RESPONSE TO HOUSE MAJORITY STAFF'S ARGUMENTS IN FAVOR OF FEPA
EXECUTIVE SUMMARY

House Majority Staff has issued a two-page response[1] to various points made in opposition[2] to the Foundations for Evidence-Based Policymaking Act, or FEPA (HR 4174),[3] which the House passed last week by voice vote without significant hearings or debate. Here is a point-by-point rebuttal of Majority Staff's claims. This page is an executive summary of that rebuttal.

Claim: FEPA doesn't create a centralized data repository.

Rebuttal: FEPA moves toward the recommendation of the Commission on Evidence-Based Policymaking (Commission) to create a "National Secure Data Service" by 1) requiring each agency to create an evidence-building plan; 2) requiring the OMB Director to unify those plans across the entire federal government; 3) creating a "federal data catalog" and a "national data inventory"; and 4) requiring various councils to recommend how to vastly increase data linking and sharing among federal agencies, with states, and with public and private research entities.

Claim: FEPA doesn't authorize any new data collection or data analysis.

Rebuttal: Regardless of whether FEPA expressly authorizes new data collection, it 1) incentivizes agency heads to expand, not maintain or minimize, data collection; 2) creates new sources of data for agencies by allowing unfettered access to other agencies' data; 3) creates a process whereby public and private organizations can access non-public government data; 4) allows the OMB Director to expand the universe of statistical agencies and units; and 5) allows one person, the OMB director, to decide via post-enactment "guidance" what if any data will be exempt from sharing as too private or confidential.

Claim: FEPA "does not overturn an existing student unit record ban, which prohibits the establishment of a database with data on all students," so parents need not worry about their children's personally identifiable information (PII).

Rebuttal: FEPA doesn't overturn this ban – that will almost certainly come later. But its extensive data-linking and data-sharing mandates create a *de facto* national database, whereby the data stays "housed" within the collecting agency but can be accessed by all. Title III specifically authorizes data "accessed" by federal agencies to be shared. This will threaten the security of not only the student data already maintained by the U.S. Department of Education (USED), but also the data in the states' longitudinal data systems.

Claim: FEPA doesn't repeal CIPSEA but rather strengthens it.

Rebuttal: FEPA strengthens nothing. It merely reiterates the same penalties (fine and jail term) in existence since 2002 that have rarely or never been enforced. Worse, FEPA increases threats to privacy and data security by mandating increased access to confidential data and metadata and encouraging unlimited data-swapping with no provisions for data security.

Claim: FEPA "does not respond to the Commission's recommendations to repeal any ban on the collection or consolidation of data."

Rebuttal: FEPA directs agency heads to identify and report "any statutory or other restrictions to accessing relevant data . . . " Because the entire thrust of the bill is to use more and more data for "evidence-building," the inevitable next step will be to implement the Commission's recommendation of repealing these pesky statutory obstacles to acquiring "relevant" data.

Claim: FEPA will make better use of existing data.

Rebuttal: The federal government has reams of data showing the uselessness or harm of existing programs. When the government continues to fund those programs despite this data (see Head Start and manifestly ineffective programs under ESEA), there's no reason – none – to assume it will change its behavior with even more data. And FEPA doesn't even mention what is considered the gold standard of evaluation – the random-assignment model that would develop more unbiased data to provide better evidence. The bill thus initiates an Orwellian data structure for no apparent purpose.

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[1] https://drive.google.com/open?id=0B7epgdVXe0gKamNsTHhFN0RMX1FRSVVwSTh0QkdsLTVyTFRF

[2] http://missourieducationwatchdog.com/congress-suspending-the-rules-to-rush-through-bill-for-national-citizen-data-system-hr4174/ & https://americanprinciplesproject.org/wp-content/uploads/CEP-one-pager-final-Nov-10.pdf

[3] http://tinyurl.com/ycxf68dh

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Claim: FEPA doesn't create a centralized data repository.

While FEPA itself doesn't expressly establish a formal data system with a central repository, the bill's mandates regarding linking and sharing data among multiple federal agents and thousands of bureaucrats will create essentially the same result – a *de facto* national database.

