensus around the FIPPs as a means to build bridges between U.S. and European law. [47]

Sector-Specific Privacy Laws in the United States

In the United States during the 1970s and 80s, narrowly-tailored sectoral privacy laws began to supplement the tort-based body of common law. These sector-specific laws create privacy safeguards that apply only to specific types of entities and data. With a few exceptions, individual states and the federal government have predominantly enacted privacy laws on a sectoral basis.[48]

The Fair Credit Reporting Act (FCRA) was originally enacted in 1970 to promote accuracy, fairness, and privacy protection with regard to the information assembled by consumer reporting agencies for use in credit and insurance reports, employee background checks, and tenant screenings. The law protects consumers by providing specific rights to access and correct their information. It requires companies that prepare consumer reports to ensure data is accurate and complete; limits when such reports may be used; and requires agencies to provide notice when an adverse action, such as the denial of credit, is taken based on the content of a report.

The 1996 Health Insurance Portability and Accountability Act (HIPAA) addresses the use and disclosure of individuals' health information by specified "covered entities" and includes standards designed to help individuals understand and control how their health information is used.[49] A key aspect of HIPAA is the principle of "minimum necessary"

[47] The APEC Privacy Principles are associated with the 2004 APEC Privacy Framework and APEC Cross Border Privacy Rules system approved in 2011. See Asia-Pacific Economic Cooperation, "APEC Privacy Principles," 2005, p. 3, http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/media/Files/Groups/ECSG/05_ecsg_privacyframewk.ashx; *Consumer Data Privacy In A Networked World,* p 49-52; export.gov/safeharbor for information on the U.S.-EU and U.S.-Swiss Safe Harbor Frameworks. These enforceable self-certification programs are administered by the U.S. Department of Commerce and were developed in consultation with the European Commission and the Federal Data Protection and Information Commissioner of Switzerland, respectively, to provide a streamlined means for U.S. organizations to comply with EU and Swiss data protection laws.

[48] California, for example, has a right to privacy in the state Constitution. Cal. Const. art. 1 § 1.

[49] See U.S. Department of Health and Human Services, Health Information Privacy, "Summary of the HIPAA Privacy Rule," http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html

use and disclosure.[50] Congress and the Department of Health and Human Services have periodically updated protections for personal health data. The Children's Online Privacy Protection Act of 1998 (COPPA) and the Federal Trade Commission's implementing regulations require online services directed at children under the age of 13, or which collect personal data from children, to obtain verifiable parental consent to do so. In the financial sector, the Gramm-Leach-Bliley Act mandates that financial institutions respect the privacy of customers and the security and confidentiality of those customers' nonpublic personal information. Other sectoral privacy laws safeguard individuals' educational, communications, video rental, and genetic information.[51]

Consumer Privacy Bill of Rights

In February 2012, the White House released a report titled *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*.[52] This "Privacy Blueprint" contains four key elements: a Consumer Privacy Bill of Rights based on the Fair Information Practice Principles; a call for government-convened multi-stakeholder processes to apply those principles in particular business contexts; support for effective enforcement of privacy rights, including the enactment of baseline consumer privacy legislation; and a commitment to international privacy regimes that support the flow of data across borders.

At the center of the Privacy Blueprint is the Consumer Privacy Bill of Rights, which states clear baseline protections for consumers. The rights are:

- **Individual Control:** Consumers have a right to exercise control over what personal data organizations collect from them and how they use it.
- **Transparency:** Consumers have a right to easily understandable information about privacy and security practices.
- **Respect for Context:** Consumers have a right to expect that organizations will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data.
- **Security:** Consumers have a right to secure and responsible handling of personal data.
- **Access and Accuracy:** Consumers have a right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data are inaccurate.

[50] This principle ensures that covered entities make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request. See U.S. Department of Health & Human Services, Health Information Privacy, "Minimum Necessary Requirement," http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/minimumnecessary.html.

[51] They include: The Fair Credit Reporting Act of 1970, the Family Educational Rights and Privacy Act of 1974, the Electronic Communications Privacy Act of 1986, the Computer Fraud and Abuse Act of 1986, the Cable Communications Policy Act of 1984, the Video Privacy Protection Act of 1998, and the Genetic Information Nondiscrimination Act of 2008.

[52] See *Consumer Data Privacy In A Networked World, p* 25.

- **Focused Collection:** Consumers have a right to reasonable limits on the personal data that companies collect and retain.
- **Accountability:** Consumers have a right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

The Consumer Privacy Bill of Rights is more focused on consumers than previous privacy frameworks, which were often couched in legal jargon. For example, it describes a right to "access and accuracy," which is more easily understood by users than previous formulations referencing "data quality and integrity." Similarly, it assures consumers that companies will respect the "context" in which data is collected and used, replacing the term "purpose specification."

The Consumer Privacy Bill of Rights also draws upon the Fair Information Practice Principles to better accommodate the online environment in which we all now live. Instead of requiring companies to adhere to a single, rigid set of requirements, the Consumer Privacy Bill of Rights establishes general principles that afford companies discretion in how they implement them. The Consumer Privacy Bill of Rights' "context" principle interacts with its other six principles, assuring consumers that their data will be collected and used in ways consistent with their expectations. At the same time, the context principle permits companies to develop new services using personal information when that use is consistent with the companies' relationship with its users and the circumstances surrounding how it collects data.

The Internet's complexity, global reach, and constant evolution require timely, scalable, and innovation-enabling policies. To answer this challenge, the Privacy Blueprint calls for all relevant stakeholders to come together to develop voluntary, enforceable codes of conduct that specify how the Consumer Privacy Bill of Rights applies in specific business contexts. The theory behind the Consumer Privacy Bill of Rights is that this combination of broad baseline principles and specific codes of conduct can protect consumers while supporting innovation.

Promoting Global Interoperability

The Obama Administration released the Consumer Privacy Bill of Rights as other countries and international organizations began to review their own privacy frameworks. In 2013, the OECD updated its Privacy Guidelines, which supplement the Fair Information Practice Principles with mechanisms to implement and enforce privacy protections. The APEC Cross Border Privacy Rules System, also announced in 2013, largely follows the OECD guidelines.[53] The Council of Europe is undertaking a review of Convention 108. Building bridges among these different privacy frameworks is critical to ensuring robust international commerce.

[53] Organization for Economic Cooperation and Development, "OECD Work on Privacy," http://www.oecd.org/sti/ieconomy/privacy.htm.

The European Union is also in the process of reforming its data protection rules.[54] The current E.U. Data Protection Directive only allows transfers of E.U. citizens' data to those non-E.U. countries with "adequate" privacy laws or mechanisms providing sufficient safeguards for data, such as the U.S.-E.U. Safe Harbor. In January 2014, the U.S. and E.U. began discussing how best to enhance the Safe Harbor Framework to ensure that it continues to provide strong data protection and enable trade through increased transparency, effective enforcement, and legal certainty. These negotiations continue, even as Europe—like the United States—wrestles with questions about how it will accommodate big data technologies and increased computational and storage capacities.[55]

In March 2014, the Federal Trade Commission, together with agency officials from the European Union and Asia-Pacific Economic Cooperation economies, announced joint E.U. and APEC endorsement of a document that maps the requirements of the European and APEC privacy frameworks.[56] The mapping project will help companies seeking certification to do business in both E.U. and APEC countries recognize overlaps and gaps between the two frameworks.[57] Efforts like these clarify obligations for companies and help build interoperability between global privacy frameworks.

Conclusion

The most common privacy risks today still involve "small data"—the targeted compromise of, for instance, personal banking information for purposes of financial fraud. These risks do not involve especially large volumes, rapid velocities, or great varieties of information, nor do they implicate the kind of sophisticated analytics associated with big data. Protecting privacy of "small" data has been effectively addressed in the United States through the Fair Information Practice Principles, sector-specific laws, robust enforcement, and global privacy assurance mechanisms.

Privacy scholars, policymakers, and technologists are now turning to the question of how big data technology can be effectively managed under the FIPPs-based frameworks. The remainder of this report explores applications of big data in the public and private sector and then returns to consider the overall implications big data may have on current privacy frameworks.

---

[54] European Commission, "Commission Proposes a Comprehensive Reform of the Data Protection Rules," January 25, 2012, http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm.

[55] See Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources, et al. (Apr. 8, 2014) in which the European Court of Justice invalidated the data retention requirements applied to electronic communications on the basis that the scope of the requirements interfered in a "particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data."

[56] European Commission, Article 29 Data Protection Working Party, Press Release: "Promoting Cooperation on Data Transfer Systems Between Europe and the Asia-Pacific," March 26, 2013, http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/20130326_pr_apec_en.pdf.

[57] Article 29 Data Protection Working Party, Opinion 02/2014 on a referential for requirements for Binding Corporate Rules, February 27, 2014, http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp212_en.pdf.

III. Public Sector Management of Data

Government keeps the peace. It makes sure our food is safe to eat. It keeps our air and water clean. The laws and regulations it promulgates order economic and political life. Big data technology stands to improve nearly all the services the public sector delivers.

This chapter explores how big data is already helping the government carry out its obligations in health, education, homeland security, and law enforcement. It also begins to frame some of the challenges big data raises. Questions about what the government should and should not do, and how the rights of citizens should be protected in light of changing technology, are as old as the Republic itself. In framing the laws and norms of our young country, the founders took pains to demarcate private spheres shielded from inappropriate government interference. While many things about the big data world might astonish them, the founders would not be surprised to find that the Constitution and Bill of Rights are as central to the debate as Moore's law and zettabytes.

At its core, public-sector use of big data heightens concerns about the balance of power between government and the individual. Once information about citizens is compiled for a defined purpose, the temptation to use it for other purposes can be considerable, especially in times of national emergency. One of the most shameful instances of the government misusing its own data dates to the Second World War. Census data collected under strict guarantees of confidentiality was used to identify neighborhoods where Japanese-Americans lived so they could be detained in internment camps for the duration of the war.

Because the government bears a special responsibility to protect its citizens when exercising power and authority for the public good, how big data should be put to use in the public sector, as well as what controls and limitations should apply, must be carefully considered. If unchecked, big data could be a tool that substantially expands government power over citizens. At the same time, big data can also be used to enhance accountability and to engineer systems that are inherently more respectful of privacy and civil rights.

Big Data and Health Care Delivery

Data has long been a part of health care delivery. In the past several years, legislation has created incentives for health care providers to transition to using electronic health records, vastly expanding the volume of health data available to clinicians, researchers, and patients. With the enactment of the Affordable Care Act, the model for health care reimbursement is beginning to shift from paying for isolated and potentially uncoordinated instances of treatment—a model called "fee-for-service"—to paying on the basis of better health outcomes. Taken together, these trends are helping build a "learning"

health care system where effective practices are identified from clinical data and then rapidly disseminated back to providers.

Big data can identify diet, exercise, preventive care, and other lifestyle factors that help keep people from having to seek care from a doctor. Big data analytics can also help identify clinical treatments, prescription drugs, and public health interventions that may not appear to be effective in smaller samples, across broad populations, or using traditional research methods. From a payment perspective, big data can be used to ensure professionals who treat patients have strong performance records and are reimbursed on the quality of patient outcomes rather than the quantity of care delivered.

The emerging practice of predictive medicine is the ultimate application of big data in health. This powerful technology peers deeply into a person's health status and genetic information, allowing doctors to better predict whether individuals will develop a disease and how they might respond to specific therapies. Predictive medicine raises many complex issues. Traditionally, health data privacy policies have sought to protect the identity of individuals whose information is being shared and analyzed. But increasingly, data about groups or categories of people will be used to identify diseases prior to or very early after the onset of clinical symptoms.

But the information that stands to be discovered by predictive medicine extends beyond a single individual's risks to include others with similar genes, potentially including the children and future descendants of those whose information is originally collected. Biorepositories that link genomic data to health care data are on the leading edge of confronting important questions about personal privacy in the context of health research and treatment.[58]

The privacy frameworks that currently cover information now used in health may not be well suited to address these developments or facilitate the research that drives them. Using big data to improve health requires advanced analytical models to ingest multiple kinds of lifestyle, genomic, medical, and financial data. The powerful connection between lifestyle and health outcomes means the distinction between personal data and health care data has begun to blur. These types of data are subjected to different and sometimes conflicting federal and state regulation, including the Health Insurance Portability and Accountability Act, Gramm-Leach-Bliley Act, Fair Credit Reporting Act, and Federal Trade Commission Act. The complexity of complying with numerous laws when data is combined from various sources raises the potential need to carve out special data use authorities for the health care industry if it is to realize the potential health gains and cost reductions that could come from big data analytics. At the same time, health organizations interact with many organizations that are not regulated under any of these

[58] Bradley Malin and Latanya Sweeney, "How (not) to protect genomic data privacy in a distributed network: using trail re-identification to evaluate and design anonymity protection systems," *Journal of Biomedical Informatics* (2004), http://www.j-biomed-inform.com/article/S1532-0464(04)00053-X.

laws.[59] In the resulting ecosystem, personal health information of various kinds is shared with an array of firms, and even sold by state governments, in ways that might not accord with consumer expectations of the privacy of their medical data.

Though medicine is changing, information about our health remains a very private part of our lives. As big data enables ever more powerful discoveries, it will be important to revisit how privacy is protected as information circulates among all the partners involved in care. Health care leaders have voiced the need for a broader trust framework to grant all health information, regardless of its source, some level of privacy protection. This may potentially involve crafting additional protections beyond those afforded in the Health Insurance Portability and Accountability Act and Genetic Information Non-Discrimination Act as well as streamlining data interoperability and compliance requirements. After studying health information technology, the President's Council of Advisors on Science & Technology concluded that the nation needs to adopt universal standards and an architecture that will facilitate controlled access to information across many different types of records.[60]

Modernizing the health care data privacy framework will require careful negotiation between the many parties involved in delivering health care and insurance to Americans, but the potential economic and health benefits make it well worth the effort.

Learning about Learning: Big Data and Education

Education at both the K-12 and university levels is now supported inside and outside the classroom by a range of technologies that help foster and enhance the learning process. Students now access class materials, watch instructional videos, comment on class activities, collaborate with each other, complete homework, and take tests online.

Technology-based educational tools and platforms offer important new capabilities for students and teachers. After only a few generations of evolution, these tools provide real-time assessment so that material can be presented based on how quickly a student learns. Education technologies can also be scaled to reach broad audiences, enable continuous improvement of course content, and increase engagement among students.[61]

Beyond personalizing education, the availability of new types of data profoundly improves researchers' ability to learn about learning. Data from a student's experience in massive open online courses (MOOCs) or other technology-based learning platforms

[59] Latanya Sweeney, a Professor of Government and Technology in Residence at Harvard University, has studied information flows in the health care industry. A graphical map of data flows that depicts information flows outside entities regulated by HIPAA can be found at www.thedatamap.org.
[60] President's Council of Advisors on Science & Technology, *Realizing the Full Potential Of Health Information Technology to Improve Health Care for Americans: The Path Forward*, The White House, December 2010, http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-health-it-report.pdf.
[61] President's Council of Advisors on Science & Technology, *Harnessing Technology for Higher Education*, The White House, December 2013, http://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_edit_dec-2013.pdf.

can be precisely tracked, opening the door to understanding how students move through a learning trajectory with greater fidelity, and at greater scale, than traditional education research is able to achieve. This includes gaining insight into student access of learning activities, measuring optimal practice periods for meeting different learning objectives, creating pathways through material for different learning approaches, and using that information to help students who are struggling in similar ways. Already, the Department of Education has studied how to harness these technologies, begun integrating the use of data from online education in the National Education Technology Plan, and laid plans for a Virtual Learning Lab to pioneer the methodological tools for this research.[62]

The big data revolution in education also raises serious questions about how best to protect student privacy as technology reaches further into the classroom. While states and local communities have traditionally played the dominant role in providing education, much of the software that supports online learning tools and courses is provided by for-profit firms. This raises complicated questions about who owns the data streams coming off online education platforms and how they can be used. Applying privacy safeguards like the Family Educational Rights and Privacy Act, the Protection of Pupil Rights Amendment, or the Children's Online Privacy Protection Act to educational records can create unique challenges.

Protecting Children's Privacy in the Era of Big Data

Children today are among the first generation to grow up playing with digital devices even before they learn to read. In the United States, children and teenagers are active users of mobile apps and social media platforms. As they use these technologies, granular data about them—some of it sensitive—is stored and processed online. This data has the potential to dramatically improve learning outcomes and open new opportunities for children, but could be used to build an invasive consumer profile of them once they become adults, or otherwise pose problems later in their lives. Although youth on average are typically no less, and in many cases more, cognizant of commercial and government use of data than adults, they often face scrutiny by parents, teachers, college admissions officers, military recruiters, and case workers. Vulnerable youth, including foster children and homeless youth, who typically have little adult guidance, are also particularly susceptible to data misuse and identity theft. Struggling to find some privacy in the face of tremendous supervision, many youth experiment with various ways to obscure the meaning of what they share except to select others, even if they are unable to limit access to the content itself.[63]

Because young people are exactly that—young—they need appropriate freedoms to explore and experiment safely and without the specter of being haunted by mistakes in the future. The Children's Online Privacy Protection Act requires website operators and app

[62] Department of Education, *Enhancing Teaching and Learning Through Educational Data Mining and Learning Analytics: An Issue Brief*, October 2012, http://www.ed.gov/edblogs/technology/files/2012/03/edm-la-brief.pdf. For information about the National Education technology plan, see www.tech.ed.gov/netp.
[63] danah boyd, *It's Complicated: The Social Lives of Networked Teens*, (Yale University Press, 2014), www.danah.org/books/ItsComplicated.pdf.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000197

developers to gain consent from a parent or guardian before collecting personal information from children under the age of 13. There is not yet a settled understanding of what harms, if any, are accruing to children and what additional policy frameworks may be needed to ensure that growing up with technology will be an asset rather than a liability.

Just as with health care, some of the information revealed when a user interacts with a digital education platform can be very personal, including aptitude for particular types of learning and performance relative to other students. It is even possible to discern whether students have learning disabilities or have trouble concentrating for long periods. What time of day and for how long students stay signed in to online tools reveals lifestyle habits. What should educational institutions do with this data to improve learning opportunities for students? How can students who use these platforms, especially those in K-12 education, be confident that their data is safe?

To help answer complicated questions about ownership and proper usage of data, the U.S. Department of Education released guidance for online education services in February 2014.[64] This guidance makes clear that schools and districts can enter into agreements with third parties involving student data only so long as requirements under the Family Educational Rights and Privacy Act and Protection of Pupil Rights Amendment are met. As more online learning tools and services become available for kids, states and local governments are also watching these issues closely.[65] Schools and districts can only share protected student information to further legitimate educational interests, and they must retain "direct control" over that information. Even with this new guidance, the question of how best to protect student privacy in a big data world must be an ongoing conversation.

The Administration is committed to vigorously pursuing these questions and will work through the Department of Education so all students can experience the benefits of big data innovations in teaching and learning while being protected from potential harms.[66] As Secretary of Education Arne Duncan has said, "Student data must be secure, and treated as precious, no matter where it's stored. It is not a commodity."[67] This means en-

[64] Department of Education, *Protecting Student Privacy While Using Online Educational Services: Requirement and Best Practices*, February 2014, http://ptac.ed.gov/sites/default/files/Student%20Privacy%20and%20Online%20Educational%20Services%20%28February%202014%29.pdf.

[65] For example, California recently passed a law prohibiting online services from gathering information about a minor's activities for marketing purposes, or from displaying certain online advertising to minors. The law further requires online services to delete information that the minor posted on the website or service, a right for which the statute has now been dubbed "the Eraser Law."

[66] The Department of Education is exploring data innovation and use in a wide variety of contexts, including making more educational data available through application programming interfaces. See David Soo, "How can the Department of Education Increase Innovation, Transparency and Access to Data?," *Department of Education Blog*, http://www.ed.gov/blog/2014/04/how-can-the-department-of-education-increase-innovation-transparency-and-access-to-data/.

[67] Department of Education, Technology in Education: Privacy and Progress, Remarks of U.S. Secretary of Education Arne Duncan at the Common Sense Media Privacy Zone Conference, February 24, 2014, https://www.ed.gov/news/speeches/technology-education-privacy-and-progress.

suring the personal information and online activity of students are protected from inappropriate uses, especially when it is gathered in an educational context.

Big Data at the Department of Homeland Security

Every day, two million passengers fly into, within, or over the United States. More than a million people enter the country by land. Verifying the identity of each person and determining whether he or she poses a threat falls to the Department of Homeland Security, which must process huge amounts of data in seconds to carry out its mission. The Department is not simply out to find the "needle in the haystack." Protecting the homeland often depends on finding the most critical needles across many haystacks—a classic big data problem.

Ensuring the Department efficiently and lawfully uses the information it collects is a massive undertaking. DHS was created out of 22 separate government agencies in the wake of the 9/11 attacks. Many of the databases DHS operates today are physically disconnected, run legacy operating systems, and are unable to integrate information across different security classifications. The Department also carries out a diverse portfolio of missions, each governed by separate authorities in law. At all times, information must be used only for authorized purposes and in ways that protect the privacy and civil liberties afforded to U.S. citizens and foreign nationals who enter or reside in the United States. Ensuring information is properly used falls to six offices at DHS headquarters.

Beginning in 2012, representatives of the Chief Information Officer, the policy division, and the intelligence division came together with privacy, civil liberties and legal oversight officers to begin developing the first department-wide big data capability, resident in two pilot programs named Neptune and Cerberus.[68] Neptune is designed from the ground up to be a "data lake" into which unclassified information from different sources flows.[69] It has multiple built-in safeguards, including the ability to apply multiple data tags and fine-grained rules to determine which users can access which data for what purpose. All of the data is tagged according to a precise scheme. The rules governing usage focus on whether there is an authorized purpose, mission, or "need to know," and whether the user has the appropriate job series and clearance to access the information. In this way, data tags can be combined with user attributes and context to govern what information is used where and by whom.

[68] Department of Homeland Security, *Privacy Impact Assessment for the Neptune Pilot*, September 2013, http://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs-wide-neptune-09252013.pdf; "Privacy Impact Assessment for the Cerberus Pilot," November 22, 2013, http://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs-cerberus-nov2013.pdf.

[69] In the first phase, three databases, from different parts of the agency, are fed into Neptune, where the data is then tagged and sorted. From there, the Department of Homeland Security feeds this tagged data into Cerberus, which operates at the classified level. Here, DHS can compare its unclassified and classified information.

