

## CHAPTER 12

### UNITED STATES

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#### **I. Is there a national act containing a legal definition of Automated Administrative Decisions?**

No. At present, there is no national act with a legal definition, but the United States (U.S.) government has defined automated systems and Artificial Intelligence (AI) in various administrative policy directives.

The Trump administration issued Executive Order 14179: Removing Barriers to American Leadership in Artificial Intelligence, which emphasizes the climate of global competition that President Trump believes drives AI development in the U.S. today<sup>1</sup>. The Trump administration revoked the Biden administration's executive branch guidance, including Executive Order 14110: Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, which outlined principles governing the development and use of AI<sup>2</sup>. The Trump administration's Executive Order 14179 nonetheless retains the same definition of AI<sup>3</sup>: "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action"<sup>4</sup>.

Other governmental policy directives addressing AI include the National Institute of Standards and Technology AI Risk Management

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<sup>1</sup> Exec. Order No. 14,179, 90 Fed. Reg. 8741 (Jan. 23, 2025).

<sup>2</sup> Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

<sup>3</sup> See Exec. Order No. 14,179, 90 Fed. Reg. 8741 (Jan. 23, 2025).

<sup>4</sup> *Ibid.* (copying the definition from the National Artificial Intelligence Initiative, 15 U.S.C. § 9401(3)).

Framework (NIST Report)<sup>5</sup>, Office of Management and Budget (OMB) Memorandum on Accelerating Federal Use of AI through Innovation, Governance, and Public Trust (“Accelerating Use of AI” OMB Memorandum)<sup>6</sup>, and OMB Memorandum on Driving Efficient Acquisition of Artificial Intelligence in Government (“Efficient Acquisition of AI” OMB Memorandum)<sup>7</sup>. The Executive Order and OMB Memoranda have binding authority within the Executive Branch of the U.S., whereas the NIST Report is advisory and non-binding<sup>8</sup>.

The Trump administration’s “Accelerating Use of AI” OMB Memorandum defined AI using the John S. McCain National Defense Authorization Act for Fiscal Year 2019:

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.

2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.

3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.

4. A set of techniques, including machine learning, that is designed to approximate a cognitive task.

5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting<sup>9</sup>.

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<sup>5</sup> Nat’l Instit. of Standards and Tech., *Artificial Intelligence Risk Management Framework* (AI RMF 1.0) (2023), <https://doi.org/10.6028/NIST.AI.100-1>.

<sup>6</sup> Memorandum from Russell T. Vought, Off. of Mgmt. & Budget for the Heads of Exec. Off. of the President, Accelerating Federal Use of AI through Innovation, Governance, and Public Trust 18 (Apr. 3, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf> [hereinafter “Accelerating Use of AI” OMB Memorandum].

<sup>7</sup> Memorandum from Russell T. Vought, Off. of Mgmt. & Budget for the Heads of Exec. Off. of the President, Driving Efficient Acquisition of Artificial Intelligence in Government (Apr. 3, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-22-Driving-Efficient-Acquisition-of-Artificial-Intelligence-in-Government.pdf>.

<sup>8</sup> See Nat’l Instit. of Standards and Tech., *Artificial Intelligence Risk Management Framework*, cit at 5, 2.

<sup>9</sup> Memorandum from Shalanda D. Young, Off. of Mgmt. & Budget for the Heads of Exec. Off. of the President, Advancing Governance Innovation and Risk Management

This definition has lasted for more than five years and endured across administrations. It was also utilized by the Biden administration in its now-revoked OMB Memorandum on Advancing Government Innovation and Risk Management for Agency Use of Artificial Intelligence (“Advancing Government Innovation” OMB Memorandum<sup>10</sup>).

In addition to these federal policy directives, the Administrative Conference of the United States (ACUS), an independent agency that identifies ways for the federal government to improve internal agency procedures, has focused significant attention on the acquisition and development of AI within federal agencies<sup>11</sup>. ACUS outlined nine key areas for the development of AI: transparency, harmful bias, technical capacity, obtaining AI systems, data, privacy, security, decisional authority, and oversight<sup>12</sup>.

All of the aforementioned executive orders and policy directives were promulgated at the national level, many directed specifically at federal agencies. Congress has yet to pass a national act directed at AI, but it has considered (in pending bills and hearings) a consolidated national approach. House Bill 1, informally referred to as One Big, Beautiful Bill, included a ten-year moratorium on state AI laws to give Congress the room to pass a comprehensive AI bill and, in the meantime,

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for Agency Use of Artificial Intelligence 26–27 (Mar. 28, 2024), <https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf> [hereinafter “Advancing Government Innovation” OMB Memorandum] (copying the definition from the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub L. No. 115-232 § 238(g)). Neither the NIST Report nor Executive Order 14091 provide any definition of AI.

<sup>10</sup> *Ibid.*

<sup>11</sup> See Admin. Conf. of the U.S., *Statement No. 20* (2020) (Conf. Rep.); C. M. Sharkey, *Algorithmic Tools in Retrospective Review of Agency Rules* (2023) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/sites/default/files/documents/Algorithmic%20Retrospective%20Review%20Final%20Report%202023.05.03.pdf>; D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M. -F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (2020) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/document/government-algorithm-artificial-intelligence-federal-administrative-agencies>.