FEPA moves toward the recommendation of the Commission to create a "National Secure Data Service" by 1) requiring each agency to create an evidence-building plan (section 312); 2) requiring the OMB Director to unify those plans across the entire federal government (section 313); 3) creating a "federal data catalog" and a "national data inventory" (section 3511); and 4) requiring various councils to recommend how to vastly increase data linking and sharing among federal agencies, with states, and with public and private research entities (sections 316, 3520A, 3581, 3583). Moreover, the bill allows the OMB Director and agency heads to promulgate their own rules governing disclosures of information to other agencies and to outside entities.

Section 316, especially, illustrates how this new data structure mandated by FEPA will move closer and closer to, and operate as, a central data repository. That section creates an Advisory Committee on Data for Evidence Building and charges the committee with making recommendations on "how to expand access to and use of Federal data for evidence building."

During its first year, the committee must "evaluate and provide recommendations to the Director on the establishment of a shared service to facilitate data sharing, enable data linkage, and develop privacy enhancing techniques . . ." (that last phrase is never fleshed out).

Sections 3520A and 3581 reiterate the goal of increased data swapping. One creates a Chief Data Officer Council, which is to "establish Government-wide best practices for the use, protection, dissemination, and generation of data, . . . promote and encourage data sharing agreements between agencies, . . and identify and evaluate new technology solutions for improving the collection and use of data." The second mandates that each agency head "make any data asset maintained by the agency available . . . to any statistical agency or unit for purposes of developing evidence." And as explained later, FEPA allows practically any government entity to be designated such a "statistical agency" entitled to access data (section 3562(a)).

In light of these and many other provisions that encourage and even mandate almost unlimited data sharing among federal agencies, the absence of a central repository is an almost meaningless detail.

Claim: FEPA doesn't authorize any new data collection or data analysis.

While FEPA doesn't expressly authorize a federal agency to collect *new* data from individuals or organizations, it directs that the bureaucrats who create the "evidence-building plans" list "data the agency *intends to collect,* use, or acquire to facilitate the use of evidence in policymaking" (section 312). There is no suggestion Congress might deny permission to collect such data. And given that the entire thrust of the bill is to gather data for evidence-building (see discussion below), this language should be read as an incentive to expand, not minimize, data collection – based not on what *elected officials* think is necessary, but on what *bureaucrats* want for their activities. It's an empowerment of the Administrative State that is already out of control.

Even more significantly, section 3581 expands access to *existing* datasets held by federal agencies (including data deemed too sensitive for inclusion in the open government database established under Title II of the Act). That section states, "The head of an agency shall, to the extent possible, make any data asset maintained be the agency available, upon request, to any statistical agency or unit for purposes of developing evidence." This expanded access will apply to other federal agencies and public- and private-sector organizations.

Section 3561 provides no limit to the number of "statistical agencies and units" with which such data *must* be shared under FEPA. According to an OMB report, there are 13 principal statistical agencies and 115 other agencies (including organizational units that carry out statistical activities). The number of bureaucrats FEPA could grant access to is vast, as there are 20,000 employees within the 13 principal statistical agencies and an untold number within the other 115 units located in federal agencies.[4] Unfortunately, FEPA doesn't limit which of these groups will have unfettered access to such data; rather, it leaves those details to be decided by the Director of OMB *after* the bill passes.

Indeed, FEPA empowers the Director to expand the universe of these data-producing and data-swapping statistical agencies. Section 3562(a) states: "The Director shall develop a process by which the Director designates agencies or organizational units as statistical agencies and units." If the Director is designating new statistical agencies or units, does that not imply expansion of data collection and data sharing?

FEPA also amends section 3502 of Title 44 to include "machine-readable" and "metadata," thus giving a 21st-century turbocharge to the data that will be compiled and shared. Advances in technology and the increased use of artificial intelligence and algorithms to analyze metadata allow generation of new data, which can be used to predict or profile. Predictive algorithms can be biased and wrong. But that seems to be of no concern to the proponents of FEPA.