A Model for Managing Data

To build the tagging standards that govern information in its big data pilots, the Department of Homeland Security brought together the owners of the data systems, called data stewards, with representatives from privacy, civil liberties, and legal oversight offices. For each database field, the group charted its attributes and how access to the data is granted to different user communities. After developing a set of tags to encode this information, they then considered what additional rules and protections were needed to account for specific use limitations or special cases governed by law or regulation. Tagging both enables precise access control and preserves links to source data and the purpose of its original collection. The end result is a taxonomy of rules governing where information goes and tracking where it came from and under what authority.

The fields in each database are grouped into three categories: core biographical data, such as name, date of birth, and citizenship status; extended biographical data, including addresses, phone number, and email; and detailed encounter data derived from electronic and in-person interactions with DHS. Encounter data is the most sensitive category. It may contain a law enforcement officer's observations about an individual they interview as well as allegations of a risk to homeland security they may pose. These data tags then allow precise rules to be set of who can access what information for what reason. In these two pilots, the majority of rules for negotiating access are consistent across DHS's different user communities. For example, many users will need access to the core biographic information of a particular data set to perform their missions. But some of the rules require far greater customization to account for specific use limitations.

The Neptune and Cerberus pilots also contain important controls around the types of searches that users are permitted to perform. A primary inspection agent may only need to perform a search on a specific person, because the agent is trying to confirm basic biographical information. However, an Immigration and Customs Investigator may need to perform person and characteristic searches while investigating a crime. DHS intelligence analysts may need to perform searches based on identities, characteristics, and trends when analyzing information related to a threat to homeland security. System administrators have no need to access the data contained within the system. The architecture of the database allows them to maintain the overall IT system but not to access any individual records.

The capabilities developed in these pilots are of a whole different order than the databases DHS inherited in 2002. Before these big data initiatives, it was not easy to perform searches across databases held by different components, let alone to aggregate them. In the past, users and system administrators might have been issued a login and username and granted total access, sometimes without an audit trail monitoring their use. Now, DHS will be able to more precisely grant access according to mission needs. Most importantly, by being deliberate in tagging and organizing the data in these advanced repositories, the agency can take on new kinds of predictive and anomaly analysis while complying with the law and subjecting its activities to robust oversight.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000200

It's no accident that DHS was able to so carefully engineer how data is handled. DHS has both a dedicated Privacy Office and an Office for Civil Rights and Civil Liberties, each staffed with experts to help navigate this complex terrain.[70] Each pilot is accompanied by a detailed privacy impact assessment released to the public in advance of its operation. DHS has provided public briefings on the pilots and allowed members of the public to ask questions about the initiatives. The privacy and civil liberties oversight officials not only approved the plan for the pilots, they also approve tools or widgets built in the future to increase their functionality. All of this helps drive improvements to DHS's mission while ensuring that privacy and civil liberties concerns are considered from the start.

Upholding our Privacy Values in Law Enforcement

Big data can be a powerful tool for law enforcement. Recently, advanced web tools developed by DARPA's Memex program have helped federal law enforcement make substantial progress in identifying human trafficking networks in the United States. These tools comb the "surface web" we all know, as well as "deep web" pages that are also public but not indexed by commonly used search engines. By allowing searches across a wide range of websites, the tools uncover a wealth of information that might otherwise be difficult or time-intensive to obtain. Possible trafficking rings can be identified and cross-referenced with existing law enforcement databases, helping police officers map connections between sex trafficking and other illegal activity. Already, the tools have helped detect trafficking networks originating in Asia and spreading to several U.S. cities. It's a powerful example of how big data can help protect some of the most vulnerable people in the world.

Big data technologies provide effective tools to law enforcement and other agencies that protect our security, but they also pose difficult questions about their appropriate uses. Blending multiple data sources can create a fuller picture of a suspect's activities around the time of a crime, but can also aid in the creation of suspect profiles that focus scrutiny on particular individuals with little or no human intervention. Pattern analysis can reveal how criminal organizations are structured or can be used to make predictions about possible future crimes. Gathering broad datasets can help catch criminals, but can also sweep up detailed personal information about people who are not subjects of an investigation. When it comes to law enforcement, we must be careful to ensure that big data technologies are used in ways that take into account the needs to protect public safety and fairly enforce the laws, as well as the civil liberties and legitimate privacy interests of citizens.

Big data will naturally—and appropriately—be used differently in national security. A powerful intelligence system that harnesses global data to identify terrorist networks, to

[70] For more information, see the Department of Homeland Security's Privacy Office website, http://www.dhs.gov/privacy, and Office for Civil Rights and Civil Liberties, http://www.dhs.gov/office-civil-rights-and-civil-liberties.

provide warning of impending attacks, and to prevent the proliferation of weapons of mass destruction will operate under different legal authorities and oversight and have different privacy protections than a law enforcement system that helps allocate police resources to neighborhoods where higher levels of crime are predicted. Even though the applications are different, there are nevertheless important similarities in how privacy and civil rights are maintained across law enforcement and intelligence contexts. Privacy and legal officials must certify use of a system in each case, minimization rules are often employed to reduce information held, and data-tagging techniques are used to control access.

New Tools and New Challenges

The use of new technologies, especially in law enforcement, has given rise to important Constitutional jurisprudence.[71] As Justice Alito observed in a 2013 Supreme Court case concerning police placement of a GPS tracker on a suspect's car without a court order: "[I]t is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?"[72] Alito noted further, "Something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both.)"[73]

The "tiny constable" has enormous implications. Ubiquitous surveillance—whether by GPS tracking, closed circuit TV, or virtually undetectable sensors—will increasingly figure in litigation about reasonable expectations of privacy and the proper uses and limits of law enforcement technology.

In recent decades, the cost of surveillance and the physical size of surveillance equipment have rapidly decreased. This has made it feasible for over 70 cities in the United States to install audio sensors that can pinpoint gunfire and rapidly dispatch police to a potential crime scene.[74] Given the speed of access and decreasing cost of storage, it has likewise become practical for even local police forces to actively collect and catalog data, like license plate and vehicle information, in real-time on a city-wide scale, and to also retain it for later use.[75]

The benefits of some of these technologies are tremendous. From finding missing persons to launching complex manhunts, the use of advanced surveillance technology by

[71] Most jurisprudence to date does not consider in their entirety big data technologies by the definition used in this report, but rather many of the advanced technologies, such as GPS trackers, that now play a crucial role in big data applications.
[72] *United States v. Jones*, 132 S.Ct. 945, 958 (2012) (Alito, J., concurring).
[73] Ibid at n.3.
[74] Over 70 cities in the U.S. use gunshot detection technology developed and provided by SST Solutions called ShotSpotter. For more information, please visit www.shotspotter.com.
[75] International Association of Chiefs of Police, *Privacy Impact Assessment Report for the Utilization of License Plate Readers*, September 2009, http://www.theiacp.org/Portals/0/pdfs/LPR_Privacy_Impact_Assessment.pdf.

federal, state, and local law enforcement can mean a faster and more effective response to criminal activity. It can also increase the chances that justice is reliably served in online crime, where criminals are among the earliest adopters of new technologies and law enforcement needs to have timely access to digital evidence.

Beyond surveillance, predictive technologies offer the potential for law enforcement to be better prepared to anticipate, intervene in, or outright prevent certain crimes. Some analytics software, such as one program in use by both the Los Angeles and Memphis police departments, employs predictive analytics to identify geographically-based "hotspots."[76] Many cities attribute meaningful declines in property crime to stepping up police patrols in "hotspot" areas.

Controversially, predictive analytics can now be applied to analyze a person's individual propensity to criminal activity.[77] In response to an epidemic of gang-related murders, the city of Chicago conducted a pilot that shifts the focus of predictive policing from geographical factors to identity. By drawing on police and other data and applying social network analysis, the Chicago police department assembled a list of roughly 400 individuals identified by certain factors as likely to be involved in violent crime. As a result, police have a heightened awareness of particular individuals that might reflect factors beyond charges and convictions that are part of the public record.[78]

Predictive analytics are also being used in other areas of criminal justice. In Philadelphia, police are using software designed to predict which parolees are more likely to commit a crime after release from prison and thus should have greater supervision.[79] The software uses about two dozen variables, including age, criminal history, and geographic location.

These new techniques have come with considerable controversy about how and when they should be deployed.[80] This technology can help more precisely allocate law enforcement and other public resources, which can lead to the prevention of harmful

[76] The National Institute of Justice, the Department of Justice's research, development, and evaluation agency, provides detailed information on the use of predictive policing at law enforcement agencies. For more information, visit www.nij.gov/topics/law-enforcement/strategies/predictive-policing.
[77] Andree G. Ferguson, "Big Data and Predictive Reasonable Suspicion," 163 *University of Pennsylvania Law Review*, April 2014, http://ssrn.com/abstract=2394683.
[78] The application of this particular predictive policing technology emerged out of a series of grants issued by the National Institute of Justice the Chicago Police Department, most recently involving Miles Wernick as technical investigator. For more information, see http://www.nij.gov/topics/law-enforcement/strategies/predictive-policing/Pages/research.aspx.
[79] For more information on government crime prediction using statistical methods, refer to Eric Holder, Mary Lou Leary, and Greg Ridgeway, "Predicting Recidivism Risk: New Tool in Philadelphia Shows Great Promise," *National Criminal Justice Reference Service*, February 2013, https://ncjrs.gov/pdffiles1/nij/240695.pdf.
[80] Controversial aspects of the Chicago pilot's methodology are captured by in Jay Stanley, "Chicago Police 'Heat List' Renews Old Fears About Government Flagging and Tagging," *American Civil Liberties Union*, February 2014, https://www.aclu.org/blog/technology-and-liberty/chicago-police-heat-list-renews-old-fears-about-government-flagging-and; Whet Moser, The Small Social Networks at the Heart of Chicago Violence," *Chicago Magazine,* December 9, 2013, http://www.chicagomag.com/city-life/December-2013/The-Small-Social-Networks-at-the-Heart-of-Chicago-Violence.

crimes. At the same time, our Constitution and Bill of Rights grant certain rights that must not be abridged.

Police departments' potential use of a new array of data and algorithms to try to predict criminal propensities and redirect police powers in advance of criminal activity has important consequences. It requires careful review of how we define "individualized suspicion," which is the constitutional predicate of surveillance and search.[81] The presence and persistence of authority, and the reasonable belief that one's activities, movements, and personal affiliations are being monitored by law enforcement, can have a chilling effect on rights of free speech and association. The next section considers where changes in technology introduce tension within particular areas of the law.

Implications of Big Data Technology for Privacy Law

Access to Data Held by Third Parties

Personal documents and records have evolved from paper kept in the home, to electronic files held on the hard drive of a computer in the home, to many different kinds of computer files kept both locally and in cloud repositories accessed across multiple devices within and outside the home. As remote processing and cloud storage technologies increasingly become the norm for personal computing and records management, we must take measure of the how the law accounts for these developments.

Whether an individual reasonably expects an act to be private has framed much of our thinking about what protections are deserved. As Justice Potter Stewart in the 1967 Katz majority opinion noted: "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection…But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[82]

Two later Supreme Court decisions further elaborated on how the Fourth Amendment applies to information that is shared with third parties. In *United States v. Miller*, in 1976, the Court found that the Fourth Amendment does not prohibit the government from obtaining "information revealed to a third-party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third-party will not be betrayed."[83] Three years later, the Supreme Court held in *Smith v. Maryland* that the telephone numbers a person dials are not protected by a reasonable expectation of privacy because the caller voluntarily conveys dialing information to the phone company. The Court again affirmed

[81] Though some argue big data analysis is merely a new way to expand the scope of what can be considered "suspicion," the program in question uses an algorithmic calculation heavily reliant on an individual's associations without other criminal pretext.
[82] *Katz v. United States*, 389 U.S. 347, 351-52 (1967).
[83] *United States v. Miller*, 425 U.S. 435, 443 (1976).

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000204

that it had "consistently . . . held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."[84]

Miller and *Smith* are often cited as the Supreme Court's foundational "third-party doctrine" cases. For decades, this doctrine has maintained that when an individual voluntarily shares information with third parties, like telephone companies, banks, or even other individuals, the government can acquire that information from the third-party absent a warrant without violating the individual's Fourth Amendment rights. Law enforcement continues to rely on the third-party doctrine to obtain information that can be critical in criminal and national security investigations that keep the American people safe, and federal courts continue to apply the doctrine to both tangible and electronic information in a wide variety of contexts.

Against this backdrop, Congress and state legislatures have enacted statutes that provide additional safeguards for certain types of information, such as the Privacy Act of 1974 protecting personal information held by the federal government; the Electronic Communications Privacy Act of 1986 protecting (among other things) stored electronic communications; and the Pen/Trap Act protecting (among other things) dialing information for phone calls. These legislative measures provide statutory protection in the absence of a strong Fourth Amendment right to protect records held by third parties.

In light of technological advances, especially the creation of exponentially more electronic records about personal interactions, some commentators have called for a reexamination of third-party doctrine.[85] In 2010, the Sixth Circuit Court of Appeals in *United States v. Warshak* held that a subscriber has a reasonable expectation of privacy in his or her email communications, "analogous to a letter or a phone call" and that the government may not compel a commercial internet service provider to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause.[86] In a recent Supreme Court case, Justice Sotomayor expressed the view in her concurring opinion that current practices around information disclosure to third parties are "ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[87]

Although we are not aware of any courts that have ruled that electronic content of communications can be accessed with less than a warrant, except with the consent of the user, since the *Warshak* case, the third-party doctrine has continued to apply to metada-

[84] *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979).
[85] Fred Cate and C. Ben Dutton, "Comments to the 60-Day Cybersecurity Review," *Center for Applied Cybersecurity Research*, March 2009, http://www.whitehouse.gov/files/documents/cyber/Center%20for%20Applied%20Cybersecurity%20Research%20-%20Cybersecurity%20Comments.Cate.pdf; Randy Reitman, "Deep Dive: Updating the Electronic Communications Privacy Act," *Electronic Frontier Foundation*, December 2012, https://www.eff.org/deeplinks/2012/12/deep-dive-updating-electronic-communications-privacy-act.
[86] *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).
[87] This assertion was not part of the Supreme Court's holding, but emphasizes the emerging discussion of third-party doctrine. *United States v. Jones*, 132 S.Ct. 945, 957 (2012) (Sotomayor, J., concurring).

ta of such communication and has been adapted and applied to cell-site location information and WiFi signals.[88]

This review of big data and privacy has cast even more light on the profound issues of privacy, market confidence, and rule of law raised by the manner in which the government compels the disclosure of electronic data. We will continually need to examine our laws and policy to keep pace with technology, and should consider how the protection of content data stored remotely, for instance with a cloud provider, should relate to the protection of content data stored in a home office or on a hard drive. This is true of emails, text messages, and other communications platforms, which over the past 30 years have become an important means of private personal correspondence, and are most often stored remotely.

Data and Metadata

The average American transacts with businesses in one form or another multiple times a day, from purchasing goods to uploading digital photos. These interactions create records, some of which, like pharmacy purchases, contain intimate personal information. In the course of ordinary activities, users also emit lots of "digital exhaust," or trace data, that leaves behind more fragmentary bits of information, such as the geographical coordinates of a cell phone transmission or an IP address in a server log. The advent of more powerful analytics, which can discern quite a bit from even small and disconnected pieces of data, raises the possibility that data gathered and held by third parties can be amalgamated and analyzed in ways that reveal even more information about individuals. What protections this material and the information derived from it merit is now a pressing question.

An equally profound question is whether certain types of data—specifically the "metadata" or transactions records about communications and documents, versus the content of those communications and documents—should be accorded stronger privacy protections than they are currently. "Metadata" is a term describing the character of the data itself. The classic example comes from telecommunications. The phone numbers originating and terminating a call, as metadata, are considered less revealing than the conversation itself and have been accorded different privacy protections. Today, with the advent of big data, both the premise and policy may not always be so straightforward.

[88] The doctrine has been adapted and applied to cell-site location information multiple times, most recently by the Fifth Circuit in *In re Application of the United States for Historical Cell Site Data,* 724 F.3d 600 (5th Cir. 2013) (finding cell site data may be obtained without a probable cause warrant); *United States v. Norris,* No. 2:11-CR-00188-KJM, 2013 WL 4737197 (E.D. Cal. Sept. 3, 2013) (finding defendant who hacked a private wireless network had no reasonable expectation of privacy in his transmissions over that network). Moreover, leading commentators have argued for the continuing vitality of the third-party doctrine in the modern era, including Professor Orin Kerr in Orin S. Kerr, "The Case for the Third-Party Doctrine," 107 *Michigan Law Review* 561 (2009), and Orin S. Kerr, "Defending the Third-Party Doctrine: A Response to Epstein and Murphy," 24 *Berkeley Technology Law Journal* 1229 (2009). *See also United States v. Perrine,* 518 F.3d 1196, 1204 (10th Cir. 2008); *United States v. Forrester,* 512 F.3d 500, 510 (9th Cir. 2008).

Experts seem divided on this issue, but those who argue that metadata today raises more sensitivities than in the past make a sufficiently compelling case to motivate review of policy on the matter. In the intelligence context, the President has already directed his Intelligence Advisory Board to consider the issue, and offer recommendations about the long-term viability of current assumptions about metadata and privacy. This review recommends that the government should broaden that examination beyond intelligence and consider the extent to which data and information should receive legal or other protections on the basis of how much it reveals about individuals.

Government Use of Commercial Data Services

Powerful private-sector profiling and data-mining technologies are not only used for commercial purposes. State, local, and federal agencies purchase access to many kinds of private databases for legitimate public uses, from land management to administering benefits. The sources of data that flow into these products are sometimes not publicly disclosed or may even be shielded as proprietary business information. Some legal scholars and privacy advocates have already raised concerns about the use of commercial data service products by the government, including law enforcement and intelligence agencies.[89]

The Department of the Treasury has been working to implement a program to help prevent waste, fraud, and abuse in federal spending by reducing the number of payments made to the wrong person, for the wrong amount, or without the proper paperwork. To provide federal agencies with a "one-stop-shop" to check various databases and identify ineligible recipients or prevent fraud or errors, the Treasury launched a "Do Not Pay" portal. While all of the current databases available on the portal are government databases, Treasury anticipates that commercial databases may eventually be useful as well.

To assist the Treasury, the Office of Management and Budget issued substantial guidance to ensure that individual privacy is fully protected in the program.[90] The guidance recognized that commercial data sources "may also present new or increased privacy risks, such as databases with inaccurate or out-of-date information." The guidelines require any commercial databases included in the Do Not Pay portal to be reviewed and approved following a 30-day period of public notice and comment. Among other requirements, the database must be relevant and necessary to the program, must be sufficiently accurate to ensure fairness to the individuals included in the database, and must

[89] See Robert Gellman and Pam Dixon, "Data Brokers and the Federal Government: A New Front in the Battle for Privacy Opens," *World Privacy Forum Report*, Oct. 30, 2013; Chris Hoofnagle, "Big Brother's Little Helpers: How Choicepoint and Other Commercial Data Brokers Collect, Process, and Package Your Data for Law Enforcement," 29 *North Carolina Journal of International Law and Commercial Regulation* 595 (2003); Jon Michaels, "All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror," 96 *California Law Review* 901 (2008).

[90] Office of Management and Budget memorandum M-13-20, *Protecting Privacy while Reducing Improper Payments with the Do Not Pay Initiative* (Aug. 13, 2013), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-20.pdf.

not contain information that describes how any individual exercises rights guaranteed by the First Amendment, unless use of the data is expressly authorized by statute.

Given the increasing range of sensitive information available about individuals through commercial sources, this guidance is a significant step to ensure privacy protections when private-sector data is used to inform government decision-making. Similar OMB guidance should be considered for a wider range of agencies and programs, so the protections Americans have come to expect from their government exist regardless of where data originates.

Insider Threat and Continuous Evaluation

The 2013 shooting at the Washington Navy Yard facility by a contract employee who held a secret security clearance despite a record of arrests and troubling behavior has added urgency to ongoing efforts to more frequently evaluate employees who hold special positions of public trust.[91] It was the latest in a string of troubling breaches and acts of violence by insiders who held security clearances, including Chelsea Manning's disclosures to WikiLeaks, the Fort Hood shooting by Major Nidal Hasan, and the most serious breach in the history of U.S. intelligence, the release of classified National Security Agency documents by Edward Snowden.

Federal government employees and contractors go through different levels of investigation, depending on the level of risk, sensitivity of their position, or their need to access sensitive facilities or systems. Currently, employees and contractors who hold "top secret" clearances are reinvestigated every five years, and those holding "secret" clearances every ten. These lengthy gaps do not allow agencies to discover new and noteworthy information about an employee in a timely manner.

Pilot programs have demonstrated the efficacy of using automated queries of appropriate official and commercial databases and social media to identify violations or irregularities, known as "derogatory information," that may call into question a person's suitability to continue serving in a sensitive position. The Department of Defense, for instance, recently conducted a pilot of what it calls the "Automated Continuous Evaluation System." The pilot examined a sample of 3,370 Army service members, civilian employees, and contractor personnel, and identified that 21.7 percent of the tested population had previously unreported derogatory information that had developed since the last investigation. For 99 individuals, the pilot surfaced serious financial, domestic abuse, drug abuse, or allegations of prostitution that resulted in the revocation or suspension of their clearances.[92]

---

[91] Department of Defense, *Security From Within: A Report of the Independent Review of the Washington Navy Yard Shooting*, November 2013, http://www.defense.gov/pubs/Independent-Review-of-the-WNY-Shooting-14-Nov-2013.pdf; Department of Defense, Under Secretary of Defense for Intelligence, *Internal Review of the Washington Navy Yard Shooting: A Report to the Secretary of Defense*, November, 2013, http://www.defense.gov/pubs/DoD-Internal-Review-of-the-WNY-Shooting-20-Nov-2013.pdf.

[92] Ibid.

The Administration recently released a review of suitability and security practices which called for expanding continuous evaluation capabilities across the federal government.[93] The Administration's report recommends adopting practices across all agencies and security levels, although the exact extent of the information that will be used in these programs, especially social media sources, is still being determined.

These reforms will create a fundamentally different process for granting and maintaining security clearances that stands to enhance our security and safety. As the Administration works to expand the use of continuous evaluation across federal agencies, the privacy of employees and contractors will have to be carefully considered. The ability to refute or correct errant information that triggers reviews must be built into the process for appealing denials or revocations of clearance. We must ensure the big data analytics powering continuous evaluation are used in ways that protect the public as well as the civil liberties and privacy rights of those who serve on their behalf.

Conclusion

When wrestling with the vexing issues big data raises in the public sector, it can be easy to lose sight of the tremendous opportunities these technologies offer to improve public services, grow the economy, and improve the health and safety of our communities. These opportunities are real and must be kept at the center of the conversation about big data.

Big data holds enormous power to make the provision of services more efficient across the entire spectrum of government activity and to detect fraud, waste, and abuse at higher rates. Big data can also help create entirely new forms of value. New sources of precise data about weather patterns can provide meaningful scientific insights about climate change, while the ability to understand energy and natural resource use can lead to greater efficiency and reduce overall consumption. The movement, storage, and analysis of data all stands to grow more efficient and powerful. The Department of Energy, for instance, is working to develop computer memory and supercomputing frameworks that will in turn yield entire new classes of analytics tools, driving the big data revolution faster still.

There is virtually no part of government that does not stand serve citizens better. The big data revolution will take hold across the entire government, not merely in departments and agencies that already have missions involving science and technology. Those departments and agencies that have not historically made wide use of advanced data analytics have perhaps the most significant opportunity to harness big data to benefit the citizens they serve.

[93] Performance Accountability Council, *Suitability and Security Processes Review, Report to the President*, February 2014, http://www.whitehouse.gov/sites/default/files/omb/reports/suitability-and-security-process-review-report.pdf.

The power of big data does not stop at the federal level. It will be equally transformational for states and municipalities. Cities and towns have emerged as some of the most innovative users of big data to improve service delivery. The federal agencies and programs that provide grants and technical assistance to cities, towns, and counties should promote the use of these transformational municipal technologies to the greatest extent possible, replicating the successes pioneered by New York City's Office of Data Analytics and Chicago's Smart Data project.

Making big data work for the public good also takes people with skills that are in short supply and high demand. A recent assessment of the ability of the public and nonprofit sectors to attract and retain technical talent sounded a strong note of alarm.[94] Though there are many young technologists who care deeply about public service and would welcome the chance to work in government, private sector opportunities are so comparatively attractive that these technologists tend to use their skills applying big data in the marketplace rather than the public sector. This means that alongside investments in technology, the federal government must create a more attractive working culture for technologists and remove hiring barriers that keep out the very experts whose creativity and technical imagination is paramount to realizing the full potential of big data in government.

[94] Ford and MacArthur Foundation, *A Future or Failure?: The Flow of Technology Talent into Government and Civil Society*, December 2013, http://www.fordfoundation.org/pdfs/news/afutureoffailure.pdf.

IV. Private Sector Management of Data

Big data means big things all across the global economy. In the next two years, the big data technologies and services market is projected to continue its rapid ascent.[95] This chapter considers how big data is shaping the products and services available to consumers and businesses, and highlights some of the challenges that arise when consumers have little insight into how information about them is being collected, analyzed, and used.

The Obama Administration has supported America's leadership position in using big data to spark innovation, productivity, and value in the private sector. However, the near-continuous collection, transfer, and re-purposing of information in a big data world also raises important questions about individual control over personal data and the risks of its use to exploit vulnerable populations. While big data will be a powerful engine for economic growth and innovation, there remains the potential for a disquieting asymmetry between consumers and the companies that control information about them.

Big Data Benefits for Enterprise and Consumer

Big data is creating value for both companies and consumers. The benefits of big data can be felt across a range of sectors, in both large and small firms, as access to data and the tools for processing it are further democratized. In large enterprises, there are several drivers of investment in big data technologies: the ability to analyze operational and transactional data, to glean insights into the behavior of online customers, to bring new and exceedingly complex products to market, and to derive deeper understanding from machines and devices within organizations.

Technology companies are using big data to analyze millions of voice samples to deliver more reliable and accurate voice interfaces. Banks are using big data techniques to improve fraud detection. Health care providers are leveraging more detailed data to improve patient treatment. Big data is being used by manufacturers to improve warranty management and equipment monitoring, as well as to optimize the logistics of getting their products to market. Retailers are harnessing a wide range of customer interactions, both online and offline, in order to provide more tailored recommendations and optimal pricing.[96]

For consumers, big data is fueling an expansion of products and services that impact their daily lives. It is enabling cybersecurity experts to protect systems—from credit card

[95] Dan Vesset and Henry Morris, *Unlocking the Business Value of Big Data: Infosys BigDataEdge*, IDC, 2013, http://www.infosys.com/bigdataedge/resources/Documents/unlocking-business-value.pdf
[96] Ibid.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000211

readers to electricity grids—by harnessing vast amounts of network and application data and using it to identify anomalies and threats.[97] It is also enabling some of the nearly 29 percent of Americans who are "unbanked" or "underbanked" to qualify for a line of credit by using a wider range of non-traditional information—such as rent payments, utilities, mobile-phone subscriptions, insurance, child care, and tuition—to establish creditworthiness.[98]

These new technologies are sensor-rich and embedded in networks. Lighting infrastructure can now detect sound, speed, temperature, and even carbon monoxide levels, and will draw data from car parks, schools, and along public streets to improve energy efficiency and public safety. Vehicles record and report a spectrum of driving and usage data that will pave the way for advanced transportation systems and improved safety. Home appliances can now tell us when to dim our lights from a thousand miles away. These are the kinds of changes that policies must accommodate. The Federal Trade Commission has already begun working to frame the policy questions raised by the Internet of Things, building on their long history of protecting consumers as new technologies come online.

The next sections discuss the online advertising and data services industries, each of which have significant histories using large datasets within long-established regulatory frameworks.

The Advertising-Supported Ecosystem

Since the earliest days of the commercial web, online advertising has been a vital driver of the growth of the Internet. One study estimated that the ad-supported Internet sustains millions of jobs in the United States and that the interactive marketing industry contributes billions to the U.S. economy each year.[99] This is a natural industry for big data to take root in and flourish. Increasingly precise data about consumers—where they are, what devices they use, and literally hundreds of categories of their interests—coupled with powerful analysis have enabled advertisers to more efficiently reach customers. Expensive television slots or full-page national magazine ads seem crude compared to the precisely segmented and instantaneously measured online ad marketplace. One study suggests that advertisers are willing to pay a premium of between 60 and 200 percent for online targeted advertising.[100]

---

[97] Centre for Information Policy Leadership, *Big Data and Analytics: Seeking Foundations for Effective Privacy Guidance*, February 2013, p. 3-4, http://www.hunton.com/files/Uploads/Documents/News_files/Big_Data_and_Analytics_February_2013.pdf.
[98] FDIC, *2011 FDIC National Survey of Unbanked and Underbanked Households*, 2012, http://www.fdic.gov/householdsurvey/2012_unbankedreport_execsumm.pdf.
[99] John Deighton and Leora Kornfeld, *Economic Value of the Advertising-Supported Internet Ecosystem*, Interactive Advertising Bureau, 2012, http://www.iab.net/economicvalue.
[100] J. Howard Beales and Jeffrey Eisenach, *An Empirical Analysis Of The Value Of Information Sharing in the Market for Online Content*, Navigant Economics, 2014, https://www.aboutads.info/resource/fullvalueinfostudy.pdf.

Consumers are reaping the benefits of a robust digital ecosystem that offers a broad array of free content, products, and services. The Internet also puts national or international advertising within reach of not just major companies, but mom-and-pop stores and fledgling brands. As a result, consumers are getting better, more useful ads from—and access to—a wider range of businesses, in a marketplace that is ultimately more competitive and innovative.

Many different actors play a role in making this ecosystem work, including the consumer, the companies they engage with directly, and an array of other entities that provide services like analytics or security, or derive and share data. Standing between the publisher of the website a user visits and the advertiser paying for the ad displayed on the user's page are a dizzying array of other companies. Advertising networks and ad exchanges facilitate transactions between the publishers and the advertisers. Ad content and campaigns are created and placed by agencies, optimizers, and media planners. Ad performance is measured and analyzed by yet another set of specialized companies.[101]

In general, the companies with which a consumer engages directly—news websites, social media, or online or offline retailers—are called "first parties," as they collect information directly from the consumer. But as described above, a broad range of companies may gather information indirectly because they are in the business of processing data on behalf of the first-party company or may have access to data—most often in an aggregated or de-identified form—as part of a different business relationship. These "third-party" companies include the many "middle players" in the digital ecosystem, as well as financial transaction companies that handle payment processing, companies that fill orders, and others. The first parties may use the data themselves, or resell it to others to develop advertising profiles or for other uses. Users, more often than not, do not understand the degree to which they are a commodity in each level of this marketplace.

The Consumer and the Challenge of Transparency

For well over a decade, the online advertising industry has worked to provide consumers choice and transparency in a self-regulatory framework. Starting at the edges of the ecosystem, where the consumer can identify the website publisher and the advertiser whose ads are served, privacy policies and other forms of notice have served to inform consumers how their information is used. Under this self-regulatory regime, companies agree to a set of principles when engaged in "behavioral" or multi-site advertising where they collect information about user activities over time and across different websites in order to infer user preferences. These principles include requiring notice to the user about their data collection practices; providing options for users to opt out of some forms of tracking; limiting the use of sensitive information, such as children's information or medical or financial data; and a requirement to delete or de-identify data.

[101] LUMA Partners, "Display Lumascape," http://www.lumapartners.com/lumascapes/display-ad-tech-lumascape.

Technologies to improve transparency and privacy choices online have been slow to develop, and for many reasons have not been used widely by consumers. For example, under the self-regulatory regime adopted by advertisers and ad networks, many online behavioral ads include a standardized icon that indicates information is being collected for purposes of behavioral ad targeting, and links to a page where the consumer can opt-out of such collection.[102] According to the online advertising industry, this icon has appeared on ads billions of times, but only a tiny fraction of users utilize this feature or understand its meaning. Advertising networks operated by some of the largest online companies have also offered users detailed dashboards for seeing the basis on which they are targeted for advertising and giving them the ability to opt out.[103] These, too, have received little consumer attention. There are many theories about why users do not make use of these privacy features. Some assert that the privacy tools are hidden or too difficult for most users to navigate.[104] Others argue that users have "privacy fatigue" from the barrage of privacy policies and settings they must wade through to simply use a service.[105] It is also possible that most of the public is not very bothered by personalized ads when they enjoy a robust selection of free content, products, and services.

As we look ahead at the rising trajectory of information collection across many sources and the ability to target advertising with greater precision, the challenge to consumer transparency and meaningful choice deepens. Even employing relatively straightforward technical measures that would provide consumers with greater control over how data flows between their web browser and the servers of the webpages they visit for advertising purposes—what has become known as the "Do Not Track" browser setting—can be problematic because anti-fraud and online security activities now rely on these same data flows to track and prevent malicious activity.

The Challenge with Do Not Track

The idea behind a Do Not Track privacy setting is to provide an easy-to-use solution that empowers consumers to limit the tracking of their activities across websites. Some browsers provide a kind of Do Not Track capability by blocking third-party cookies by default, or allowing consumers to choose to do so. Some browsers also allow consumers to send a signal instructing services not to track them. While Do Not Track technology is fairly straightforward, attempts to build consensus around the policy requirements for the

[102] For information about the industry's opt-out program, see http://www.youradchoices.com/..
[103] See Google Ads Settings at http://www.google.com/settings/ads; Yahoo! Ads Interest Manager at https://info.yahoo.com/privacy/us/yahoo/opt_out/targeting/; Microsoft at http://choice.microsoft.com/en-us/opt-out.
[104] See, e.g., Pedro Leon, Blase Ur, Richard Shay, Yang Wang, Rebecca Balebako, and Lorrie Cranor, "Why Johnny Can't Opt Out: a Usability Evaluation of Tools to Limit Online Behavioral Advertising," Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, 2012, http://dl.acm.org/citation.cfm?doid=2207676.2207759.
[105] See, e.g., Sarah Kidner, "Privacy Fatigue Hits Facebook: Have You Updated Your Settings?," *Which? Conversation*, Oct. 18, 2011, http://conversation.which.co.uk/technology/facebook-privacy-settings-privacy-fatigue/; Aleecia McDonald and Lorrie Cranor, "The Cost of Reading Privacy Policies," *4 Information Society: A Journal of Law and Policy for the Information Society*, 543, 544, 564 (2008).

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000214

websites receiving visits by users with Do Not Track technology enabled have proven far more difficult. Some websites voluntarily agreed to honor the wishes of visitors with Do Not Track indicators, but others have not, or have adopted policies that still permit partial tracking—muddling expectations for consumers and frustrating privacy advocates.

A working group of the World Wide Web Consortium, which included technologists, developers, advertising industry representatives, and privacy advocates, worked to craft a standard for implementation of the Do Not Track signal for more than three years. Recently, the working group released a final candidate for a technical Do Not Track specification, which will now go to the larger community to consider for approval.

In the meantime, the European Union amended its E-Privacy Directive in 2009 to require user consent to the use of cookies and other online tracking devices, unless they are "strictly necessary for delivery of a service requested by the user," such as an online shopping cart. Compliance with the Directive has been uneven, although many European company websites now obtain a one-time explicit consent for the use of cookies—a solution that is widely acknowledged as clunky and which has been criticized in some circles as not providing the user the meaningful choice about privacy first envisioned by the directive.

While imperfect, these efforts reflect a growing interest in creating a technological means to allow individuals to control how commercial entities collect and use information about them.

The Data Services Sector

Alongside firms that focus primarily on online advertising are a related set of businesses that offer broader services drawn from information about consumers, public records, and other data sets. The "data services" sector—sometimes called "data brokers"— encompasses a class of businesses that collect data across many sources, aggregate and analyze it, and then share that information, or information derived from it. Typically, these companies have no direct relationship with the consumers whose information they collect. Instead, they offer services to other businesses or government agencies, including marketing products, verifying an individual's identity, providing "people search" services, or detecting fraud. Some of these companies also have a specific line of business as "consumer reporting agencies," which provide reports for purposes of credit applications, insurance, employment, or health care reports.

From a regulatory standpoint, data services fall into three broad categories:

1. Consumer reporting functions regulated under the Fair Credit Reporting Act, which generally keep the data, analysis, and reporting collected and used for these purposes in a separate system and under specific compliance rules apart from the rest of their data services operations.
2. Risk mitigation services such as identity verification, fraud detection and people-search or look up services; and
3. Marketing services to identify potential customers, enhance ad targeting information, and other advertising-related services.

The Fair Credit Reporting Act, as discussed in Chapter 2, provides affirmative rights to consumers. Consumer reporting agencies that provide reports for determining eligibility for credit, insurance, or employment, are required under the Fair Credit Reporting Act or the Equal Credit Opportunity Act to inform consumers when an adverse action, such as a denial or higher cost of credit, is taken against them based on a report. By law, consumers also have a right to know what is in their file, what their credit score is, and how to correct or delete inaccurate information.[106] The Fair Credit Reporting Act mandates that credit reporting agencies remove negative information after certain periods, such that late payments and tax liens are deleted from a consumer's file after seven years and bankruptcies after ten. Certain types of information—such as race, gender and religion—may not be used as factors to determine creditworthiness.

These statutory rights do not exist for risk mitigation or marketing services. As a matter of practice, data services companies may provide access and correction mechanisms to consumers for the information used in identity verification. In the context of marketing services, some companies permit consumers to opt-out of having their personal information used in marketing services.

Unregulated Data Broker Services

To assist marketers, data brokers can provide a profile of a consumer who may interact with a brand or seek services across many different channels, from online web presence to social media to mobile engagement. Data brokers aggregate purchase patterns, activities on a website, mobile, social media, ad network interactions, or direct customer support, and then further "enhance" it with information from public records or other commercially available sources. That information is used to develop a profile of a customer, whose activities or engagements can then be monitored to help the marketer pinpoint the message to send and the right moment to send it.

These profiles can be exceptionally detailed, containing upwards of thousands of pieces of data. Some large data firms have profiles on hundreds of millions of consumers. They algorithmically analyze this information to segment customers into precise categories, often with illustrative names that help their business customers identify populations for targeted advertising. Some of these categories include "Ethnic Second-City Strugglers," "Retiring on Empty: Singles," "Tough Start: Young Single Parents," "Credit Crunched: City Families," and "Rural and Barely Making It."[107] These products include factual information about individuals as well as "modeled" elements inferred from other data. Data brokers then sell "original lists" of consumers who fit particular criteria. They may also offer a "data append" service whereby companies can buy additional data about particu-

[106] Federal Trade Commission, "A Summary of Your Rights Under the Fair Credit Reporting Act," http://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf.
[107] U.S. Senate Committee on Commerce, Science & Transportation, Majority Staff, "A Review of the Data Broker Industry: Collection, Use, and Sale of Consumer Data for Marketing Purposes," p. ii, December 18, 2013.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000216

lar customers to help them build out more complete profiles of individuals on whom they maintain information.[108]

What is a Credit Reporting Agency?

Since the 1950s, credit reporting companies–now known as "consumer reporting agencies"–have collected information and provided reports on individuals that are used to decide eligibility for credit, insurance or a job. In one typical scenario, a credit reporting agency collects information about an individual's credit history, such as whether they pay their bills on time, how many and what kind of accounts they hold and for how long, whether they've been the subject of collection actions, and whether they have outstanding debt. The agency then uses a statistical program to compare this information to the loan repayment history of consumers with similar profiles and assigns a score that reflects the individual's creditworthiness: how likely it is that he or she will repay a loan and make timely payments. This score facilitates consumers' ability to buy a home or car or otherwise engage in the economy by becoming a basis for creditors' decisions about whether to provide credit to the consumer, and on what terms.

While this precise profiling of consumer attributes yields benefits, it also represents a powerful capacity on the part of the private sector to collect information and use that information to algorithmically profile an individual, possibly without the individual's knowledge or consent. This application of big data technology, if used improperly, irresponsibly, or nefariously, could have significant ramifications for targeted individuals. In its 2012 Privacy Report, the Federal Trade Commission recommended that data brokers become more transparent in the services that are not already covered by the Fair Credit Report Act, and provide consumers with reasonable access to and choices about data maintained about them, in proportion to the sensitivity of data and how it is used.[109]

Algorithms, Alternative Scoring and the Specter of Discrimination

The business models and big data strategies now being built around the collection and use of consumer data, particularly among the "third-party" data services companies, raise important questions about how to ensure transparency and accountability in these practices. Powerful algorithms can unlock value in the vast troves of information available to businesses, and can help empower consumers, but also raise the potential of encoding discrimination in automated decisions. Fueled by greater access to data and powerful analytics, there are now a host of products that "score" individuals beyond the scope of traditional credit scores, which are regulated by law.[110] These products attempt to statistically characterize everything from a consumer's ability to pay to whether, on the basis of their social media posts, they are a "social influencer" or "socially influenced."

[108] Ibid at 22.
[109] Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Business and Consumers*, 2012, http://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers.
[110] Frank Pasquale, *The Black Box Society: The Secret Algorithm Behind Money and Information*, (Harvard University Press, 2014).

While these scores may be generated for marketing purposes, they can also in practice be used similarly to regulated credit scores in ways that influence an individuals' opportunities to find housing, forecast their job security, or estimate their health, outside of the protections of the Fair Credit Reporting Act or Equal Credit Opportunity Act.[111] Details on what types of data are included in these scores and the algorithms used for assigning attributes to an individual are held closely by companies and largely invisible to consumers. That means there is often no meaningful avenue for either identifying harms or holding any entity in the decision-making chain accountable.

Because of this lack of transparency and accountability, individuals have little recourse to understand or contest the information that has been gathered about them or what that data, after analysis, suggests.[112] Nor is there an industry-wide portal for consumers to communicate with data services companies, as the online advertising industry voluntarily provides and the Fair Credit Reporting Act requires for regulated entities. This can be particularly harmful to victims of identity theft who have ongoing errors or omissions impacting their scores and, as a result, their ability to engage in commerce.

What is an algorithm?

In simple terms, an algorithm is defined by a sequence of steps and instructions that can be applied to data. Algorithms generate categories for filtering information, operate on data, look for patterns and relationships, or generally assist in the analysis of information. The steps taken by an algorithm are informed by the author's knowledge, motives, biases, and desired outcomes. The output of an algorithm may not reveal any of those elements, nor may it reveal the probability of a mistaken outcome, arbitrary choice, or the degree of uncertainty in the judgment it produces. So-called "learning algorithms" which underpin everything from recommendation engines to content filters evolve with the datasets that run through them, assigning different weights to each variable. The final computer-generated product or decision—used for everything from predicting behavior to denying opportunity—can mask prejudices while maintaining a patina of scientific objectivity.

For all of these reasons, the civil rights community is concerned that such algorithmic decisions raise the specter of "redlining" in the digital economy—the potential to discriminate against the most vulnerable classes of our society under the guise of neutral algorithms.[113] Recently, some offline retailers were found to be using an algorithm that generated different discounts for the same product to people based on where they believed

[111] Pam Dixon and Robert Gellman, "The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future," *World Privacy Forum*, April 2014, http://www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF_Scoring_of_America_April2014_fs.pdf.
[112] The Government Accounting Office conducted a gap analysis of privacy laws and regulation in its September 2013 report on Information Resellers. See GAO, *Information Resellers: Consumer Privacy Framework Needs to Reflect Changes in Technology and the Marketplace*, GAO-13-663, 2013, http://www.gao.gov/assets/660/658151.pdf.
[113] The Leadership Conference on Civil and Human Rights, "Civil Rights Principles for the Era of Big Data," http://www.civilrights.org/press/2014/civil-rights-principles-big-data.html.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000218

the customer was located. While it may be that the price differences were driven by the lack of competition in certain neighborhoods, in practice, people in higher-income areas received higher discounts than people in lower-income areas.[114]

There are perfectly legitimate reasons to offer different prices for the same products in different places. But the ability to segment the population and to stratify consumer experiences so seamlessly as to be almost undetectable demands greater review, especially when it comes to the practice of differential pricing and other potentially discriminatory practices. It will also be important to examine how algorithmically-driven decisions might exacerbate existing socio-economic disparities beyond the pricing of goods and services, including in education and workforce settings.

Conclusion

The advertising-supported Internet creates enormous value for consumers by providing access to useful services, news, and entertainment at no financial cost. The ability to more precisely target advertisements is of enormous value to companies, which can efficiently reach audiences that are more likely to purchase their goods and services. However, private-sector uses of big data must ensure vulnerable classes are not unfairly targeted. The increasing use of algorithms to make eligibility decisions must be carefully monitored for potential discriminatory outcomes for disadvantaged groups, even absent discriminatory intent. The Federal Trade Commission should be commended for their continued engagement with industry and the public on this complex topic and should continue its plans to focus further attention on emerging practices in the data broker industry. We look forward to their forthcoming report on this important topic. Additional work should be done to identify practical ways of increasing consumer access to information about unregulated consumer scoring, with particular emphasis on the ability to correct or suppress inaccurate information. Likewise, additional research in measuring adverse outcomes due to the use of scores or algorithms is needed to understand the impacts these tools are having and will have in both the private and public sector as their use grows.