More shocking, section 3583 allows public and private organizations to request access to data deemed too sensitive for public access. It requires the OMB Director to create a process through which "the Congressional Budget Office, State, local, and Tribal governments, researchers, and other individuals" can apply to access such sensitive data for the "purposes of developing evidence." The Director, not the agency that collected the data, will decide the criteria for determining whether to grant the applicant access to the data -- the exact process for which, of course, will be decided after the bill passes. FEPA's lack of any prohibitions on federal agencies' granting such access to researchers at data-hungry corporations, such as Google, provides them unprecedented access.

What data will be exempt? It's unclear. While the bill states that data assets "subject to a statute that prohibits the sharing or use of such asset" are exempt, it qualifies that statement by adding that such prohibitions apply only if the statute is written in such a way "as to leave no discretion on the issue." In other words, if the statute could be interpreted to not *completely* prohibit sharing such data, it will be made available. Moreover, any future data collection will automatically be shared under this Act unless the authorizing legislation specifically cites to this exemption.

[4]Seehttps://obamawhitehouse.archives.gov/sites/default/files/omb/assets/information_and_regulatory_affairs/statistcal-programs-2017.pdf

Section 3562(b) of FEPA trusts each agency to promulgate rules to implement all these requirements. But the public has already seen how privacy protections can be simply disregarded by unaccountable bureaucrats. Consider the U.S. Department of Education, which implemented rules contrary to the will of Congress[5] that gutted the privacy protections of the Family Education Rights and Privacy Act (FERPA). Those 2012 regulations greatly broadened access of researchers to student personally identifiable information (PII), without parental consent,[6] and allowed "re-disclosure"[7] of PII to yet other entities, also without consent. So under FEPA, that sensitive PII that is now only marginally protected will be available to every other federal agency.

How about the proponents' claims that FEPA will improve data security? FEPA doesn't require any specific protections for the security of data disclosures. Section 3582(a) states that those requirements will be worked out later in accordance with yet-to-be-written regulations promulgated by the Director of OMB. The technical term for this is "pig in a poke." The American public should not be asked to buy it.

Claim: FEPA "does not overturn an existing student unit record ban, which prohibits the establishment of a database with data on all students," so parents need not worry about the confidentiality of their children's PII.

No, FEPA doesn't overturn this ban – that will certainly come later (see discussion below). But its data-linkage and data-sharing provisions will affect student data already in the custody of the U.S. Department of Education (USED) and the states, through their statewide longitudinal data systems. Parents *cannot* opt students out of local and state data collection,

Title III (section 3581) specifically authorizes data "accessed" by federal agencies to be shared with other agencies and possibly outside entities. This forcibly obtained student data can then be further shared, analyzed, and profiled at the federal level. Federal protections of student data privacy have already been gutted by the Obama administration with its regulatory rewrite of FERPA; the new bill will accelerate the obliteration of student privacy.

Claim: FEPA doesn't repeal CIPSEA but rather strengthens it.

This claim is one of the more shameless made by FEPA drafters. FEPA doesn't strengthen privacy in CIPSEA – it actually weakens it.

Because Section 3561 mandates data sharing to hundreds of federal agencies and thousands of federal bureaucrats, and because the Director is empowered to add to these numbers at will, data will be subject to an increased risk of hacking -- which has already occurred in numerous instances.[8] FEPA contains *no new language strengthening data security*.

[5] https://epic.org/privacy/student/EPIC_FERPA_Comments.pdf
[6] https://www.scribd.com/document/217174726/Ferpa-Aacrao-Comments
[7] Title 34, §99.31(a)(6)(ii)
[8] See https://oversight.house.gov/hearing/reviewing-fafsa-data-breach/, http://www.cnn.com/2015/07/09/politics/office-of-personnel-management-data-breach-20-million/index.html, and https://www.nasfaa.org/news-item/7466/House_Oversight_Committee_Grills_ED_CIO_on_Conduct_Security for disturbing examples.

The dangers of misuse of metadata (newly defined in Section 202(a)(18)) present another serious concern about FEPA's so-called privacy protections. For example, education metadata is being collected without consent and used in state longitudinal data systems, in research, by corporations, and for psychological profiling[9] for subjective, biased, and inaccurate[10] predictive testing. All this is allowed under FERPA[11] -- despite parents' vehement objections.[12]

Section 3511 requires only that the OMB Director "establish guidance" for privacy and confidentiality. There is no absolute prohibition on sharing sensitive data.