[114] Jennifer Valentino-Devries and Jeremy Singer-Vine, "Websites Vary Prices, Deals Based on Users' Information," *The Wall Street Journal*, December 24, 2012, http://online.wsj.com/news/articles/SB10001424127887323777204578189391813881534.

V. Toward a Policy Framework for Big Data

In what feels like the blink of an eye, the information age has fundamentally reconfigured how data affects individual lives and the broader economy. More than 6,000 data centers dot the globe. International data flows are continuous and multidirectional. To a greater degree than ever before, this data is being harnessed by businesses, governments, and entrepreneurs to improve the services they deliver and enhance how people live and work.

Big data applications create social and economic value on a scale that, collectively, is of strategic importance for the nation. Technological innovation is the animating force of the American economy. In the years to come, big data will foster significant productivity gains in industry and manufacturing, further accelerating the integration of the industrial and information economies.

Government should support the development of big data technologies with the full suite of policy instruments in its toolkit. Agencies must continue advancing the Administration's Open Data initiative. The federal government should also invest in research and development to support big data technologies, especially as they apply to education, health care, and energy. As the preceding chapters have documented, adjusting existing policies will make possible certain new applications of big data that are clearly in the public interest, particularly in health care. The policy framework for big data will require cooperation between the public and private sectors to accelerate the revolution that is underway and identify barriers that ought to be removed for innovations driven by big data to flourish.

Like other transformative factors of production, big data generates value differently for individuals, organizations, and society. While many applications of big data are unequivocally beneficial, some of its uses impact privacy and other core values of fairness, equity, and autonomy.

Big data technologies enable data collection that is more ubiquitous, invasive, and valuable. This new cache of collected and derived data is of huge potential benefit but is also unevenly regulated. Certain private and public institutions have access to more data and more resources to compute it, potentially heightening asymmetries between institutions and individuals.

It is the responsibility of government to ensure that transformative technologies are used fairly and employed in all areas where they can achieve public good. Four areas in particular emerge as places for further policy exploration:

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000220

1. How government can harness big data for the public good while guarding against unacceptable uses against citizens;
2. The extent to which big data alters the consumer landscape in ways that implicate core values;
3. How to protect citizens from new forms of discrimination that may be enabled by big data technologies; and
4. How big data affects the core tenet of modern privacy protection, the notice and consent framework that has been in wide use since the 1970s.

Big Data and the Citizen

Big data will enhance how the government administers public services and enable it to create whole new kinds of value. But big data tools also unquestionably increase the potential of government power to accrue unchecked. Local police departments now have access to surveillance tools more powerful than those used by superpowers during the Cold War. The new means of surveillance that in Justice Alito's evocative analogy deploy "tiny constables" to all areas of life, together with the ways citizens can be profiled by algorithms that redirect police powers, raise many questions about big data's implications for First Amendment rights of free speech and free association.

Many of the laws governing law enforcement access to electronic information were passed by Congress at a time when private papers were largely stored in the home. The Stored Communications Act, which is part of the Electronic Communications Privacy Act (ECPA), articulates the rules for obtaining the content of electronic communications, including email and cloud services. ECPA was originally passed in 1986. It has served to protect the privacy of individuals' stored communications. But with time, some of the lines drawn by the statute have become outdated and no longer reflect ways in which we use technology today. In considering how to update the Act, there are a variety of interests at stake, including privacy interests and the need for law enforcement and civil enforcement agencies to protect public safety and enforce criminal and civil law. Email, text messaging, and other private digital communications have become the principal means of personal correspondence and the cloud is increasingly used to store individuals' files. They should receive commensurate protections.

Similarly, many protections afforded to metadata were calibrated for a time that predated the rise of personal computers, the Internet, mobile phones, and cloud computing. No one imagined then that the traces of digital data left today as a matter of routine can be reassembled to reveal intimate personal details. Today, most law enforcement uses of metadata are still rooted in the "small data" world, such as identifying phone numbers called by a criminal suspect. In the future, metadata that is part of the "big data" world will be increasingly relevant to investigations, raising the question of what protections it should be granted. While today, the content of communications, whether written or verbal, generally receives a high level of legal protection, the level of protection afforded to metadata is less so.

Although the use of big data technologies by the government raises profound issues of how government power should be regulated, big data technologies also hold within them solutions that can enhance accountability, privacy, and the rights of citizens. These include sophisticated methods of tagging data by the authorities under which it was collected or generated; purpose- and user-based access restrictions on this data; tracking which users access what data for what purpose; and algorithms that alert supervisors to possible abuses. All of these methods are being employed in parts of the federal government today to protect the rights of citizens and regulate how big data technologies are used, and more agencies should put them to use. Responsibly employed, big data could lead to an aggregate increase in actual protections for the civil liberties and civil rights afforded of citizens, as well as drive transformation improvements in the provision of public services.

Big Data and the Consumer

The technologies of collection and analysis that fuel big data are being used in every sector of society and the economy. Many of them are trained squarely on people as consumers. One of the most intensely discussed of big data analytics to date has been in the online advertising industry, where it is used to serve customized ads as people browse the web or travel around town with their mobile phone. But the information collected and the uses to which it is put are far broader and quickly changing, with data derived from the real world increasingly being combined with data drawn from online activity.

The end result is a massive increase in the amount of intimate information compiled about individuals. This information is highly valuable to businesses of all kinds. It is bought, bartered, traded, and sold. An entire industry now exists to commoditize the conclusions drawn from that data. Products sold on the market today include dozens of consumer scores on particular individuals that describe attributes, propensities, degrees of social influence over others, financial habits, household wealth, and even suitability as a tenant, job security, and frailty. While some of these scoring efforts are highly regulated, other uses of data are not.

There are enormous benefits associated with the rise of profiling and targeted advertising and the ways consumers can be tracked and offered services as they move through the online and physical world. Advertising and marketing effectively subsidize many free goods on the Internet, fueling an entire industry in software and consumer apps. As one person pointedly remarked during this review, “We don’t like putting a quarter into the machine to go do a web search.”

Data collection is also vital to securely verify identity online. The data services and financial industries have gone to extraordinary lengths to enable individuals to conduct secure transactions from computers and mobile devices. The same verification technologies that make transaction in the private sector possible also enable citizens to securely in-

teract with the government online, opening a new universe of public services, all accessible from an arm chair.

But there are also costs to organizing the provision of commercial services in this way. Amalgamating so much information about consumers makes data breaches more consequential, highlighting the need for federal data breach legislation to replace a confusing patchwork of state standards. The sheer number of participants in this new, interconnected ecosystem of data collection, storage, aggregation, transfer, and sale can disadvantage consumers. The average consumer is unlikely to be aware of the range of data being collected or held or even to know who holds it; will have few opportunities to engage over the scope or accuracy of data being held about them; and may have limited insight into how this information feeds into algorithms that make decisions about their consumer experience or market access.

When considering what policies will allow big data to flourish in the consumer context, a crucial distinction must be drawn around the ways this collected information gets used. It is one thing for big data to segment consumers for marketing purposes, thereby providing more tailored opportunities to purchase goods and services. It is another, arguably far more serious, matter if this information comes to figure in decisions about a consumer's eligibility for—or the conditions for the provision of—employment, housing, health care, credit, or education.

Big Data and Discrimination

In addition to creating tremendous social good, big data in the hands of government and the private sector can cause many kinds of harms. These harms range from tangible and material harms, such as financial loss, to less tangible harms, such as intrusion into private life and reputational damage. An important conclusion of this study is that big data technologies can cause societal harms beyond damages to privacy, such as discrimination against individuals and groups. This discrimination can be the inadvertent outcome of the way big data technologies are structured and used. It can also be the result of intent to prey on vulnerable classes.

An illustrative example of how one organization ensured that a big data technology did not inadvertently discriminate comes from Boston, where the city developed an experimental app in partnership with the Mayor's Office of New Urban Mechanics.[115] Street Bump is a mobile application that uses a smartphone's accelerometer and GPS feed to collect data about road condition, including potholes, and report them to the city's Public Works Department. It is a marvelous example of how cities are creatively using crowdsourcing to improve service delivery. But the Street Bump team also identified a potential problem with deploying the app to the public. Because the poor and the elderly are less likely to carry smartphones or download the Street Bump app, its release could

[115] See New Urban Mechanics, http://www.newurbanmechanics.org/. All information about Street Bump comes from its former project manager James Solomon, who was interviewed by officials from the office of the White House Chief Technology Officer.

have the effect of systematically directing city services to wealthier neighborhoods populated by smartphone owners.

To its credit, the city of Boston and the StreetBump developers figured this out before launching the app. They first deployed it to city-road inspectors, who service all parts of the city equally; the public now provides additional supporting data. It took foresight to prevent an unequal outcome, and the results were worth it. The Street Bump app has to date recorded 36,992 "bumps," helping Boston identify road castings like manholes and utility covers, not potholes, as the biggest obstacle for drivers.

More serious cases of potential discrimination occur when individuals interact with complex databases as they verify their identity. People who have multiple surnames and women who change their names when they marry typically encounter higher rates of error. This has also been true, for example, in the E-verify program, a database run jointly by the Department of Homeland Security and the Social Security Administration, which has long been a concern for civil rights advocates.

E-verify provides employers the ability to confirm the eligibility of newly hired employees to work legally in the United States. Especially given the number of queries the system processes and the volume of information it amalgamates from different sources that are themselves constantly changing, the overwhelming majority of results returned by E-verify are timely and accurate, giving employers certainty that people they hire are authorized to work in the United States. Periodic evaluations to improve the performance of E-verify have nonetheless revealed different groups receive initial verifications at different rates. A 2009 evaluation found the rate at which U.S. citizen have their authorization to work be initially erroneously unconfirmed by the system was 0.3 percent, compared to 2.1 percent for non-citizens. However, after a few days many of these workers' status was confirmed.[116]

The Department of Homeland Security and Social Security Administration have focused great attention on addressing this issue. A more recent evaluation of the program found many more people were able to verify their work status more quickly and with lower rates of error. Over five years, the rates of initial mismatch fell by 60 percent for U.S. citizens and 30 percent for non-citizens.[117] Left unresolved, technical issues like this could create higher barriers to employment or other critical needs for certain individuals and groups, making imperative the importance of accuracy, transparency, and redress in big data systems.

---

[116] Westat Corporation, *Findings of the E-Verify Program Evaluation*, December 2009, Report Submitted to Department of Homeland Security, http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

[117] Westat Corporation. *Evaluation of the Accuracy of E-Verify Findings*, July 2012, Report Submitted to Department of Homeland Security, http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Everify%20Studies/Evaluation%20of%20the%20Accuracy%20of%20EVerify%20Findings.pdf.

These two examples of inadvertent discrimination illustrate why it is important to monitor outcomes when big data technologies are applied even in instances where discriminatory intent is not present and where one might not anticipate an inequitable impact. There is, however, a whole other class that merits concern—the use of big data for deliberate discrimination.

We have taken considerable steps as a society to mandate fairness in specific domains, including employment, credit, insurance, health, housing, and education. Existing legislative and regulatory protections govern how personal data can be used in each of these contexts. Though predictive algorithms are permitted to be used in certain ways, the data that goes into them and the decisions made with their assistance are subject to some degree of transparency, correction, and means of redress. For important decisions like employment, credit, and insurance, consumers have a right to learn why a decision was made against them and what information was used to make it, and to correct the underlying information if it is in error.

These protections exist because of the United States' long history of discrimination. Since the early 20th century, banks and lenders have used location data to make assumptions about individuals. It was not until the Home Mortgage Disclosure Act was signed into law in 1975 that denying granting a person a loan on the basis of what neighborhood they live in rather than their personal capacity for credit became far less prevalent. "Redlining," in which banks quite literally drew—and in cases continue to draw—boundaries around neighborhoods where they would not loan money, existed for decades as a potent tool of discrimination against African-Americans, Latinos, Asians, and Jews.

Just as neighborhoods can serve as a proxy for racial or ethnic identity, there are new worries that big data technologies could be used to "digitally redline" unwanted groups, either as customers, employees, tenants, or recipients of credit. A significant finding of this report is that big data could enable new forms of discrimination and predatory practices.

The same algorithmic and data mining technologies that enable discrimination could also help groups enforce their rights by identifying and empirically confirming instances of discrimination and characterizing the harms they caused. Civil rights groups can use the new and powerful tools of big data in service of equal treatment for the communities they represent. Whether big data will build greater equality for all Americans or exacerbate existing inequalities depends entirely on how its technologies are applied in the years to come, what kinds of protections are present in the law, and how the law is enforced.

Big Data and Privacy

Big data technologies, together with the sensors that ride on the "Internet of Things," pierce many spaces that were previously private. Signals from home WiFi networks reveal how many people are in a room and where they are seated. Power consumption data collected from demand-response systems show when you move about your

house.[118] Facial recognition technologies can identify you in pictures online and as soon as you step outside. Always-on wearable technologies with voice and video interfaces and the arrival of whole classes of networked devices will only expand information collection still further. This sea of ubiquitous sensors, each of which has legitimate uses, make the notion of limiting information collection challenging, if not impossible.

This trend toward ubiquitous collection is in part driven by the nature of technology itself.[119] Whether born analog or digital, data is being reused and combined with other data in ways never before thought possible, including for uses that go beyond the intent motivating initial collection. The potential future value of data is driving a digital land grab, shifting the priorities of organizations to collect and harness as much data as possible. Companies are now constantly looking at what kind of data they have and what data they need in order to maximize their market position. In a world where the cost of data storage has plummeted and future innovation remains unpredictable, the logic of collecting as much data as possible is strong.

Another reality of big data is that once data is collected, it can be very difficult to keep anonymous. While there are promising research efforts underway to obscure personally identifiable information within large data sets, far more advanced efforts are presently in use to re-identify seemingly "anonymous" data. Collective investment in the capability to fuse data is many times greater than investment in technologies that will enhance privacy.

Together, these trends may require us to look closely at the notice and consent framework that has been a central pillar of how privacy practices have been organized for more than four decades. In a technological context of structural over-collection, in which re-identification is becoming more powerful than de-identification, focusing on controlling the collection and retention of personal data, while important, may no longer be sufficient to protect personal privacy. In the words of the President's Council of Advisors for Science & Technology, "The notice and consent is defeated by exactly the positive benefits that big data enables: new, non-obvious, unexpectedly powerful uses of data."[120]

[118] Stephen Wicker and Robert Thomas, "A Privacy-Aware Architecture for Demand Response Systems," *44th Hawaii International Conference on System Sciences*, January 2011, http://ieeexplore.ieee.org/xpl/login.jsp?tp=&arnumber=5718673&url=http%3A%2F%2Fieeexplore.ieee.org%2Fxpls%2Fabs_all.jsp%3Farnumber%3D5718673; National Institute of Standards and Technology, *Guidelines for Smart Grid Cyber Security: Vol. 2, Privacy and the Smart Grid*, 2010, http://csrc.nist.gov/publications/nistir/ir7628/nistir-7628_vol2.pdf.

[119] President's Council of Advisors on Science & Technology, *Big Data and Privacy: A Technological Perspective*, The White House, May 1, 2014, whitehouse.gov/bigdata.

[120] Ibid at 36.

Federal Research in Privacy-Enhancing Technologies

The research and development of privacy enhancing technologies has been a priority for the Obama Administration. Agencies across the Networking and Information Technology Research and Development (NITRD) program collectively spend over $70 million each year on privacy research.[121] This research falls into four broad areas: support for privacy as an extension of security; research on how enterprises comply with privacy laws; privacy in health care; and basic research into technologies that enable privacy. The table below summarizes some of the research programs in progress at agencies in the NITRD. In their review of big data technologies, the President's Council of Advisors on Science & Technology endorses strengthening U.S. research in privacy-related technologies and the social science questions surrounding their use.

Research areas	Support for privacy as an extension of security	Research on how enterprises comply with privacy laws	Privacy in health care	Privacy research explorations
Agencies	Air Force Research Laboratory, Defense Advanced Research Projects Agency, National Security Agency, Intelligence Advanced Research Projects Activity, Office of Naval Research	Department of Energy, Department of Homeland Security, National Institute of Standards and Technology	Telemedicine and Advanced Technology Research Center, Office of the National Coordinator for Health Information Technology, National Institute of Health	National Science Foundation
Funding est. (total $77M/year)	$34M/year	$10M/year	$8M/year	$25M/year
Sampling of key projects	Anonymization techniques Confidential collaboration and communication Homomorphic encryption Privacy preserving data aggregation Traffic-secure routing	Automated privacy compliance Location-privacy tools Protection of personally identifiable information Standards for legal compliance Voluntary code of conduct for smart grid	Collection and use limitation Data segmentation for privacy Patient consent and privacy Patient data quality Preserving anonymity in health care data	Algorithmic foundations for privacy and tools Economics of privacy Privacy as a social-psychological construct Privacy policy analysis Privacy solutions for cloud computing, data integration, mining

Anticipating the Big Data Revolution's Next Chapter

For the vast majority of today's ordinary interactions between consumers and first parties, the notice and consent framework adequately safeguards privacy protections. But as the President's Council of Advisors on Science & Technology note, the trajectory of technology is shifting to far more collection, use and storage of data by entities that do

[121] Networking and Information Technology Research and Development, *Report on Privacy Research within NITRD,* April 2014, http://www.nitrd.gov/Pubs/Report_on_Privacy_Research_within_NITRD.pdf.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000227

not have a direct relationship with the consumer or individual.[122] In instances where the notice and consent framework threatens to be overcome—such as the collection of ambient data by our household appliances—we may need to re-focus our attention on the context of data use, a policy shift presently being debated by privacy scholars and technologists.[123] The context of data use matters tremendously. Data that is socially beneficial in one scenario can cause significant harm in another. To borrow a term, data itself is "dual use." It can be used for good or for ill.

Putting greater emphasis on a responsible use framework has many potential advantages. It shifts the responsibility from the individual, who is not well equipped to understand or contest consent notices as they are currently structured in the marketplace, to the entities that collect, maintain, and use data. Focusing on responsible use also holds data collectors and users accountable for how they manage the data and any harms it causes, rather than narrowly defining their responsibility to whether they properly obtained consent at the time of collection.

Focusing more attention on responsible use does not mean ignoring the context of collection. Part of using data responsibly could mean respecting the circumstances of its original collection. There could, in effect, be a "no surprises" rule, as articulated in the "respect for context" principle in the Consumer Privacy Bill of Rights. Data collected in a consumer context could not suddenly be used in an employment one. Technological developments support this shift toward a focus on use. Advanced data-tagging schemes can encode details about the context of collection and uses of the data already granted by the user, so that information about permissive uses travels along with the data wherever it goes. If well developed and brought widely into use, such a data-tagging scheme would not solve all the dilemmas posed by big data, but it could help address several important challenges.

Perhaps most important of all, a shift to focus on responsible uses in the big data context allows us to put our attention more squarely on the hard questions we must reckon with: how to balance the socially beneficial uses of big data with the harms to privacy and other values that can result in a world where more data is inevitably collected about more things. Should there be an agreed-upon taxonomy that distinguishes information that you do not collect or use under any circumstances, information that you can collect or use without obtaining consent, and information that you collect and use only with consent? How should this taxonomy be different for a medical researcher trying to cure cancer and a marketer targeting ads for consumer products?

As President Obama said upon the release of the Consumer Privacy Bill of Rights, "Even though we live in a world in which we share personal information more freely than

[122] President's Council of Advisors on Science & Technology, *Big Data and Privacy: A Technological Perspective*, The White House, May 1, 2014, p. 20, whitehouse.gov/bigdata.
[123] Craig Mundie, "Privacy Pragmatism: Focus on Data Use, Not Data Collection," *Foreign Affairs*, March/April, 2014, http://www.foreignaffairs.com/articles/140741/craig-mundie/privacy-pragmatism.

in the past, we must reject the conclusion that privacy is an outmoded value." Privacy, the President said, "has been at the heart of our democracy from its inception, and we need it now more than ever." This is even truer in a world powered by big data.

VI. Conclusion and Recommendations

The White House review of big data and privacy, announced by President Obama on January 17, 2014, was conceived to examine the broader implications of big data technology. The President recognized the big data revolution is playing out widely across the public and private sectors and that its implications need to be considered alongside the Administration's review of signals intelligence.

The White House big data working group set out to learn, in 90 days, how big data technologies are transforming government, commerce, and society. We wanted to understand what opportunities big data affords us, and the advances it can spur. We wanted a better grasp of what kinds of technologies already existed, and what we could anticipate coming just over the horizon. The President's Council of Advisors for Science & Technology conducted a parallel report to take measure of the underlying technologies. Their findings underpin many of the technological assertions in this report.

Big data tools offer astonishing and powerful opportunities to unlock previously inaccessible insights from new and existing data sets. Big data can fuel developments and discoveries in health care and education, in agriculture and energy use, and in how businesses organize their supply chains and monitor their equipment. Big data holds the potential to streamline the provision of public services, increase the efficient use of taxpayer dollars at every level of government, and substantially strengthen national security. The promise of big data requires government data be viewed as a national resource and be responsibly made available to those who can derive social value from it. It also presents the opportunity to shape the next generation of computational tools and technologies that will in turn drive further innovation.

Big data also introduces many quandaries. By their very nature, many of the sensor technologies deployed on our phones and in our homes, offices, and on lampposts and rooftops across our cities are collecting more and more information. Continuing advances in analytics provide incentives to collect as much data as possible not only for today's uses but also for potential later uses. Technologically speaking, this is driving data collection to become functionally ubiquitous and permanent, allowing the digital traces we leave behind to be collected, analyzed, and assembled to reveal a surprising number of things about ourselves and our lives. These developments challenge longstanding notions of privacy and raise questions about the "notice and consent" framework, by which a user gives initial permission for their data to be collected. But these trends need not prevent creating ways for people to participate in the treatment and management of their information.

An important finding of this review is that while big data can be used for great social good, it can also be used in ways that perpetrate social harms or render outcomes that

have inequitable impacts, even when discrimination is not intended. Small biases have the potential to become cumulative, affecting a wide range of outcomes for certain disadvantaged groups. Society must take steps to guard against these potential harms by ensuring power is appropriately balanced between individuals and institutions, whether between citizen and government, consumer and firm, or employee and business.

The big data revolution is in its earliest stages. We will be grappling for many years to understand the full sweep of its technologies; the ways it will empower health, education, and the economy; and, crucially, what its implications are for core American values, including privacy, fairness, non-discrimination, and self-determination.

Even at this early juncture, the authors of this report believe important conclusions are already emerging about big data that can inform how the Administration moves forward in a number of areas. In particular, there are five areas that will each bring the American people into the national conversation about how to maximize benefits and minimize harms in a big data world:

1. **Preserving Privacy Values:** Maintaining our privacy values by protecting personal information in the marketplace, both in the United States and through interoperable global privacy frameworks;
2. **Educating Robustly and Responsibly:** Recognizing schools—particularly K-12—as an important sphere for using big data to enhance learning opportunities, while protecting personal data usage and building digital literacy and skills;
3. **Big Data and Discrimination:** Preventing new modes of discrimination that some uses of big data may enable;
4. **Law Enforcement and Security:** Ensuring big data's responsible use in law enforcement, public safety, and national security; and
5. **Data as a Public Resource:** Harnessing data as a public resource, using it to improve the delivery of public services, and investing in research and technology that will further power the big data revolution.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000231

Policy Recommendations:

This review also identifies six discrete policy recommendations that deserve prompt Administration attention and policy development. These are:

- **Advance the Consumer Privacy Bill of Rights.** The Department of Commerce should take appropriate consultative steps to seek stakeholder and public comment on big data developments and how they impact the Consumer Privacy Bill of Rights and then devise draft legislative text for consideration by stakeholders and submission by the President to Congress.
- **Pass National Data Breach Legislation.** Congress should pass legislation that provides for a single national data breach standard along the lines of the Administration's May 2011 Cybersecurity legislative proposal.
- **Extend Privacy Protections to non-U.S. Persons.** The Office of Management and Budget should work with departments and agencies to apply the Privacy Act of 1974 to non-U.S. persons where practicable, or to establish alternative privacy policies that apply appropriate and meaningful protections to personal information regardless of a person's nationality.
- **Ensure Data Collected on Students in School is Used for Educational Purposes.** The federal government must ensure that privacy regulations protect students against having their data being shared or used inappropriately, especially when the data is gathered in an educational context.
- **Expand Technical Expertise to Stop Discrimination.** The federal government's lead civil rights and consumer protection agencies should expand their technical expertise to be able to identify practices and outcomes facilitated by big data analytics that have a discriminatory impact on protected classes, and develop a plan for investigating and resolving violations of law.
- **Amend the Electronic Communications Privacy Act.** Congress should amend ECPA to ensure the standard of protection for online, digital content is consistent with that afforded in the physical world—including by removing archaic distinctions between email left unread or over a certain age.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000232

1. Preserving Privacy Values

Big data technologies are driving enormous innovation while raising novel privacy implications that extend far beyond the present focus on online advertising. These implications make urgent a broader national examination of the future of privacy protections, including the Administration's Consumer Privacy Bill of Rights, released in 2012. It will be especially important to re-examine the traditional notice and consent framework that focuses on obtaining user permission prior to collecting data. While notice and consent remains fundamental in many contexts, it is now necessary to examine whether a greater focus on how data is used and reused would be a more productive basis for managing privacy rights in a big data environment. It may be that creating mechanisms for individuals to participate in the use and distribution of his or her information after it is collected is actually a better and more empowering way to allow people to access the benefits that derive from their information. Privacy protections must also evolve in a way that accommodates the social good that can come of big data use.

Advance the Consumer Privacy Bill of Rights

As President Obama made clear in February 2012, the Consumer Privacy Bill of Rights and the associated Blueprint for Consumer Privacy represent "a dynamic model of how to offer strong privacy protection and enable ongoing innovation in new information technologies." The Consumer Privacy Bill of Rights is based on the Fair Information Practice Principles. Some privacy experts believe nuanced articulations of these principles are flexible enough to address and support new and emerging uses of data, including big data. Others, especially technologists, are less sure, as it is undeniable that big data challenges several of the key assumptions that underpin current privacy frameworks, especially around collection and use. These big data developments warrant consideration in the context of how to viably ensure privacy protection and what practical limits exist to the practice of notice and consent.

RECOMMENDATION*: The Department of Commerce should promptly seek public comment on how the Consumer Privacy Bill of Rights could support the innovations of big data while at the same time responding to its risks, and how a responsible use framework, as articulated in Chapter 5, could be embraced within the framework established by the Consumer Privacy Bill of Rights. Following the comment process, the Department of Commerce should work on draft legislative text for consideration by stakeholders and for submission by the President to Congress.*

Pass national data breach legislation to benefit consumers and businesses

As organizations store more information about individuals, Americans have a right to know if that information has been stolen or otherwise improperly exposed. A patchwork of 47 state laws currently governs when and how the loss of personally identifiable information must be reported.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000233

RECOMMENDATION: ***Congress should pass legislation that provides for a single national data breach standard along the lines of the Administration's May 2011 Cybersecurity legislative proposal. Such legislation should impose reasonable time periods for notification, minimize interference with law enforcement investigations, and potentially prioritize notification about large, damaging incidents over less significant incidents.***

The data services industry—colloquially known as "data brokers"—should bring greater transparency to the sector

Consumers deserve more transparency about how their data is shared beyond the entities with which they do business directly, including "third-party" data collectors. This means ensuring that consumers are meaningfully aware of the spectrum of information collection and reuse as the number of firms that are involved in mediating their consumer experience or collecting information from them multiplies. The data services industry should follow the lead of the online advertising and credit industries and build a common website or online portal that lists companies, describes their data practices, and provides methods for consumers to better control how their information is collected and used or to opt-out of certain marketing uses.

Even as we focus more on data use, consumers still have a valid interest in "Do Not Track" tools that help them control when and how their data is collected. Strengthening these tools is especially important because there is now a growing array of technologies available for recording individual actions, behavior, and location data across a range of services and devices. Public surveys indicate a clear and overwhelming demand for these tools, and the government and private sector must continue working to evolve privacy-enhancing technologies in step with improved consumer services.

The government should lead a consultative process to assess how the Health Insurance Portability and Accountability Act and other relevant federal laws and regulations can best accommodate the advances in medical science and cost reduction in health care delivery enabled by big data

Breakthroughs in predicting, detecting, and treating disease deserve the utmost public policy attention, but are unlikely to realize their full potential without substantial improvements in the medical data privacy regime that enables researchers to combine and analyze various kinds of lifestyle and health information. Any proposed reform must also consider bringing under regulatory and legal protection the vast quantities of personal health information circulated by organizations that are not covered entities governed by the Health Insurance Portability and Accountability Act.

The United States should lead international conversations on big data that reaffirms the Administration's commitment to interoperable global privacy frameworks

The benefits of big data depend on the global free flow of information. The United States should engage international partners in a dialogue on the benefits and challenges of big data as they impact the legal frameworks and traditions of different nations.

Specifically, the Department of State and the Department of Commerce should actively engage with bilateral and intergovernmental partners, including the European Union, Asia Pacific Economic Cooperation (APEC), and Organization for Economic Cooperation and Development, and with other stakeholders, to take stock of how existing and proposed policy frameworks address big data.

The Administration should also work to strengthen the U.S.-European Union Safe Harbor Framework, encourage more countries and companies to join the APEC Cross Border Privacy Rules system, and promote collaboration on data flows between the United States, Europe and Asia through efforts to align Europe's system of Binding Corporate Rules and the APEC CBPR system.

Privacy is a worldwide value that the United States respects and which should be reflected in how it handles data regarding all persons

For this reason the United States should extend privacy protections to non-U.S. persons.

RECOMMENDATION: ***The Office of Management and Budget should work with departments and agencies to apply the Privacy Act of 1974 to non-U.S. persons where practicable, or to establish alternative privacy policies that apply appropriate and meaningful protections to personal information regardless of a person's nationality.***

2. Responsible Educational Innovation in the Digital Age

Big data offers significant opportunities to improve learning experiences for children and young adults. Big data intersects with education in two important ways. As students begin to share information with educational institutions, they expect that they are doing so in order to develop knowledge and skills, not to have their data used to build extensive profiles about their strengths and weaknesses that could be used to their disadvantage in later years. Educational institutions are also in a unique position to help prepare children, adolescents, and adults to grapple with the world of big data.

Ensure data protection while promoting innovation in learning

Substantial breakthroughs stand to be made using big data to improve education as personalized learning on network-enabled devices becomes more common. Over the next five years, under the President's ConnectED initiative, American classrooms will receive a dramatic influx of technology—with substantial potential to enhance teaching and learning, particularly for disadvantaged communities. Internet-based education tools and

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000235

software enable rapid iteration and innovation in educational technologies and businesses. These technologies are already being deployed with strong privacy and safety protections for students, inside and outside of the classroom. The Family Educational Rights and Privacy Act and Children's Online Privacy Protection Act provide a federal regulatory framework to protect the privacy of students—but FERPA was written before the Internet, and COPPA was written before smartphones, tablets, apps, the cloud, and big data. Students and their families need robust protection against current and emerging harms, but they also deserve access to the learning advancements enabled by technology that promise to empower all students to reach their full potential.

RECOMMENDATION: ***The federal government should ensure that data collected in schools is used for educational purposes and continue to support investment and innovation that raises the level of performance across our schools. To promote this innovation, it should explore how to modernize the privacy regulatory framework under the Family Educational Rights and Privacy Act and Children's Online Privacy Protection Act and Children's Online Privacy Protection Act to ensure two complementary goals: 1) protecting students against their data being shared or used inappropriately, especially when that data is gathered in an educational context, and 2) ensuring that innovation in educational technology, including new approaches and business models, have ample opportunity to flourish.***

Recognize digital literacy as an important 21st century skill.

In order to ensure students, citizens, and consumers of all ages have the ability to adequately protect themselves from data use and abuse, it is important that they develop fluency in understanding the ways in which data can be collected and shared, how algorithms are employed and for what purposes, and what tools and techniques they can use to protect themselves. Although such skills will never replace regulatory protections, increased digital literacy will better prepare individuals to live in a world saturated by data. Digital literacy—understanding how personal data is collected, shared, and used—should be recognized as an essential skill in K-12 education and be integrated into the standard curriculum.

3. Big Data and Discrimination

The technologies of automated decision-making are opaque and largely inaccessible to the average person. Yet they are assuming increasing importance and being used in contexts related to individuals' access to health, education, employment, credit, and goods and services. This combination of circumstances and technology raises difficult questions about how to ensure that discriminatory effects resulting from automated decision processes, whether intended or not, can be detected, measured, and redressed. We must begin a national conversation on big data, discrimination, and civil liberties.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000236

The federal government must pay attention to the potential for big data technologies to facilitate discrimination inconsistent with the country's laws and values

RECOMMENDATION: ***The federal government's lead civil rights and consumer protection agencies, including the Department of Justice, the Federal Trade Commission, the Consumer Financial Protection Bureau, and the Equal Employment Opportunity Commission, should expand their technical expertise to be able to identify practices and outcomes facilitated by big data analytics that have a discriminatory impact on protected classes, and develop a plan for investigating and resolving violations of law in such cases. In assessing the potential concerns to address, the agencies may consider the classes of data, contexts of collection, and segments of the population that warrant particular attention, including for example genomic information or information about people with disabilities.***

Consumers have a legitimate expectation of knowing whether the prices they are offered for goods and services are systematically different than the prices offered to others

It is implausible for consumers to be presented with the full parameters of the data and algorithms shaping their online and offline experience. Nonetheless, some transparency is appropriate when a consumer's experience is being altered based on their personal information, particularly in situations where companies offer differential pricing to consumers in situations where they would not expect it—such as when comparing airline ticket prices on a web-based search engine or visiting the online storefront of a major retailer. The President's Council of Economic Advisers should assess the evolving practices of differential pricing both online and offline, assess the implications for efficient operations of markets, and consider whether new practices are needed to ensure fairness for the consumer.

Data analytics can be used to shore up civil liberties

The same big data technologies that enable discrimination can also help groups enforce their rights. Applying correlative and data mining capabilities can identify and empirically confirm instances of discrimination and characterize the harms they caused. The federal government's civil rights offices, together with the civil rights community, should employ the new and powerful tools of big data to ensure that our most vulnerable communities are treated fairly.

To build public awareness, the federal government's consumer protection and technology agencies should convene public workshops and issue reports over the next year on the potential for discriminatory practices in light of these new technologies; differential pricing practices; and the use of proxy scoring to replicate regulated scoring practices in credit, employment, education, housing, and health care.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000237

4. Law Enforcement and Security

Big data, lawfully applied, can make our communities safer, make our nation's infrastructure more resilient, and strengthen our national security. It is crucial that the national security, homeland security, law enforcement, and intelligence communities continue to vigorously experiment with and apply lawful big data technology while adhering to full accountability, oversight, and relevant privacy requirements.

The Electronic Communications Privacy Act should be reformed

RECOMMENDATION: ***Congress should amend ECPA to ensure the standard of protection for online, digital content is consistent with that afforded in the physical world—including by removing archaic distinctions between email left unread or over a certain age.***

The use of predictive analytics by law enforcement should continue to be subjected to careful policy review

It is essential that big data analysis conducted by law enforcement outside the context of predicated criminal investigations be deployed with appropriate protections for individual privacy and civil liberties. The presumption of innocence is the bedrock of the American criminal justice system. To prevent chilling effects to Constitutional rights of free speech and association, the public must be aware of the existence, operation, and efficacy of such programs.

Federal agencies with expertise in privacy and data practices should provide technical assistance to state, local, and other federal law enforcement agencies seeking to deploy big data techniques

Law enforcement agencies should continue to examine how federal grants involving big data surveillance technologies can foster their responsible use, as well as the potential utility of establishing a national registry of big data pilots in state and local law enforcement in order to track, identify, and promote best practices. Federal government agencies with technology leaders and experts should also report progress in developing privacy-protective technologies over the next year to help advance the development of technical skills for the advancement of the federal privacy community.

Government use of lawfully-acquired commercial data should be evaluated to ensure consistency with our values

Recognizing the longstanding practice of basic commercial records searches against criminal suspects, the federal government should undertake a review of uses of commercially available data on U.S. citizens, focusing on the use of services that employ big data techniques and ensuring that they incorporate appropriate oversight and protections for privacy and civil liberties.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000238

Federal agencies should implement best practices for institutional protocols and mechanisms that can help ensure the controlled use and secure storage of data

The Department of Homeland Security, the intelligence community, and the Department of Defense are among the leaders in developing privacy-protective technologies and policies for handling personal data. Other public sector agencies should evaluate whether any of these practices—particularly data tagging to enforce usage limitations, controlled access policies, and immutable auditing—could be integrated into their databases and data practices to provide built-in protections for privacy, civil rights, and civil liberties.

Use big data analysis and information sharing to strengthen cybersecurity

Protecting the networks that drive our economy, sustain public safety, and protect our national security has become a critical homeland security mission. The federal government's collaboration with private sector partners to use big data in programs, pilots, and research for both cybersecurity and protecting critical infrastructure can help strengthen our resilience and cyber defenses, especially as more cyber threat data is shared. The Administration continues to support legislation that protects privacy while providing targeted liability protection for companies sharing certain threat information and appropriately defending their networks on that basis. At the same time, the Administration will continue to use executive action to increase incentives for and reduce barriers to the kind of information sharing and analytics that will help the public and private sector prevent and respond to cyber threats.

5. Data as a Public Resource

Government data is a national resource, and should be made broadly available to the public wherever possible, to advance government efficiency, ensure government accountability, and generate economic prosperity and social good—while continuing to protect personal privacy, business confidentiality, and national security. This means finding new opportunities for the government to release large data sets and ensuring all agencies make maximum use of Data.gov, a repository of federal data tools and resources. Big data can help improve the provision of public services, provide new insights to inform policymaking, and increase the efficient use of taxpayer dollars at every level of government.

Government data should be accurate and securely stored, and to the maximum extent possible, open and accessible

Government data—particularly statistical and census data—distinguishes itself by providing a high level of accuracy, reliability, and confidentiality. Similarly, the "My Data" initiatives that currently allow Americans easy, secure access to their own digital data in useful formats constitutes a model for personal data accessibility that should be replicated as widely as possible across the government.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000239

All departments and agencies should, in close coordination with their senior privacy and civil liberties officials, examine how they might best harness big data to help carry out their missions

Departments and agencies that have not historically made wide use of advanced data analytics should make the most out of what the big data revolution means for them and the citizens they serve. They should experiment with pilot projects, develop in-house talent, and potentially expand research and development. From the earliest stages, agencies should build these projects in consultation with their privacy and civil liberties officers.

In particular, big data analytics present an important opportunity to increase value and performance for the American people in the delivery of government services. Big data also holds enormous power to detect and address waste, fraud and abuse, thereby saving taxpayer money and improving public trust. Big data can further help identify high performers across government whose practices can be replicated by similar agencies and programs and may deliver new insights into effective public-sector management.

We should dramatically increase investment for research and development in privacy-enhancing technologies, encouraging cross-cutting research that involves not only computer science and mathematics, but also social science, communications and legal disciplines

The Administration should lead an effort to identify areas where big data analytics can provide the greatest impact for improving the lives of Americans and encourage data scientists to develop social, ethical, and policy knowledge. To this end, the Office of Science and Technology Policy, in partnership with experts across the agencies, should work to define areas that promise significant public gains—for example, in urban informatics—and assess how to provide appropriate attention and resources.

Promising areas for basic research include data provenance, de-identification and encryption, but we also encourage focusing on lab-to-market tools that can be rapidly deployed to consumers. Because we will need a growing cadre of data and social scientists who are able to encode critical policy values into technical infrastructure, we support investment in fields such as Science and Technology Studies which emphasize teaching scientific knowledge and technology in its social and ethical context, and the teaching of module courses to data scientists and engineers to familiarize them with the broader societal implications of their work.

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000240

Appendix

Index

A. Methodology 69
B. Stakeholder Meetings 70
C. Academic Symposia 73
D. PCAST Report 76
E. Public Request for Information 76
F. White House Big Data Survey 79

A. Methodology

This 90-day study was announced by President Obama in his January 17, 2014 remarks on the review of signals intelligence. He charged his Counselor John Podesta to "look how the challenges inherent in big data are being confronted by both the public and private sectors; whether we can forge international norms on how to manage this data; and how we can continue to promote the free flow of information in ways that are consistent with both privacy and security." Podesta led a working group of senior Administration officials including Secretary of Commerce Penny Pritzker, Secretary of Energy Ernie Moniz, Director of the Office of Science and Technology Policy John Holdren, and Director of the National Economic Council Jeffrey Zients. Nicole Wong, R. David Edelman, Christopher Kirchhoff, and Kristina Costa were the principal staff authors supporting this report. To inform its deliberations, the working group initiated a broad public dialogue on the implications of technological advancements in big data.

During the course of this study, the working group met with hundreds of stakeholders from industry, academia, civil society, and the federal government through briefings at the White House. These briefings provided a chance for dialogue with key stakeholders, including privacy and civil liberties advocates; scientific and statistical agencies; international data protection authorities; the intelligence community; law enforcement officials; leading academics who study social and technical aspects of privacy and the Internet; and practitioners and executives from the health care, financial, and information services industries. A full list of briefings and participants is included in Section B of the appendix.

To further engage the public, the White House Office of Science and Technology Policy sponsored conferences at the Massachusetts Institute of Technology, New York University, and the University of California, Berkeley. Senior Administration officials, including Counselor Podesta and Secretary Pritzker, participated in these conferences, along with

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000241

policy experts, academics, and representatives from business and the nonprofit community. Details of these conferences and a list of presentations is included in Section C of the appendix.

The working group also published a Federal Register notice to gather written input, and used the whitehouse.gov platform to solicit comments from the general public online. Details of these efforts are included in Sections E and F of the appendix.