Perhaps most brazen of all is the claim, trumpeted to members of Congress to lure them into voting "yes", that FEPA increases penalty provisions for data miscreants -- five years in jail and a $250,000 fine. But this language (from section 3572) is identical to current law as it has existed since 2002 (section 513 of CIPSEA). These penalties are rarely, if ever, enforced. The idea that the government will suddenly start throwing people in jail when it hasn't for the last 15 years is, simply, laughable.

The bottom line is that FEPA not only doesn't increase data protections, it increases the threat of misuse or breaches of data. There is no serious counter-argument.

Claim: FEPA "does not respond to the Commission's recommendations to repeal any ban on the collection or consolidation of data."

The Commission recommended that Congress and the President consider repealing statutory bans on collecting and using data for evidence-building. Examples of current statutory bans include the prohibition against a federal student unit-record system[13] (tracking higher-education students throughout their lives and careers) and against maintaining a federal K-12 student database.[14] Here's what the CEP report says:

> Legislative bans on the collection and use of data create barriers to the use of information for evidence building. . . . [A]bsent articulated criteria, bans on data collection and use create a serious impediment to evidence-based policymaking. . . . Provided that the collection and use of data occur consistent with the Commission's guiding principles, particularly with regard to privacy protection, such collection and use should generally be allowed.[15]

Lay that recommendation beside this language of FEPA: "Such [agency evidence-building] plan shall . . . contain the following: . . . (4) A list of any challenges to developing evidence to support policymaking, including **any statutory or other restrictions** to accessing relevant data . . . ."[16] (emphasis added).

[9] https://thenationalpulse.com/commentary/psychological-profiling-students-ramps-up-parents-have-no-idea/
[10] https://eric.ed.gov/?id=ED502858
[11] 20 USC 1232g(b)(1)(F)
[12] https://thenationalpulse.com/common-core/memo-to-big-data-parents-are-not-fearful-they-are-furious-about-data-mining/
[13] https://www.naicu.edu/docLib/20081030_HEA101-studentunit.pdf
[14] https://www.law.cornell.edu/uscode/text/20/7911#
[15] https://www.cep.gov/content/dam/cep/report/cep-final-report.pdf, p. 43.
[16] Section 312(a)(4).

Any bureaucrat worthy of the name will read that language as an incentive to report to Congress all pesky statutes that keep him from accessing data that might be "relevant" to his agency's evidence building. After all, the point of the entire bill is to maximize use of data to assist policymaking. So if Congress is notified about these "statutory restrictions" to accessing "relevant data," the assumption is that it will address the problem, as identified by the Commission and affirmed by the Administrative State.

Such a "baby steps" approach to achieving the data free-for-all envisioned by Big Data was advocated during the Commission's hearings. One Census Bureau official testified in favor of having one law to govern all PII in various agencies so that such data could be more easily passed around:[17]

> [I]f data with PII [whether from Social Security, from states, etc.] on it was treated the same, you know I think that would permit, you know, organizations that were collecting PII-laden data for different purposes to make those data available more easily. Now, that's probably a pretty heavy lift. . . to show people through examples like that, that there is not an explosion and the world keeps working, maybe even works better, um, to do this in sort of baby steps showing by example, as opposed to trying to rip the Band-Aid off. I think ripping the Band-Aid would probably not fly.

Clearly, FEPA is the first step to ripping off the Band-Aid.

There could not be a more direct connection between a Commission recommendation and statutory language. Majority Staff's denial that this is the intent is disingenuous – the American people can recognize a Marx Brothers claim when they see one.[18] FEPA sets up the inevitable scenario advocated by the Commission: repeal of prohibitions on collecting and using data that some denizen of the Administrative State claims to need. All of this would be done under the philosophy that citizens' private personal data really belongs to the government and to corporate and other researchers – a philosophy profoundly at odds with American principles.