B. Stakeholder Meetings

Acxiom
Adobe
Allstate
Ally Financial
Amazon
American Association of Advertising Agencies
American Association of Universities
American Civil Liberties Union
Apple
AppNexus
Archimedes Incorporated
Asian Americans Advancing Justice
Association of National Advertisers
athenahealth
Bank of America
BlueKai
Bureau of Consumer Protection
Canadian Interim Privacy Commissioner
Capital One
Carnegie Mellon University
Cato Institute
Census Bureau
Center for Democracy & Technology
Center for Digital Democracy
Center for National Security Studies
Central Intelligence Agency
ColorOfChange
Computer Science and Artificial Intelligence Laboratory, MIT
comScore
Corelogic
Cornell University
Council of Better Business Bureaus
Datalogix
Department of Commerce, General Counsel
Department of Homeland Security
Digital Advertising Alliance
Direct Marketing Association

epic.org EPIC-16-06-15-DOJ-FOIA-20171031-Production-3 000242

Discover
Drug Enforcement Administration
Duke University School of Law
Dutch Data Protection Authority
Economics and Statistics Administration
Electronic Frontier Foundation
Electronic Privacy Information Center
Epsilon
European Union Data Protection Supervisor
European Commission: Directorate-General for Justice (Data Protection Division)
Evidera
Experian
Explorys
Facebook
Federal Bureau of Investigation
Federal Telecommunications Commission, Bureau of Consumer Protection
Financial Services Roundtable
Free Press
French National Commission on Informatics and Liberty
Future of Privacy
George Washington University
Georgetown University Law Center
GNS Health care
Google
GroupM
Harvard University
Humedica
IBM Health care
IMS Health
Infogroup
Interactive Advertising Bureau
International Association of Privacy Professionals
Jenner & Block LLP
Lawrence Berkeley National Laboratory
Lawrence Livermore National Laboratory
LexisNexis
LinkedIn
Massachusetts Institute of Technology
Massachusetts Institute of Technology Media Lab
MasterCard
Mexican Data Privacy Commissioner
Microsoft
National Association for the Advancement of Colored People
National Economic Council
National Hispanic Media Coalition
National Oceanic and Atmospheric Administration
National Organization for Women
National Security Agency
National Telecommunications and Information Administration
National Urban League Policy Institute

NaviMed Capital
Network Advertising Initiative
Neustar
Office of Chairwoman Edith Ramirez
Office of Science and Technology Policy
Office of the Director of National Intelligence
Office of the National Coordinator for Health Information Technology
Ogilvy
Open Society Foundations
Open Technology Institute
Optum Labs
PatientsLikeMe
Princeton University
Privacy Analytics
Public Knowledge
Quantcast
Robinson & Yu LLC
SalesForce
The Brookings Institution
The Constitution Project
The Leadership Conference on Civil and Human Rights
UK Information Commissioner
University of Maryland
University of Virginia
Visa
Yahoo!
Zillow

C. Academic Symposia

Big Data and Privacy Workshop: Advancing the State of the Art in Technology and Practice
Massachusetts Institute of Technology (MIT)
Cambridge, Massachusetts
March 3, 2014

Welcome: L. Rafael Reif, President of MIT

Keynote: John Podesta, Counselor to the President

Keynote: Penny Pritzker, Secretary of Commerce

State of the Art of Privacy Protection: Cynthia Dwork, Microsoft

Panel Session 1: Big Data Opportunities and Challenges
- Panel Chair: Daniela Rus, MIT
- Mike Stonebraker, MIT
- John Guttag, MIT
- Manolis Kellis, MIT
- Sam Madden, MIT
- Anant Agarwal, edX

Panel Session 2: Privacy Enhancing Technologies
- Panel Chair: Shafi Goldwasser
- Nickolai Zeldovich, MIT
- Vinod Vaikuntanathan, Assistant Professor, MIT
- Salil Vadhan, Harvard University
- Daniel Weitzner, MIT

Panel Session 3: Roundtable Discussion of Large-Scale Analytics Case Study
- Panel Moderator: Daniel Weitzner
- Chris Calabrese, American Civil Liberties Union
- John DeLong, National Security Agency
- Mark Gorenberg, Zetta Venture Partners
- David Hoffman, Intel
- Karen Kornbluh, Nielsen
- Andy Palmer, KOA Lab
- James Powell, Thomson Reuters
- Latanya Sweeney, Harvard University
- Vinod Vaikuntanathan, MIT

Concluding Statements: Maria Zuber, MIT

The Social, Cultural, & Ethical Dimensions of 'Big Data'
The Data & Society Research Institute & New York University (NYU)
New York, New York
March 17, 2014

Introduction: danah boyd, Data & Society

Fireside Chat: John Podesta, Counselor to the President

Keynote: Penny Pritzker, Secretary of Commerce

State of the Art of Privacy Protection: Cynthia Dwork, Microsoft

Discussion Breakouts
- Tim Hwang: On Cognitive Security
- Nick Grossman: Regulation 2.0
- Nuala O'Connor: The Digital Self & Technology in Daily Life
- Alex Howard: Data Journalism in the Second Machine Age
- Mark Latonero: Big Data and Human Trafficking
- Corrine Yu: Civil Rights Principles for the Era of Big Data
- Natasha Schüll: Tracking for Profit; Tracking for Protection
- Kevin Bankston: The Biggest Data of All
- Alessandro Acquisti: The Economics of Privacy (and Big Data)
- Latanya Sweeney: Transparency Builds Trust
- Deborah Estrin: You + Your Data
- Clay Shirky: Analog Thumbs on Digital Scales Open Discussion
- Moderators: danah boyd and Nicole Wong

Workshops
- Data Supply Chains
- Inferences and Connections
- Predicting Human Behavior
- Algorithmic Accountability
- Interpretation Gone Wrong
- Inequalities and Asymmetries

Public Plenary
- Welcome: danah boyd, Data & Society
- Video Address: John Podesta, Counselor to the President
- Keynote: Nicole Wong, Deputy Chief Technology Officer of the US
- Plenary Panel Statements
  - Kate Crawford, Microsoft Research and MIT
  - Anil Dash, Think Up and Activate (moderator)
  - Steven Hodas, NYC Department of Education
  - Alondra Nelson, Columbia University
  - Shamina Singh, MasterCard Center for Inclusive Growth

Big Data: Values and Governance
University of California, Berkeley (UC Berkeley)
Berkeley, California
April 1, 2014

Welcome: Dean AnnaLee Saxenian, UC Berkeley School of Information

Welcome: Nicole Wong, Deputy Chief Technology Officer, OSTP

Panel Session 1: Values at stake, Values in tension: Privacy and Beyond
- Moderator: Deirdre Mulligan, UC Berkeley School of Information
- Amalia Deloney, Center for Media Justice
- Nicole Ozer, Northern California ACLU
- Fred Cate, University of Indiana
- Kenneth A. Bamberger, UC Berkeley School of Law

Panel Session 2: New Opportunities and Challenges in Health and Education
- Moderator: Paul Ohm, University of Colorado Law School
- Barbara Koenig, University of California, San Francisco
- Deven McGraw, Center for Democracy & Technology
- Scott Young, Kaiser Permanente
- Zachary Pardos, UC Berkeley School of Information

Panel Session 3: Algorithms: Transparency, Accountability, Values and Discretion
- Moderator: Omer Tene, International Association of Privacy Professionals
- Ari Gesher, Palantir
- Lee Tien, Electronic Frontier Foundation
- Seeta Gangadharan, New America Foundation
- Thejo Kote, Automatic
- James Rule, UC Berkeley

Governance Roundtable
- Moderator: David Vladeck, Georgetown University Law School
- Julie Brill, Federal Trade Commission
- Erika Rottenberg, LinkedIn
- Cameron Kerry, MIT Media Lab
- Cynthia Dwork, Microsoft Research
- Mitchell Stevens, Stanford University
- Rainer Stentzel, German Federal Ministry of the Interior

Concluding Keynote: John Podesta, Counselor to the President

D. PCAST Report

To take measure of the shifting technological landscape, the President charged his Council of Advisors on Science & Technology (PCAST) to conduct a parallel study to assess the technological dimensions of the intersection of big data and privacy. PCAST's statement of work reads, in part:

> "PCAST will study the technological aspects of the intersection of big data with individual privacy, in relation to both the current state and possible future states of the relevant technological capabilities and associated privacy concerns.
>
> Relevant big data include data and metadata collected, or potentially collectable, from or about individuals by entities that include the government, the private sector, and other individuals. It includes both proprietary and open data, and also data about individuals collected incidentally or accidentally in the course of other activities (e.g., environmental monitoring or the "Internet of things").

The PCAST assessment was conducted simultaneously with the 90-study on big data. PCAST shared their preliminary conclusions with the working group in order to inform its deliberations. The final PCAST report can be found at whitehouse.gov/bigdata and at PCAST's own website, whitehouse.gov/administration/eop/ostp/pcast.

E. Public Request for Information

As part of the effort to make this review as inclusive as possible, the White House Office of Science and Technology Policy (OSTP) released a Request for Information (RFI) seeking public comment on the ways in which big data may impact privacy, the economy, and public policy. The RFI was published on March 4, 2014, and 76 comments were submitted through April 4, 2014. The comments came from nonprofits, corporations, universities, and individual citizens. The full list of respondents is included below, and the full text of all responses is publicly available at whitehouse.gov/bigdata.

The RFI posed five questions to respondents:

> (1) What are the public policy implications of the collection, storage, analysis, and use of big data? For example, do the current U.S. policy framework and privacy proposals for protecting consumer privacy and government use of data adequately address issues raised by big data analytics?
>
> (2) What types of uses of big data could measurably improve outcomes or productivity with further government action, funding, or research? What types of uses of big data raise the most public policy concerns? Are there specific sectors or types of uses that should receive more government and/or public attention?
>
> (3) What technological trends or key technologies will affect the collection, storage, analysis and use of big data? Are there particularly promising technologies or new practices for safeguarding privacy while enabling effective uses of big data?
>
> (4) How should the policy frameworks or regulations for handling big data differ between the government and the private sector? Please be specific as to the type of entity and type of use (e.g., law enforcement, government services, commercial, academic research, etc.).

(5) What issues are raised by the use of big data across jurisdictions, such as the adequacy of current international laws, regulations, or norms?

The RFI can be found at:
http://www.gpo.gov/fdsys/pkg/FR-2014-03-04/pdf/2014-04660.pdf.

Respondents:

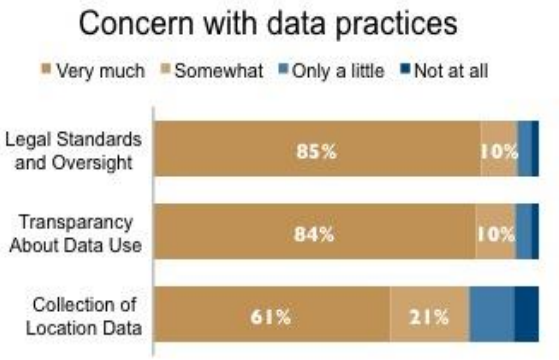
Access
American Civil Liberties Union
Ad Self-Regulatory Council, Council of Better Business Bureaus
Annie Shebanow
The Architecture for a Digital World and Advanced Micro Devices
Association for Computing Machinery
Association of National Advertisers
Brennan Center for Justice
BSA | The Software Alliance
Center for Democracy and Technology
Center for Data Innovation
Center for Digital Democracy
Center for National Security Studies
Cloud Security Alliance
Coalition for Privacy and Free Trade
Common Sense Media
Computer and Communications Industry Association
Computing Community Consortium
Constellation Research
Consumer Action
Consumer Federation of America
Consumer Watchdog
Dell
Direct Marketing Association
Dr. Tyrone W A Grandison
Dr. A. R. Wagner
Durrell Kapan
Electronic Frontier Foundation
Electronic Transactions Association
Entity
Federation of American Societies for Experimental Biology
Financial Services Roundtable
Food Marketing Groups
Frank Pasquale, UMD Law
Fred Cate, Microsoft, Oxford Internet Institute
Future of Privacy Forum
Georgetown University
Health care Leadership Council
IMS Health
Information Technology Industry Council
Interactive Advertising Bureau
Intrical

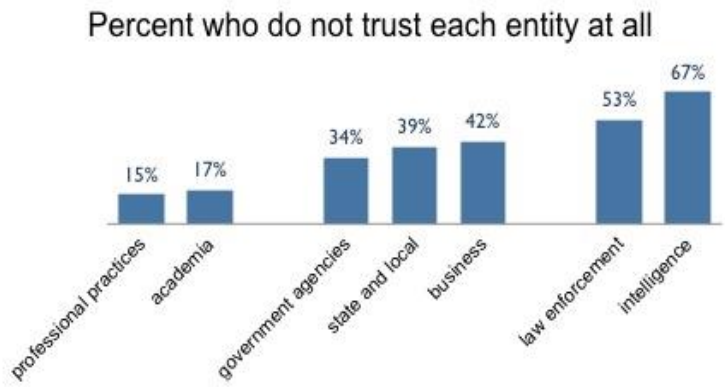
IT Law Group
Jackamo
James Cooper, George Mason Law
Jason Kint
Jonathan Sander, STEALTHbits
Kaliya Identity Woman
Leadership Conferences on Civil and Human Rights & Education
Making Change at Walmart
Marketing Research Association
Mary Culnan, Bentley University & Future of Privacy Forum
McKenna Long & Aldridge LLP
mediajustice.org
Microsoft
Massachusetts Institute of Technology
MITRE Corporation
Mozilla
New York University Center for Urban Science & Progress
Online Trust Alliance
Pacific Northwest National Laboratory
Peter Muhlberger
Privacy Coalition
Reed Elsevier
Sidley Austin LLP
Software & Information Industry Association
TechAmerica
TechFreedom
Technology Policy Institute
The Internet Association
U.S. Chamber of Commerce
U.S. Leadership for the Revision of the 1967 Space Treaty
U.S. PIRG
VIPR Systems
World Privacy Forum

F. White House Big Data Survey

Additional public input about big data and privacy issues was solicited via a short web form posted on WhiteHouse.gov and promoted via email and social media. During the four weeks the survey was open for public input, 24,092 people submitted responses. It is important to note, however, that this process was a means of gathering public input and should not be considered a statistically representative survey of attitudes about data privacy. The White House did not include submission fields for name or contact information on the survey form.

Respondents expressed a great deal of concern about big data practices. They communicated particularly strong feelings around ensuring that data practices have proper transparency and oversight—more than 80 percent of respondents were very concerned with each of these areas—but even in the area of least concern (collection of location data), 61 percent indicated that they were "very much concerned" about this practice. By contrast, considerably more nuance was evident in respondents' views towards particular entities. Although majorities claimed to trust Intelligence and Law Enforcement Agencies "not at all," their views towards other government agencies at both federal and local levels were far less negative. Furthermore, majorities were generally trusting of how professional practices, like law and medical offices, and academia use and handle big data.





Taken together, the findings from this survey indicate that respondents were most wary of how intelligence and law enforcement agencies are collecting and using data about them, particularly when they have little insight into these practices. This suggests that the Administration should work to increase the transparency about intelligence practices where possible, reassure the public that collected data is stored as securely as possible, and strengthen applicable legal structures and oversight.

For more information about the survey, visit: WhiteHouse.gov/BigData.

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, September 09, 2014 10:17 AM
To: Krulic, Alexander (OLP); Pazur, Shannon (OLP)
Subject: Predictive Policing - revised outline
Attachments: Predictive Policing Outline.docx

Alex, Shannon

Attached is a revised version of our outline reflecting comments from yesterday's meeting.

Shannon thank you for supplying the bullet point on the AG's comments.

Alex (b) (5) [redacted]

(b) (5) [redacted] Finally, I added an introductory bullet point under the Concerns section. Please let me know what you think.

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23698

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, September 09, 2014 5:39 PM
To: Krulic, Alexander (OLP)
Subject: Predictive Policing - Revised Outline
Attachments: Predictive Policing Outline v.2.docx

Alex did you want to look this over before I circulate to the rest of the group?

Beth

Team

Attached is a revised outline for #2. Substantive changes from the version circulated this morning include:

1. (b) (5) [redacted]
2. (b) (5) [redacted]
3. (b) (5) [redacted]
4. (b) (5) [redacted]
5. (b) (5) [redacted]

(b) (5) [redacted]

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242

Document ID: 0.7.11378.23707

Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23707

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, September 09, 2014 6:47 PM
To: Tyrangiel, Elana (OLP); Siger, Steven B. (OLP); Krulic, Alexander (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP); Pronley, Alyssa (JMD)
Subject: Predictive Policing - Revised Draft Outline
Attachments: Predictive Policing Outline v.2.docx

Team

Attached is a revised outline for #2. Substantive changes from the version circulated this morning include:

1. (b) (5) [redacted].
2. (b) (5) [redacted]
3. (b) (5) [redacted]
4. (b) (5) [redacted]
5. (b) (5) [redacted].

(b) (5) [redacted]

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.

Document ID: 0.7.11378.23690

Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23690

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Wednesday, September 10, 2014 12:42 PM
To: Krulic, Alexander (OLP); 'Siger, Steven B. (OLP)'
Subject: Predictive Policing Outline for Distribution to Components
Attachments: Predictive Policing Outline for Distribution to Components.docx

Document ID: 0.7.11378.29385

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Wednesday, September 10, 2014 1:34 PM
To: Hecker, Elizabeth (OLP)
Subject: Predictive Policing Outline - DRAFT
Attachments: Predictive Policing Outline - DRAFT.docx

If you have two mins, will you look this over for corrections or edits? I hope to send it out by 1:45.

Thanks!

Document ID: 0.7.11378.23742

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Thursday, September 11, 2014 2:22 PM
To: Krulic, Alexander (OLP)
Subject: Revised Outline
Attachments: Predictive Policing Outline 9.11.14.docx

Just sending this to you for now, but you can circulate more broadly if you need to. (b) (5) [redacted]

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23648

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Thursday, September 11, 2014 6:40 PM
To: Tyrangiel, Elana (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP); Hecker, Elizabeth (OLP); Fried, Hannah (OLP); Pronley, Alyssa (JMD)
Subject: Big Data - Predictive Analytics Outline
Attachments: Predictive Analytics - Outline 09 11 14.docx

Attached is the most recent draft of the outline for Report # 2 (Predictive Analytics).

(b) (5) [redacted] ."

Thank you all for your great work on this. Despite the volume of material and the acute time pressure, we have gotten this to a good starting point.

If anything urgent arises tomorrow, I should have regular e-mail access other than from 8:30 am to 9:45 am.

Alex

Document ID: 0.7.11378.23735

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Monday, September 15, 2014 2:45 PM
To: kate_e_heinzelman@who.eop.go
Cc: Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject: Predictive Analytics Outline
Attachments: Predictive Analytics Outline 09 15 14.docx

Kate,

Attached please find our outline for the predictive analytics report that was tasked to the Department via memorandum dated July 28, 2014. We look forward to discussing these issues with you.

Thanks,
Elana

Document ID: 0.7.11378.24334

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, September 16, 2014 12:31 PM
To: Krulic, Alexander (OLP)
Subject: Predictive Policing - Revised outline
Attachments: Predictive Analytics Outline 09 16 14.docx

Alex the new stuff is highlighted. Let me know what you think.

(b) (5) [redacted]

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23660

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, September 16, 2014 12:47 PM
To: Krulic, Alexander (OLP)
Subject: Predictive policing
Attachments: Predictive Analytics Outline 09 16 14.docx

Revised draft attached. I left the new sections highlighted so Elana could see the revisions more clearly.

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23661

Siger, Steven B. (OLP)

From: Siger, Steven B. (OLP)
Sent: Tuesday, September 16, 2014 1:14 PM
To: Tyrangiel, Elana (OLP)
Cc: Krulic, Alexander (OLP)
Subject: RE: Predictive Analytics Outline 09 16 14 v2
Attachments: Predictive Analytics Outline 09 16 14 v2.SBS.docx

I know you're separately reviewing, but I had a few suggestions in the attached.

Best,
Steve

From: Tyrangiel, Elana (OLP)
Sent: Tuesday, September 16, 2014 1:07 PM
To: Krulic, Alexander (OLP)
Cc: Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Siger, Steven B. (OLP)
Subject: RE: Predictive Analytics Outline 09 16 14 v2

Thanks for this I will look now and let you know!

From: Krulic, Alexander (OLP)
Sent: Tuesday, September 16, 2014 1:05 PM
To: Tyrangiel, Elana (OLP)
Cc: Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Siger, Steven B. (OLP)
Subject: Predictive Analytics Outline 09 16 14 v2

Elana,

(b) (5) [redacted]

(b) (5) [redacted]

Once you have had a chance to review, will you let us know if you need additional inputs (b) (6) [redacted], but will be back in 15 minutes.

Alex

Document ID: 0.7.11378.24341

<< File: Predictive Analytics Outline 09 16 14 v2.docx >>

Document ID: 0.7.11378.24341

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, September 16, 2014 3:29 PM
To: Krulic, Alexander (OLP)
Subject: Draft 3
Attachments: Predictive Analytics Outline 09 16 14 v3.docx

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23522

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, September 16, 2014 4:05 PM
To: Tyrangiel, Elana (OLP)
Cc: Krulic, Alexander (OLP)
Subject: Predictive Policing - Revised Outline
Attachments: Predictive Analytics Outline 09 16 14 v3.docx

Revised outline is attached.

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23737

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Tuesday, September 16, 2014 4:14 PM
To: Lan, Iris (ODAG); Walsh, James (ODAG); Brown Lee, Erika (ODAG)
Subject: Finals -- so you have them
Attachments: Predictive Analytics Outline 09 15 14.docx (b) (5) [redacted]

Sorry for the delay!

Document ID: 0.7.11378.29631

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Tuesday, September 16, 2014 6:30 PM
To: Lan, Iris (ODAG); Walsh, James (ODAG); Brown Lee, Erika (ODAG)
Cc: Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject: Predictive Analytics
Attachments: Predictive Analytics Outline 09 16 14.docx

Hi all

(b) (5) [redacted] (b) (5) [redacted] Changes are in yellow highlight.

Thanks,
Elana

Document ID: 0.7.11378.24346

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Wednesday, September 17, 2014 2:31 PM
To: kate_e_heinzelman@who.eop.gov
Cc: Siger, Steven B. (OLP); Krulic, Alexander (OLP)
Subject: Predictive Analytics Outline
Attachments: Predictive Analytics Outline 09 17 14.docx

Kate, attached please find our revised predictive analytics outline. Please let us know if you have any questions

Thanks much,
Elana

Document ID: 0.7.11378.24348

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Wednesday, September 17, 2014 3:01 PM
To: Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP); Pronley, Alyssa (JMD)
Cc: Tyrangiel, Elana (OLP); Siger, Steven B. (OLP)
Subject: Predictive Analytics Outline
Attachments: Predictive Analytics Outline 09 17 14.docx

Attached is the final version of the Predictive Analytics outline sent to WHCO!

Thank you to all of you for your help and hard work over the past few days.

Alyssa, I am reviewing your excellent write-up of the FTC conference.

Alex

Document ID: 0.7.11378.23740

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Friday, September 26, 2014 5:41 PM
To: Pazur, Shannon (OLP)
Subject: Work Plan
Attachments: Work Plan.docx

Draft work plan is attached. I seriously have no pride of ownership here so please feel free to suggest changes. If you want to change any of the things I have under your name or take any of the things I've assigned to myself let me know.

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23785

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Monday, September 29, 2014 5:24 PM
To: Krulic, Alexander (OLP)
Cc: Pazur, Shannon (OLP)
Subject: Big Data - Workplan, etc.
Attachments: Work Plan.docx

Alex

A draft work plan for Big Data #2 is attached. Let us know what you think.

(b) (5) [redacted]

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23714

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Wednesday, October 01, 2014 8:18 PM
To: Siger, Steven B. (OLP)
Cc: Pazur, Shannon (OLP); Hecker, Elizabeth (OLP); Fried, Hannah (OLP)
Subject: Work Plan - Predictive Analytics
Attachments: Work Plan - Predictive Analytics.docx

Steve-

Beth prepared an excellent draft Work Plan for Predictive Analytics (attached).

Will you look it over and let us know if you have any comments or suggestions?

Alex

Document ID: 0.7.11378.23717

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Thursday, October 02, 2014 11:19 AM
To: Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: Revised #2 outline
Attachments: Predictive Analytics Outline 10 02 14.docx

Revised outline is attached (b) (5) .

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23719

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Monday, October 06, 2014 9:35 AM
To: Krulic, Alexander (OLP); Pazur, Shannon (OLP)
Subject: Predictive Policing: Revised Workplan
Attachments: Work Plan.docx

I've revised this a bit based on Steve's comments from Thursday. (b) (5) [redacted] Let me know if you have any comments or suggestions.

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23722

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, October 14, 2014 10:35 AM
To: Pazur, Shannon (OLP); Krulic, Alexander (OLP)
Subject: Revised work plan
Attachments: Work Plan 10.14.14.docx

Revised work plan is attached.

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23850

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Wednesday, October 15, 2014 4:53 PM
To: Pazur, Shannon (OLP)
Subject: Draft - thoughts?
Attachments: Predictive Analytics in Law Enforcement - Report.docx

Wanted to catch you before you left. What do you think?

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23864

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Wednesday, October 15, 2014 5:19 PM
To: Krulic, Alexander (OLP)
Cc: Pazur, Shannon (OLP)
Subject: Predictive Analytics in Law Enforcement - Draft
Attachments: Predictive Analytics in Law Enforcement - Report.docx

Alex a draft of the first part of Section II is attached. Please let me know what you think. I'm going to get started on the in-depth discussion for now and will await your comments.

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23867

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Wednesday, October 15, 2014 6:43 PM
To: Hecker, Elizabeth (OLP)
Subject: Predictive Analytics - Draft 10 15 2014
Attachments: Predictive Analytics - Draft 10 15 2014.docx

Excellent work! A couple of suggested line edits in the attached.

Document ID: 0.7.11378.23869

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Wednesday, October 15, 2014 9:37 PM
To: Hecker, Elizabeth (OLP)
Subject: Draft
Attachments: Predictive Analytics - Draft 10 15 2014.docx

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23875

Siger, Steven B. (OLP)

From:	Siger, Steven B. (OLP)
Sent:	Thursday, October 16, 2014 10:28 AM
To:	Krulic, Alexander (OLP); Tyrangiel, Elana (OLP)
Subject:	RE: Predictive Policing - Draft Section
Attachments:	Predictive Analytics - Draft 10 15 2014.SBS.docx

Hi Alex and Elana,

I agree with Alex that this is a good start. I've taken a run at editing and inserting a few comments – mostly explanatory – in the attached. The main points of my suggestions are as follows:

(1) (b) (5) [redacted]

(2) (b) (5) [redacted]

(3) (b) (5) [redacted]

(4) (b) (5) [redacted]

I'm happy to discuss any of this. (b) (5) [redacted]
(b) (5) [redacted]

Best,
Steve

From: Krulic, Alexander (OLP)
Sent: Wednesday, October 15, 2014 8:15 PM
To: Tyrangiel, Elana (OLP); Siger, Steven B. (OLP)
Subject: Predictive Policing - Draft Section
Sensitivity: Private

Elana and Steve,

I provided some edits before we shared it with the group tonight. Overall, I think it is a good start. Will be curious for your reaction.

Alex

Document ID: 0.7.11378.24378

From: Hecker, Elizabeth (OLP)
Sent: Wednesday, October 15, 2014 7:24 PM
To: Tyrangiel, Elana (OLP)
Cc: Siger, Steven B. (OLP); Krulic, Alexander (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: Big Data - Draft Section

Good evening, Big Data team!

Attached please find a draft of the first part of Section II, (b) (5) [redacted] (b) (5) [redacted] (b) (5) [redacted] I welcome your comments.

I will continue to work on the highlighted sections tonight and tomorrow.

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24378

Fried, Hannah (OLP)

From: Fried, Hannah (OLP)
Sent: Friday, October 17, 2014 3:03 PM
To: Krulic, Alexander (OLP); Hecker, Elizabeth (OLP)
Cc: Pazur, Shannon (OLP)
Subject: RE: Predictive Analytics - Draft
Attachments: Predictive Analytics - Draft 10 17 2014 hkf edits.docx

Neat stuff. A few thoughts or tracked (and minor) line edits, attached at p. 1, p. 2, p. 5, p. 7, p. 8

Thanks!

From: Krulic, Alexander (OLP)
Sent: Friday, October 17, 2014 12:28 PM
To: Hecker, Elizabeth (OLP)
Cc: Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: RE: Predictive Analytics Draft

Thank you so much Beth! Have a great weekend.

Shannon or Hannah, if you have any line edits, please let me know.

I plan to review the draft this afternoon and then send it to Elana.

Alex

From: Hecker, Elizabeth (OLP)
Sent: Friday, October 17, 2014 12:02 PM
To: Krulic, Alexander (OLP)
Cc: Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: Predictive Analytics Draft

Team

Attached is a new version of the Predictive Analytics report (b) (5) [redacted] Thanks, Hannah!

Document ID: 0.7.11378.23779

(b) (5)

I will be on a train until around 3 and will try to check my blackberry from time to time if you need me. Have a great weekend!

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

<< File: Predictive Analytics - Draft 10 17 2014.docx >>

Document ID: 0.7.11378.23779

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Sunday, October 19, 2014 5:04 PM
To: Tyrangiel, Elana (OLP)
Cc: Siger, Steven B. (OLP); Pazur, Shannon (OLP); Hecker, Elizabeth (OLP); Fried, Hannah (OLP); Pronley, Alyssa (JMD)
Subject: Predictive Analytics - Draft
Attachments: Predictive Analytics - Draft 10 19 2014.docx

Elana,

Attached is a new working draft of the Predictive Analytics paper (b) (5) [redacted]

Although still a work-in-progress, the draft reflects a tremendous amount of work and learning by Beth, Shannon, and Alyssa over the last couple of weeks. I know that the next days will be intense, so I wanted to pause and say thank you to them on the relative leisure of a Sunday afternoon.

A very minor question: Is there an office convention for defining terms - with or without quotation marks in the parenthetical, ("DOJ") or (DOJ)? You will note that both conventions are included in the draft at times, but before correcting that, I wanted to know what you prefer.

Alex

Alex Krulic
Office of Legal Policy
alexander.krulic@usdoj.gov
Tel. (202) 305-4870

Document ID: 0.7.11378.24384

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, October 21, 2014 5:32 PM
To: Krulic, Alexander (OLP); Pazur, Shannon (OLP)
Subject: Predictive Analytics - Draft
Attachments: Predictive Analytics - Draft 10.21.14.docx

Alex, Shannon

A revised draft report is attached. I should have done a read-through but wanted to get it to you in case you want to look at it tonight. (b) (6) [redacted] I should be done by 12:30 and can make any changes you may have.

As you can see, I've given restructuring a shot. Let me know what you think. My guess is that we will continue to restructure as new sections are drafted but I thought this might make sense for now.

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.23796

Podesta, John

From:	Podesta, John
Sent:	Tuesday, October 21, 2014 8:06 PM
To:	Alcindor, Lew AG Holder DOJ Email Account
Cc:	Cole, James (ODAG); Kadzik, Peter J (OLA)
Subject:	Memo - BDWG - Next Steps
Attachments:	20141021_JDP_Holder memo.docx

AG Holder-

I want to thank you and your team for updating me recently on the status of two key efforts arising from our Big Data and Privacy report. (b) (5) [redacted] As always, please don't hesitate to let me know if you'd like to discuss these issues further.

John

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Wednesday, October 22, 2014 5:38 PM
To: Hecker, Elizabeth (OLP)
Attachments: Predictive Analytics - Draft 10.22.14.docx

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24107

Tyrangiel, Elana (OLP)

From:	Tyrangiel, Elana (OLP)
Sent:	Thursday, October 23, 2014 9:30 AM
To:	Walsh, James (ODAG); Lan, Iris (ODAG); Brown Lee, Erika (ODAG)
Cc:	Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject:	FW: Memo to AG
Attachments:	20141020_JDP_Holder memo.docx

This (or some slightly different version of it) was sent to the AG. I got this bootleg copy late last night.

Document ID: 0.7.11378.24383

Tyrangiel, Elana (OLP)

From:	Tyrangiel, Elana (OLP)
Sent:	Thursday, October 23, 2014 4:15 PM
To:	Kadzik, Peter J (OLA)
Subject:	RE: Big Data
Attachments:	Predictive Analytics Outline 09 15 14.docx

Peter, here's an electronic version of the doc I gave you in hard copy at the meeting. If you have a moment, would you mind sharing the version of the Podesta memo that you received on Tuesday evening? (b) (5)
(b) (5)

Thanks --

Elana

-----Original Message-----
From: Kadzik, Peter J (OLA)
Sent: Thursday, October 23, 2014 1:40 PM
To: Tyrangiel, Elana (OLP)
Subject: FW: Big Data

Would you please send me our 9/15 report that was the subject of JDP's recent memo to the AG? Thanks.

Peter J. Kadzik

Assistant Attorney General
Office of Legislative Affairs
(202) 514-2141
peter.j.kadzik@usdoj.gov

-----Original Message-----
From: Walsh, James (ODAG)
Sent: Thursday, October 23, 2014 1:38 PM
To: Cheung, Denise (OAG); Kadzik, Peter J (OLA)
Cc: Tyrangiel, Elana (OLP); Brown Lee, Erika (ODAG); Lan, Iris (ODAG)
Subject: RE: Big Data

Adding Peter here. The plan for the 2 pm meeting, I think, is to get together quickly and have a preliminary discussion.

Document ID: 0.7.11378.29990

-----Original Message-----
From: Cheung, Denise (OAG)
Sent: Thursday, October 23, 2014 1:19 PM
To: Walsh, James (ODAG)
Cc: Tyrangiel, Elana (OLP); Brown Lee, Erika (ODAG); Lan, Iris (ODAG)
Subject: RE: Big Data

I have a meeting with the DAG at 2 p.m., but could you let me know what comes out of that meeting? Also, could you make sure that Peter is kept in the loop? Perhaps he should be included in the meeting? Thanks.

-----Original Message-----
From: Walsh, James (ODAG)
Sent: Thursday, October 23, 2014 12:36 PM
To: Cheung, Denise (OAG)
Cc: Tyrangiel, Elana (OLP); Brown Lee, Erika (ODAG); Lan, Iris (ODAG)
Subject: Big Data

Denise,

Got your message about the Big Data report. We're planning to meet at 2 pm in 4236 to discuss the letter to the AG. Are you available?

Jim

Document ID: 0.7.11378.29990

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Friday, October 24, 2014 12:42 PM
To: Siger, Steven B. (OLP); Krulic, Alexander (OLP); Fried, Hannah (OLP); Pazur, Shannon (OLP)
Subject: Predictive Analytics #2 - DRAFT
Attachments: Predictive Analytics - Draft 10.24.14.docx

Team Attached for your review is the most recent draft of the predictive analytics in law enforcement document. As you can see, it is still a work in progress, but much of the substance is there. Please let us know your thoughts.

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24112

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Friday, October 24, 2014 5:40 PM
To: Tyrangiel, Elana (OLP); Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: Predictive Analytics in Law Enforcement - DRAFT
Attachments: Predictive Analytics - Draft 10.24.14.docx

Team

Attached is the most recent version of the Predictive Analytics in Law Enforcement draft. Alex has not yet reviewed some of the new sections, but we wanted to go ahead and send in case you would like to take a look at it over the weekend.

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24305

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Monday, October 27, 2014 6:10 PM
To: Krulic, Alexander (OLP)
Attachments: Predictive Analytics - Draft 10 24 14 et.docx

Document ID: 0.7.11378.24408

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, October 28, 2014 5:28 PM
To: Hecker, Elizabeth (OLP)
Attachments: Predictive Analytics - Draft 10.28.14.docx

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24136

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Wednesday, October 29, 2014 6:59 PM
To: Krulic, Alexander (OLP)
Subject: Predictive Analytics - DRAFT 10.29.14
Attachments: Predictive Analytics - Draft 10.29.14.docx

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24268

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Thursday, October 30, 2014 11:56 AM
To: Tyrangiel, Elana (OLP); Siger, Steven B. (OLP); Krulic, Alexander (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: Predictive Analytics in Law Enforcement - Draft 10.30.14
Attachments: Predictive Analytics - Draft 10.30.14.docx

Team

Attached is the latest version of the Predictive Analytics in Law Enforcement draft. (b) (5) [redacted]

I will likely circulate a revised version again tomorrow morning.

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24411

Siger, Steven B. (OLP)

From: Siger, Steven B. (OLP)
Sent: Friday, October 31, 2014 9:56 AM
To: Krulic, Alexander (OLP)
Cc: Tyrangiel, Elana (OLP)
Subject: Predictive Analytics

Alex,

Here are my (mostly) big picture thoughts on the current draft. In my haste to go be a banana, I neglected to emphasize that I think the vast majority of the pieces of the puzzle are in the report, and it is clear that everyone has put a great deal of thought and effort into it.

A few structural points:

(1 (b) (5)

(2) (b) (5)

(3 (b) (5) .

And then some more random ones:

(1) (b) (5)

(2 (b) (5)

(3 (b) (5)

(4 (b) (5)

(5) (b) (5)

(6 (b) (5) .

Document ID: 0.7.11378.24491

Happy to talk further when I'm back.

best,
Steve

Document ID: 0.7.11378.24491

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Friday, October 31, 2014 12:22 PM
To: Krulic, Alexander (OLP); Pazur, Shannon (OLP)
Subject: Predictive Analytics - Draft 10.21.14
Attachments: Predictive Analytics - Draft 10.31.14.docx

New version attached. Have a great weekend!

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24183

Siger, Steven B. (OLP)

From: Siger, Steven B. (OLP)
Sent: Friday, October 31, 2014 4:40 PM
To: Krulic, Alexander (OLP)
Cc: Tyrangiel, Elana (OLP)
Subject: Predictive Analytics - Draft 10 30 14.SBS
Attachments: Predictive Analytics - Draft 10 30 14.SBS.docx

Alex, Elana,

(b) (5) [redacted]

I would be happy to discuss your thoughts, including most especially whether any of these edits seem unnecessary.

Best,
Steve

Document ID: 0.7.11378.24495

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Friday, October 31, 2014 5:17 PM
To: Krulic, Alexander (OLP)
Subject: suggested edits attached
Attachments: Predictive Analytics - Draft 10 30 14 (2).docx

Document ID: 0.7.11378.24494

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Monday, November 03, 2014 12:27 PM
To: Hecker, Elizabeth (OLP)
Cc: Siger, Steven B. (OLP)
Subject: Predictive Analytics - Concerns
Attachments: Predictive Analytics - Draft 11 03 14 a.docx

Beth,

(b) (5) I added some additional line edits as well.

If you want to discuss or disagree with any of these, please let me know.

Alex

Document ID: 0.7.11378.24206

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, November 04, 2014 10:02 AM
To: Krulic, Alexander (OLP); Pazur, Shannon (OLP)
Subject: Predictive Analytics
Attachments: Predictive Analytics - Draft 11.4.14.docx

Current draft is attached.

(b) (5) [redacted]. I'm doing it now. Please feel free to join if you'd like.

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24195

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Tuesday, November 04, 2014 11:44 AM
To: Tyrangiel, Elana (OLP)
Cc: Siger, Steven B. (OLP); Hecker, Elizabeth (OLP); Pazur, Shannon (OLP)
Subject: Predictive Policing - Draft
Attachments: Predictive Analytics - Draft 11 04 14 v1.docx

Elana,

Attached is the most recent draft (b) (5) .

(b) (5)

(b) (5)

Alex

Document ID: 0.7.11378.24549

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, November 04, 2014 2:09 PM
To: Siger, Steven B. (OLP)
Subject: FW: Intro
Attachments: Intro draft.docx

Steve - FYI

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, November 04, 2014 12:33 PM
To: Krulic, Alexander (OLP); Pazur, Shannon (OLP)
Subject: Intro

Attached is a draft intro. I welcome your thoughts.

Also, if we are going to meet at 1:0 (b) (6)

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24197

Siger, Steven B. (OLP)

From: Siger, Steven B. (OLP)
Sent: Tuesday, November 04, 2014 4:28 PM
To: Krulic, Alexander (OLP)
Subject: Conclusion Draft
Attachments: Conclusion Draft.docx

Document ID: 0.7.11378.24317

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Tuesday, November 04, 2014 4:34 PM
To: Siger, Steven B. (OLP)
Subject: Conclusion Draft 11 04
Attachments: Conclusion Draft 11 04.docx

Great stuff. A couple of suggested edits.

Document ID: 0.7.11378.24320

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Tuesday, November 04, 2014 4:54 PM
To: Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Siger, Steven B. (OLP)
Subject: Predictive Analytics - Draft
Attachments: Predictive Analytics - Draft 11 04 14 v2.docx

Attached is the re-ordered version. I am working on edits to th (b) (5)

Document ID: 0.7.11378.24205

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Tuesday, November 04, 2014 5:10 PM
To: Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject: still in progress . . .
Attachments: Predictive Analytics - Draft 11 04 14 v2.docx

I will resume tomorrow.

Document ID: 0.7.11378.24568

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Tuesday, November 04, 2014 5:39 PM
To: Hecker, Elizabeth (OLP)
Cc: Siger, Steven B. (OLP); Pazur, Shannon (OLP)
Subject: Draft - v4
Attachments: Predictive Analytics - Draft 11 04 14 v4.docx

Beth had trouble opening the attachment.

Here it is again, this time as version 4.

Alex

Document ID: 0.7.11378.24324

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Tuesday, November 04, 2014 6:48 PM
To: Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP)
Subject: Big Data
Attachments (b) (5) 11.4.14.docx; Predictive Analytics - Draft 11.04.14 EVENING.docx

Attached is the latest draft of the Predictive Analytics in Law Enforcement report. Please work from this version if you have edits between now and tomorrow.

(b) (5)

Have a good night!

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24266

Siger, Steven B. (OLP)

From: Siger, Steven B. (OLP)
Sent: Wednesday, November 05, 2014 10:28 AM
To: Tyrangiel, Elana (OLP); Krulic, Alexander (OLP)
Subject: Predictive Analytics - Draft 11 04 14 EVENING.SBS INTRO
Attachments: Predictive Analytics - Draft 11 04 14 EVENING.SBS INTRO.docx

Here's a redline of the intro (b) (5) [redacted]

Document ID: 0.7.11378.27122

Pazur, Shannon (OLP)

From: Pazur, Shannon (OLP)
Sent: Wednesday, November 05, 2014 11:02 AM
To: Krulic, Alexander (OLP)
Subject: Draft data report
Attachments: Predictive Analytics - Draft 11 05 14 11am.docx

Here you go (b) (5) [redacted]. I'd still like to fix the citations, but I can do that later.

Shannon M. Pazur
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
202.305.0645
Shannon.Pazur@usdoj.gov

Document ID: 0.7.11378.27124

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Wednesday, November 05, 2014 11:18 AM
To: Tyrangiel, Elana (OLP)
Cc: Siger, Steven B. (OLP)
Subject: Conclusions Draft - 11 05 14
Attachments: Conclusions Draft - 11 05 14.docx

Elana,

Here is the current draft of the Conclusions and Next Steps, reflecting Steve drafting and my editing.

Alex

Document ID: 0.7.11378.27126

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Wednesday, November 05, 2014 12:14 PM
To: Krulic, Alexander (OLP)
Cc: Siger, Steven B. (OLP)
Subject: RE: Conclusions Draft - 11 05 14
Attachments: Predictive Analytics - Draft 11 05 14 clean.docx

Trying again.

From: Krulic, Alexander (OLP)
Sent: Wednesday, November 05, 2014 12:11 PM
To: Tyrangiel, Elana (OLP)
Cc: Siger, Steven B. (OLP)
Subject: RE: Conclusions Draft 11 05 14

Thank you. Both of these appear to be the redline.

I can review and accept the changes, but if you meant to send a clean version, I don't think that it made it.

From: Tyrangiel, Elana (OLP)
Sent: Wednesday, November 05, 2014 12:07 PM
To: Krulic, Alexander (OLP)
Cc: Siger, Steven B. (OLP)
Subject: RE: Conclusions Draft 11 05 14

<< File: Predictive Analytics - Draft 11 05 14 clean.docx >>

Concerns and benefits. Let me know if you need the redline at this point, I think a clean version is more useful.

<< File: Predictive Analytics - Draft 11 05 14 clean.docx >>

From: Krulic, Alexander (OLP)
Sent: Wednesday, November 05, 2014 11:44 AM
To: Tyrangiel, Elana (OLP)
Cc: Siger, Steven B. (OLP)
Subject: RE: Conclusions Draft 11 05 14

Document ID: 0.7.11378.27130

Elana,

(b) (5) [redacted]

[redacted]

(b) (5) [redacted]

(b) (5) [redacted]

Alex

From: Krulic, Alexander (OLP)
Sent: Wednesday, November 05, 2014 11:18 AM
To: Tyrangiel, Elana (OLP)
Cc: Siger, Steven B. (OLP)
Subject: Conclusions Draft 11 05 14

Elana,

Here is the current draft of the Conclusions and Next Steps, reflecting Steve drafting and my editing.

Alex

Document ID: 0.7.11378.27130

<< File: Conclusions Draft - 11 05 14.docx >>

Document ID: 0.7.11378.27130

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Wednesday, November 05, 2014 1:03 PM
To: Tyrangiel, Elana (OLP); Siger, Steven B. (OLP)
Cc: Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: Predictive Analytics - Draft 1 pm
Attachments: Predictive Analytics - Draft 11 05 14 - 1 pm.docx

Elana,

Attached is the most recent draft.

(b) (5) [redacted].

(b) (5) [redacted].

Alex

Document ID: 0.7.11378.24567

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Wednesday, November 05, 2014 5:10 PM
To: Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject: new version
Attachments: Predictive Analytics - Draft 11 05 14 - 5 pm.docx

Document ID: 0.7.11378.27141

Siger, Steven B. (OLP)

From: Siger, Steven B. (OLP)
Sent: Wednesday, November 05, 2014 5:36 PM
To: Krulic, Alexander (OLP); Tyrangiel, Elana (OLP)
Subject: RE: new version
Attachments: Predictive Analytics - Draft 11 05 14 - 5 pm.SBS.docx

Attached is my cut at the intro. (b) (5) [redacted]

I think this works, but very much welcome any feedback.

Best,
Steve

From: Krulic, Alexander (OLP)
Sent: Wednesday, November 05, 2014 5:18 PM
To: Tyrangiel, Elana (OLP); Siger, Steven B. (OLP)
Subject: RE: new version

Thank you. I will look at this now.

Steve may have told you, but Hannah is still workin (b) (5) [redacted].

We asked her to print it when she is done.

From: Tyrangiel, Elana (OLP)
Sent: Wednesday, November 05, 2014 5:10 PM
To: Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject: new version

<< File: Predictive Analytics - Draft 11 05 14 - 5 pm.docx >>

Document ID: 0.7.11378.27143

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Wednesday, November 05, 2014 5:40 PM
To: Hecker, Elizabeth (OLP)
Subject: Revised Draft
Attachments: Predictive Analytics - Draft 11 05 14 - 6 pm.docx

Deliberative & Pre-Decisional

Document ID: 0.7.11378.25198

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Wednesday, November 05, 2014 5:40 PM
To: Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject: Predictive Analytics - Draft 11 05 14 - 5 pm SBS
Attachments: Predictive Analytics - Draft 11 05 14 - 5 pm SBS.docx

Alex, curious for your thoughts too, but I had just one initial tweak to Steve's edits (in blue, in the third paragraph).

Document ID: 0.7.11378.27145

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Wednesday, November 05, 2014 8:01 PM
To: Hecker, Elizabeth (OLP)
Cc: Siger, Steven B. (OLP)
Subject: Predictive Analytics - Draft
Attachments: Predictive Analytics - Draft 11 05 14 - 8 pm.docx

Beth,

Attached is the most recent draft. For now, you have the pen.

Alex

Document ID: 0.7.11378.25199

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Thursday, November 06, 2014 10:06 AM
To: Krulic, Alexander (OLP)
Subject: Big Data doc
Attachments: Predictive Analytics - Draft 11.6.14.docx

(b) (5) [redacted]. Can you just send it back when you're done?