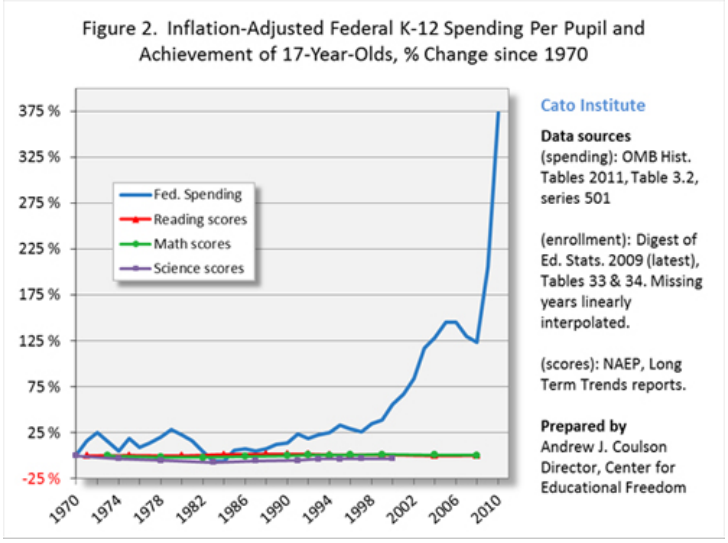
Claim: FEPA will make better use of existing data.

This statement does nothing to respond to the easily provable assertion that "the government routinely ignores the overwhelming data it already has that shows the ineffectiveness of many (most) federal programs." Here are a couple of prominent examples from the education realm:

- Head Start. – The major studies on Head Start's effectiveness[19] by the Department of Health and Human Services, from 1985 through the most recent in 2014, establish that the program is at best an utter waste of money. The 1997 study was a GAO review[20] of over 600 other studies showing that "[t]he body of research on current Head Start is insufficient to draw conclusions about the impact of the national program." Yet Head Start receives more funding every year, and the Every Student Succeeds Act allocates another $250 million that this nation doesn't have to preschool development grants. As soon as Congress acknowledges the mountain of data it already has by defunding Head Start, then it can at least argue it will put data to good use. Until then, there is no reason to assume piling data upon data will have any effect on congressional behavior.

[17] Video from 12/5/2016 CEP meeting at https://youtu.be/eHXRnFCNdeQ starting at 1:28:54
[18] Chico Marx, *Duck Soup* (1933)("Who ya gonna believe, me or your own eyes?").
[19] http://edlibertywatch.org/wp-content/uploads/2017/07/Effectiveness-Research-from-the-U.pdf
[20] GAO review of over 600 citations, manuscripts, and studies http://www.gao.gov/assets/230/223877.pdf

- Despite federal spending of more than $2 trillion on education for poor children with the Elementary and Secondary Education Act since 1965, academic achievement has been stagnant or falling, states' autonomy to direct education is trampled, data privacy is becoming a thing of the past, and parental rights are disappearing. Good money is thrown after demonstrably bad policies year after year, decade after decade.



  At the same time, data showing that two-parent families and religious involvement erase the achievement gap[21], something that $2 trillion and 52 years of federal involvement in education have not come close to accomplishing, is ignored.

Nothing in this bill will change this state of affairs.

Even if Congress were willing to buck the constituencies of various programs and defund the useless ones, will the "evidence-building plans" provide unbiased, objective evidence of program efficacy as promised? Not according to testimony submitted by The Heritage Foundation. This evidence showed that any assessment of the effectiveness of federal social programs must include "experimental designs that use random assignment" and "large-scale evaluations that assess the effectiveness of federal social programs in multiple settings."[22] That is not what FEPA requires. In fact, FEPA establishes *no* standards or criteria for which data collected will be evaluated by federal agencies. Section 312(a)(3) allows the heads of the federal agencies, not Congress, to establish "a list of methods and analytical approaches that may be used to develop evidence to support policymaking." FEPA isn't about using data to form more effective policies, but rather allowing federal agencies and private organizations more access to it.

FEPA is a Christmas gift to Big Data. It's based on the notion that the federal government is entitled to extremely personal data on all citizens and to use that data for whatever purposes the Administrative State can imagine – without the citizens' knowledge or consent. Our Founders would be appalled. We don't need more data to evaluate federal programs – we need far fewer federal programs. This bill must be defeated.

[21] https://eric.ed.gov/?q=%22Jeynes+William+H.%22&pg=2&id=EJ663866
[22] See: http://www.socialinnovationcenter.org/?p=2344