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.25233

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Thursday, November 06, 2014 10:44 AM
To: Siger, Steven B. (OLP)
Subject: Predictive Analytics Intro 10 am
Attachments: Predictive Analytics Intro 10 am.docx

Document ID: 0.7.11378.27374

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Thursday, November 06, 2014 10:45 AM
To: Siger, Steven B. (OLP)
Subject: Predictive Analytics - Draft 11 06 14 - 11 am
Attachments: Predictive Analytics - Draft 11 06 14 - 11 am.docx

Document ID: 0.7.11378.27372

Siger, Steven B. (OLP)

From: Siger, Steven B. (OLP)
Sent: Thursday, November 06, 2014 11:08 AM
To: Krulic, Alexander (OLP)
Subject: RE: Intro
Attachments: SBS Insert 10.6.14 1107AM.docx

(b) (5) [redacted]

Best,
Steve

From: Krulic, Alexander (OLP)
Sent: Thursday, November 06, 2014 10:56 AM
To: Siger, Steven B. (OLP)
Subject: Intro

(b) (5) [redacted].

Document ID: 0.7.11378.27375

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Thursday, November 06, 2014 11:51 AM
To: Hecker, Elizabeth (OLP)
Cc: Siger, Steven B. (OLP); Pazur, Shannon (OLP)
Subject: Predictive Analytics - DRAFT
Attachments: Predictive Analytics - Draft 11 06 14 - 12 pm.docx

Attached is the latest draft reflecting line edits by Steve and me.

(b) (5)
[redacted].

The goal remains to provide it to Elana at 1:00 pm.

Alex

Document ID: 0.7.11378.25235

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Thursday, November 06, 2014 12:54 PM
To: Krulic, Alexander (OLP)
Subject: Predictive Analytics - 12:45 Draft
Attachments: Predictive Analytics - Draft 11.06.14 1245pm.docx

(b) (5)
[redacted]

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.25243

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Thursday, November 06, 2014 1:05 PM
To: Tyrangiel, Elana (OLP)
Cc: Siger, Steven B. (OLP); Hecker, Elizabeth (OLP)
Subject: Predictive Analytics - Draft
Attachments: Predictive Analytics - Draft 11 06 14 - 1 pm.docx

Elana,

Attached is a revised draft of the paper for your review.

We are all available this afternoon to help as needed. Beth is waiting on a few factual items, but filled in a lot of the brackets.

Since you last saw it, Steve and I also added line edits throughout the document.

Alex

Document ID: 0.7.11378.24849

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Thursday, November 06, 2014 2:49 PM
To: Krulic, Alexander (OLP)
Subject: Predictive Analytics - Draft 11 06 14 - 1 pm
Attachments: Predictive Analytics - Draft 11 06 14 - 1 pm.docx

Document ID: 0.7.11378.27383

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Thursday, November 06, 2014 3:27 PM
To: Tyrangiel, Elana (OLP)
Cc: Siger, Steven B. (OLP)
Subject: Predictive Analytics Intro - Draft
Attachments: Predictive Analytics Intro - Draft 3 pm.docx

Elana,

Attached is my revised version of the Intro in response to your comments.

Thank you for your guidance, I think the logical flow is much improved.

Alex

Document ID: 0.7.11378.27385

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Thursday, November 06, 2014 4:18 PM
To: Tyrangiel, Elana (OLP)
Cc: Siger, Steven B. (OLP); Hecker, Elizabeth (OLP)
Subject: Predictive Analytics Introduction
Attachments: Predictive Analytics Introduction - Draft 4 pm.docx

Further revisions to the Introduction (now labeled 4 pm), based on comments from Elana and Steve.

Alex

Document ID: 0.7.11378.24971

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Thursday, November 06, 2014 5:16 PM
To: Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject: Predictive Analytics - Draft 11 06 14 - 515 pm
Attachments: Predictive Analytics - Draft 11 06 14 - 515 pm.docx

Document ID: 0.7.11378.27392

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Thursday, November 06, 2014 5:17 PM
To: Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject: Predictive Analytics - Draft 11 06 14 - 515 pm
Attachments: Predictive Analytics - Draft 11 06 14 - 515 pm.docx

Clean version.

Document ID: 0.7.11378.27393

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Thursday, November 06, 2014 7:53 PM
To: Tyrangiel, Elana (OLP); Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP)
Subject: Predictive Analytics in Law Enforcement - Draft 11.6.14 8pm
Attachments: Predictive Analytics - Draft 11.06.14 EPH EVENING REDLINE.docx

Good evening! I am attaching a redlined version of the Predictive Analytics in Law Enforcement report. (b) (5) [redacted]

I have also made substantial edits to the footnotes. They should be correctly blue booked now. You will not see them in redline because they are not substantive and they added a lot of unnecessary and distracting red to the document. However, if you would like to see the footnote changes I'm happy to do a compare version tomorrow morning.

I've also tried to answer a couple of Elana's comments in the margins.

(b) (5) [redacted]

Have a good night, and I will see you tomorrow morning!

Beth

(b) (5) [redacted]

Document ID: 0.7.11378.24973

(b) (5) [redacted]

[redacted]

[redacted]

[redacted]

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.24973

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Friday, November 07, 2014 11:04 AM
To: Krulic, Alexander (OLP); Siger, Steven B. (OLP); Hecker, Elizabeth (OLP); Pazur, Shannon (OLP)
Subject: New version
Attachments: Predictive Analytics - Draft 11 07 14 v2.docx

In redline. Please call me with any concerns about the edits.

Document ID: 0.7.11378.24988

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Friday, November 07, 2014 3:31 PM
To: Cheung, Denise (OAG)
Subject: predictive analytics
Attachments: Predictive Analytics - Draft 11 07 14 CIRCULATION VERSION.docx

Denise, FYI, here's the version of the predictive analytics report that we're circulating to components today, with a COB Monday request for comments. We will recirculate for leadership clearance next week. If you have any questions, please feel free to call me. Thanks, and hope you're having a good trip.

Document ID: 0.7.11378.28020

Hecker, Elizabeth (OLP)

From:	Hecker, Elizabeth (OLP)
Sent:	Wednesday, November 12, 2014 11:37 AM
To:	Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Cc:	Pazur, Shannon (OLP)
Subject:	RE: Predictive
Attachments:	Predictive Analytics - All component redline - 11.12.14.docx

Attached is a document reflecting all of the comments we've received, along with my recommendations (signified next to my initials in bold) on how we handle each comment. I played around with different ways to mark this up and this seemed to be the most clear.

(b) (5) [redacted]

(b) (5) [redacted] Please let me know your thoughts.

Beth

From: Krulic, Alexander (OLP)
Sent: Wednesday, November 12, 2014 9:33 AM
To: Siger, Steven B. (OLP)
Cc: Hecker, Elizabeth (OLP); Pazur, Shannon (OLP)
Subject: Re: Predictive

That's all correct. Thank you Steve.

On Nov 12, 2014, at 9:18 AM, "Siger, Steven B. (OLP)" <ssiger@jmd.usdoj.gov> wrote:

> Beth,
>
> (b) (5) [redacted]
>
> Best,
> Steve
>
> <mime-attachment>
> <mime-attachment>
> <mime-attachment>
> <mime-attachment>
> <mime-attachment>

Document ID: 0.7.11378.25262

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Wednesday, November 12, 2014 4:40 PM
To: Tyrangiel, Elana (OLP); Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP)
Subject: Predictive Analytics - Component Comments
Attachments: Predictive Analytics - All component redline - 11 12 14 v.2.docx

Elana and team

Attached is a redline of the Predictive Analytics in Law Enforcement document reflecting the comments we received from the various components.

We met and discussed each of the suggested changes and these recommendations reflect all of our input. I've tracked the proposed changes and have included in the comments the component's original suggestion, our proposed edit, and our reasoning.

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.25113

Tyrangiel, Elana (OLP)

From:	Tyrangiel, Elana (OLP)
Sent:	Wednesday, November 12, 2014 6:30 PM
To:	Delery, Stuart F. (OAAG)
Cc:	Cox, James C. (OAAG)
Subject:	RE: Predictive Analytics
Attachments:	Predictive Analytics 11 12 14 Clearance Copy.docx

Hello again –

As promised, attached is a revised copy of the predictive analytics report, reflecting (b) (5) (b) (5) Please let us know if you would like to discuss.

Thanks much –

Elana

From: Tyrangiel, Elana (OLP)
Sent: Sunday, November 09, 2014 9:50 AM
To: Delery, Stuart F. (OAAG)
Cc: Cox, James C. (OAAG)
Subject: RE: Predictive Analytics

Great, thanks. I have attached here the draft we circulated on Friday, and we'll be sure to share the revised version when we hear back from components.

Elana

-----Original Message-----
From: Delery, Stuart F. (OAAG) [sfdelery@jmd.usdoj.gov]
Received: Sunday, 09 Nov 2014, 9:01AM
To: Tyrangiel, Elana (OLP) [etyrangiel@jmd.usdoj.gov]
CC: Cox, James C. (OAAG) [jccox@jmd.usdoj.gov]
Subject: Re: Predictive Analytics

Thanks, Elana. We would be interested in seeing the draft.

Stuart

On Nov 7, 2014, at 3:23 PM, Tyrangiel, Elana (OLP) <etyrangiel@jmd.usdoj.gov> wrote:

Document ID: 0.7.11378.28105

Dear Stuart,

As I mentioned at our last meeting, as a follow-on assignment from the White House Big Data report, we've been working on a draft report on predictive analytics in law enforcement. (b) (5)
(b) (5)
(b) (5) We would be happy to share a draft, if you would be interested. Just let me know – we're sending a draft to the relevant components today, with a request for comments by Monday COB, and will re-circulate to leadership offices (including yours, if you like) next week.

I hope all is well with you –

Elana

Document ID: 0.7.11378.28105

Krulic, Alexander (OLP)

From:	Krulic, Alexander (OLP)
Sent:	Wednesday, November 12, 2014 11:30 PM
To:	Pazur, Shannon (OLP); Hecker, Elizabeth (OLP)
Subject:	Predictive Analytics Paper
Attachments:	Predictive Analytics 11 12 14 Clearance Copy.docx; ATT00001.htm

Beth and Shannon,

This is the copy that went to ODAG this evening.

Alex

Begin forwarded message:

> **From:** "Tyrangiel, Elana (OLP)" <etyrangiel@jmd.usdoj.gov>
> **Date:** November 12, 2014 at 6:29:55 PM EST
> **To:** "Walsh, James (ODAG)" <jamwalsh@jmd.usdoj.gov>, "Lan, Iris (ODAG)" <irlan@jmd.usdoj.gov>, "Brown Lee, Erika (ODAG)" <ebrownlee@jmd.usdoj.gov>
> **Cc:** "Krulic, Alexander (OLP)" <akrulic@jmd.usdoj.gov>, "Siger, Steven B. (OLP)" <ssiger@jmd.usdoj.gov>
> **Subject: Predictive Analytics Paper**
>
> Hi all –
>
> Attached is a copy of the predictive analytics paper, which is ready for review and clearance. This version incorporates some light edits from components. I would love to chat tomorrow about next steps but wanted to be sure you had a copy of the paper asap. (b) (5)
> (b) (5) [redacted]
>
> Thanks,
> Elana

Document ID: 0.7.11378.25264

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Thursday, November 13, 2014 10:55 AM
To: Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Cc: Pazur, Shannon (OLP)
Subject: Predictive Analytics
Attachments: Predictive Analytics 11.13.14.docx

Attached is the document again, (b) (5) [redacted]

I've also filled in the supras and made a handful of additional formatting changes (mostly eliminating extra hard returns).

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.25266

Brown Lee, Erika (ODAG)

From:	Brown Lee, Erika (ODAG)
Sent:	Thursday, November 13, 2014 12:25 PM
To:	Tyrangiel, Elana (OLP); Walsh, James (ODAG); Lan, Iris (ODAG)
Cc:	Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject:	RE: Predictive Analytics Paper
Attachments:	Predictive Analytics - Draft 11 07 14 CIRCULATION VERSION - EBL Edits.docx

Elana – Thanks for providing the opportunity to review the report, which is very well written. Attached for your consideration are proposed additions based on the materials we submitted in our Sept. 15 response to the WH.

Best regards,
Erika

Erika Brown Lee
Chief Privacy and Civil Liberties Officer
Office of the Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Tel: 202-307-0697
Erika.Brown.Lee@usdoj.gov

From: Tyrangiel, Elana (OLP)
Sent: Wednesday, November 12, 2014 6:30 PM
To: Walsh, James (ODAG); Lan, Iris (ODAG); Brown Lee, Erika (ODAG)
Cc: Krulic, Alexander (OLP); Siger, Steven B. (OLP)
Subject: Predictive Analytics Paper

Hi all –

Attached is a copy of the predictive analytics paper, which is ready for review and clearance. This version incorporates some light edits from components. I would love to chat tomorrow about next steps but wanted to be sure you had a copy of the paper asap. (b) (5) [redacted]
(b) (5) [redacted]

Thanks,
Elana

<< File: Predictive Analytics 11 12 14 Clearance Copy.docx >>

Document ID: 0.7.11378.27581

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Thursday, November 13, 2014 4:51 PM
To: Hecker, Elizabeth (OLP)
Subject: Predictive Analytics - DRAFT 11 13 14
Attachments: Predictive Analytics - DRAFT 11 13 14.docx

Will you review, accept her changes, and then add your copy edits. And then add Steve's edits to Erika's edits (with my one improvement).

Thank you!

From: Tyrangiel, Elana (OLP)
Sent: Thursday, November 13, 2014 3:59 PM
To: Krulic, Alexander (OLP)
Subject: Predictive Analytics DRAFT 11 13 14

Document ID: 0.7.11378.25272

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Thursday, November 13, 2014 5:10 PM
To: Krulic, Alexander (OLP)
Subject: FW: Cover Letter
Attachments: Podesta Cover Letter.docx

From: Hecker, Elizabeth (OLP)
Sent: Thursday, November 13, 2014 4:13 PM
To: Pazur, Shannon (OLP)
Subject: Cover Letter

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.25275

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Thursday, November 13, 2014 5:20 PM
To: Tyrangiel, Elana (OLP)
Cc: Pazur, Shannon (OLP); Siger, Steven B. (OLP); Hecker, Elizabeth (OLP); Fried, Hannah (OLP)
Subject: Cover Letter - Draft 11 13 14
Attachments: Cover Letter - Draft 11 13 14.docx

Attached is a draft cover letter from OLP or the DAG.

Document ID: 0.7.11378.25121

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Friday, November 14, 2014 3:48 PM
To: Kadzik, Peter J (OLA)
Subject: RE: draft predictive analytics
Attachments: Predictive Analytics - Draft Nov 13 at 530pm.docx

Glad to hear it thanks so much. Just so you have it, attached is the most recent version that reflects (b) (5) [redacted]. We should be able to clear this to make the deadline Monday. Thanks again for reviewing and we'll keep you posted on anything we hear on our end.

From: Kadzik, Peter J (OLA)
Sent: Friday, November 14, 2014 12:45 PM
To: Tyrangiel, Elana (OLP)
Subject: RE: draft predictive analytics

I did the side-by-side an (b) (5) [redacted].

Peter J. Kadzik

Assistant Attorney General
Office of Legislative Affairs
(202) 514-2141
peter.j.kadzik@usdoj.gov

From: Tyrangiel, Elana (OLP)
Sent: Friday, November 07, 2014 3:28 PM
To: Kadzik, Peter J (OLA)
Subject: draft predictive analytics

Peter, attached is a draft of the predictive analytics report. We're circulating it to components today for comment by COB Monday. If you have any concerns or comments, please let me know. Thanks much.

<< File: Predictive Analytics - Draft 11 07 14 CIRCULATION VERSION.docx >>

Document ID: 0.7.11378.28134

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Friday, November 14, 2014 3:53 PM
To: Cheung, Denise (OAG)
Subject: predictive analytics
Attachments: Predictive Analytics - Draft Nov 13 at 530pm.docx

Denise, FYI, attached is a newer version of the paper I previously sent to you on predictive analytics. This version includ (b) (5) . We're sending this (once we do a final review for typos and formatting) up to the DAG today in order to hit the Monday deadline.

If you have any questions, please feel free to call!

Elana

Document ID: 0.7.11378.28165

Siger, Steven B. (OLP)

From:	Siger, Steven B. (OLP)
Sent:	Friday, November 14, 2014 3:57 PM
To:	Krulic, Alexander (OLP)
Cc:	Pazur, Shannon (OLP); Hecker, Elizabeth (OLP); Tyrangiel, Elana (OLP)
Subject:	RE: Predictive Analytics - Draft
Attachments:	Predictive Analytics - Draft Nov 14 355pm.docx

Alex et al.,

Attached, please find a version with cover page. The first page of text is numberless, and the second page of text is page 2. It would be great if someone else would eyeball the page numbers and cover page to make sure I didn't miss anything.

best,
Steve

From: Krulic, Alexander (OLP)
Sent: Friday, November 14, 2014 3:48 PM
To: Siger, Steven B. (OLP)
Cc: Pazur, Shannon (OLP); Hecker, Elizabeth (OLP); Tyrangiel, Elana (OLP)
Subject: Predictive Analytics - Draft

Steve,

Please add the cover page to this version.

Beth and Shannon have identified a number of typos which we will endeavor to put in as soon as you are done.

Alex

From: Krulic, Alexander (OLP)
Sent: Thursday, November 13, 2014 5:33 PM
To: Hecker, Elizabeth (OLP); Tyrangiel, Elana (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: RE: Predictive Analytics - Draft 5:15

Attached is a slightly revised version.

A couple of formatting changes and fixing the (b) (5) [redacted]

Alex
<< File: Predictive Analytics - Draft Nov 13 at 530pm.docx >>

Document ID: 0.7.11378.25161

From: Hecker, Elizabeth (OLP)
Sent: Thursday, November 13, 2014 5:15 PM
To: Tyrangiel, Elana (OLP); Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: Predictive Analytics - Draft 5:15

Formatting issues have been fixed, Erika's additions (as edited by Steve and Hannah) have been added, Elana's changes have been accepted and supras have been corrected. (b) (6) (b) (6) Let me know…I'll check my Samsung.

Beth

<< File: Predictive Analytics - DRAFT 11.13.14 515pm.docx >>

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Siger, Steven B. (OLP)

From: Siger, Steven B. (OLP)
Sent: Friday, November 14, 2014 4:03 PM
To: Krulic, Alexander (OLP); Tyrangiel, Elana (OLP)
Subject: FW: Predictive Analytics - Draft
Attachments: Predictive Analytics - Draft Nov 13 at 530pm.docx

Upon very quick review (b) (5)

(1 (b) (5)

(2 (b) (5) .

From: Krulic, Alexander (OLP)
Sent: Friday, November 14, 2014 3:48 PM
To: Siger, Steven B. (OLP)
Cc: Pazur, Shannon (OLP); Hecker, Elizabeth (OLP); Tyrangiel, Elana (OLP)
Subject: Predictive Analytics Draft

Steve,

Please add the cover page to this version.

Beth and Shannon have identified a number of typos which we will endeavor to put in as soon as you are done.

Alex

From: Krulic, Alexander (OLP)
Sent: Thursday, November 13, 2014 5:33 PM
To: Hecker, Elizabeth (OLP); Tyrangiel, Elana (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: RE: Predictive Analytics Draft 5:15

Attached is a slightly revised version.

A couple of formatting changes and fixing th (b) (5) .

Alex

Document ID: 0.7.11378.27636

From: Hecker, Elizabeth (OLP)
Sent: Thursday, November 13, 2014 5:15 PM
To: Tyrangiel, Elana (OLP); Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)
Subject: Predictive Analytics Draft 5:15

Formatting issues have been fixed, Erika's additions (as edited by Steve and Hannah) have been added, Elana's changes have been accepted and supras have been corrected (b) (6) [redacted] Let me know…I'll check my Samsung.

Beth

<< File: Predictive Analytics - DRAFT 11.13.14 515pm.docx >>

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.27636

Hecker, Elizabeth (OLP)

From: Hecker, Elizabeth (OLP)
Sent: Friday, November 14, 2014 5:30 PM
To: Tyrangiel, Elana (OLP); Siger, Steven B. (OLP); Krulic, Alexander (OLP); Pazur, Shannon (OLP)
Subject: Predictive Analytics - Line Edits
Attachments: Predictive Analytics - Draft Nov 14 EPH SMP line edits 2.docx

Line edits are attached. Some are typos, some are formatting suggestions, just a handful are phrasing suggestions. (b) (5) [redacted], I accepted the edits that Steve sent and also made changes that he and I discussed on the phone, and then inserted the clean version into the document, and then made a few additional redlines that Shannon and I had identified. My apologies if that is confusing everything else should be reflected in redline.

Beth

Elizabeth Parr Hecker
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4242
Washington, D.C. 20530
202-514-2160
Elizabeth.Hecker@usdoj.gov

Document ID: 0.7.11378.25167

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Friday, November 14, 2014 6:26 PM
To: Brinkley, Winnie (ODAG)
Cc: Lan, Iris (ODAG); Walsh, James (ODAG); Brown Lee, Erika (ODAG); Gauhar, Tashina (ODAG); Siger, Steven B. (OLP); Krulic, Alexander (OLP)
Subject: Materials for the DAG
Attachments: Cover Letter - Draft 11 14 14.docx; MEMORANDUM 3.docx; Predictive Analytics - Draft Nov 14 FINAL.docx; PREDICTIVE ANALYTICS PACKAGE.pdf

Winnie, attached are the materials I mentioned.

The PDF document has the complete package.

I've attached Word versions of the component parts, in the event anyone needs them.

Thanks so much

Elana

Document ID: 0.7.11378.27650

Tyrangiel, Elana (OLP)

From: Tyrangiel, Elana (OLP)
Sent: Wednesday, November 19, 2014 4:03 PM
To: kate_e_heinzelman@who.eop.gov
Cc: Krulic, Alexander (OLP)
Subject: Predictive Analytics
Attachments: Predictive Analytics - FINAL.pdf; Predictive Analytics Cover Memo.pdf

Kate, attached please find a cover memo and a report on predictive analytics (b) (5) [redacted]

Thanks,
Elana

Document ID: 0.7.11378.27723

Krulic, Alexander (OLP)

From: Krulic, Alexander (OLP)
Sent: Wednesday, November 19, 2014 4:46 PM
To: Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Siger, Steven B. (OLP); Fried, Hannah (OLP)
Subject: Predictive Analytics
Attachments: Predictive Analytics - FINAL.pdf

Final copy of the Predictive Analytics paper attached! Elana just sent it to WHCO.

Thank you for all of your great work!

Alex

Document ID: 0.7.11378.25306