<sup>12</sup> See Admin. Conf. of the U.S., *Statement No. 20*, cit. at 11.; Admin. Conf. of the U.S., *Information Interchange Bulletin No. 030, Agency Use of Artificial Intelligence* (2023), <https://www.acus.gov/sites/default/files/documents/30-Agency-Use-of-AI.pdf>.

remove the patchwork of emerging state AI laws<sup>13</sup>. However, the Senate voted 99-1 to remove the provision from the legislation after bipartisan concern from governors and state officials<sup>14</sup>. The first attempt to pass the moratorium may have failed, but the effort has been revisited. In September 2025, the House Judiciary Subcommittee on Courts, Intellectual Property, Artificial Intelligence, and the Internet held a hearing called, “AI at a Crossroads: A Nationwide Strategy or Californication?” to investigate how AI laws at the state level can “hinder innovation and impose significant costs on the industry”<sup>15</sup>.

In the meantime, Congress passed the Take It Down Act, the first piece of AI-focused federal legislation since 2018<sup>16</sup>, which cracked down on the sharing of “revenge porn” and forced online platforms and social media sites to remove qualifying images within two days of notification<sup>17</sup>.

In the U.S. federal system, the individual fifty states can also enact legislation and regulations. In the absence of comprehensive federal legislation and regulation, much of the work is left to the states. Since 2019, seventeen states have enacted legislation governing the design, development, and use of AI<sup>18</sup>. Four states have legislation to protect citizens from impacts of uses of unsafe or ineffective AI systems<sup>19</sup>. Eleven states have legislation to safeguard citizens against abusive data practices and ensure that citizens have agency over how AI systems collect and use their data, including “opt-out” provisions<sup>20</sup>. Three states

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<sup>13</sup> J. Hendrix, C. Lima-Strong, *US House Passes 10-Year Moratorium on State AI Laws*, Tech Policy Press (May 22, 2025), <https://www.techpolicy.press/us-house-passes-10-year-moratorium-on-state-ai-laws/>.

<sup>14</sup> M. Brown, M. O’Brien, *Senate Strikes AI Regulatory Ban from GOP Bill After Uproar from the States*, AP (July 1, 2025, 2:30 PM), <https://apnews.com/article/congress-ai-provision-moratorium-states-20beeb6967057be5fe64678f72f6ab0>.

<sup>15</sup> *AI at a Crossroads: A Nationwide Strategy or Californication?: Hearing Before the H. Subcomm. on Cts., Intell. Prop., A.I., & the Internet of the H. Comm. on the Judiciary*, 119th Cong. (2025).

<sup>16</sup> The 2018 legislation established the National Security Commission on Artificial Intelligence to create a body of experts that would regulate AI. See S. 2806 & H.R. 5356, 115th Cong. (2018).

<sup>17</sup> M. Gold, C. Kang, *House Passes Bill to Ban Sharing of Revenge Porn, Sending it to Trump*, N.Y. Times (Apr. 28, 2025), <https://www.nytimes.com/2025/04/28/us/politics/house-revenge-porn-bill.html>.

<sup>18</sup> R. Wright, *Artificial Intelligence in the States: Emerging Legislation* (2023) <https://www.csg.org/2023/12/06/artificial-intelligence-in-the-states-emerging-legislation/>.

<sup>19</sup> *Ibid.* (issuing states include California, Connecticut, Louisiana, and Vermont).

<sup>20</sup> *Ibid.* (issuing states include California, Colorado, Connecticut, Delaware, Indiana, Iowa, Montana, Oregon, Tennessee, Texas, and Virginia).

have legislation to protect its citizens from discrimination and to ensure systems are designed equitably<sup>21</sup>, and twelve states have enacted legislation to ensure that both the state government and private parties develop systems that comply with existing rules—such as privacy laws—and are held accountable<sup>22</sup>.

For example, California recently passed a new law that establishes guardrails for AI in the absence of similar federal legislation<sup>23</sup>. The bill defines an Artificial Intelligence model as an “engineered or machine-based system that varies in its level of autonomy and that can, for explicit or implicit, objectives, infer from the input it receives how to generate outputs that can influence physical or virtual environments”<sup>24</sup>.

Moreover, due to the intricacies of the U.S. federal system of government, states may be bound by some of the federal directives. For example, the Department of Health and Human Services (HHS) funds public benefits administered through state, tribal, local, and territorial government entities<sup>25</sup>. HHS outlined a plan, strongly in line with the aforementioned federal guidelines, to ensure consistency between federal and state agencies in issuing public benefits<sup>26</sup>.

**II. Is there a general legal basis (either at the constitutional level or in the Administrative Procedure Act) for the use of algorithmic automation and/or artificial intelligence (AI) by public authorities (government, agencies, local authorities, and specialised bodies)? If no such legal basis exists, are there any legislative provisions that permit public authorities to experiment with algorithmic automation or AI?**

There is currently no national legislation explicitly outlining a legal basis for the use of AI by public administrations. However, current and past administrations have put forth administrative directives that both encourage federal agencies to adopt AI and explain how agencies

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<sup>21</sup> *Ibid.* (issuing states include California, Colorado, and Illinois).

<sup>22</sup> *Ibid.* (issuing states include California, Colorado, Connecticut, Delaware, Indiana, Iowa, Montana, Oregon, Tennessee, Texas, Virginia, and Washington).

<sup>23</sup> See Press Release, Governor Gavin Newsom, Governor Newsom Signs SB 53, *Advancing Cal’s World-Leading A.I. Indus.* (Sept. 29, 2025) The Biden administration had similar directives that have been since revoked. See also Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

<sup>24</sup> Transparency in Frontier Artificial Intelligence Act, S.B. 53, 2025-2026 session (Cal. 2025).

<sup>25</sup> Health and Hum. Servs., *Public Benefits and AI* (2024), <https://www.hhs.gov/sites/default/files/public-benefits-and-ai.pdf>.

<sup>26</sup> *Ibid.*

should implement AI to ensure compliance with existing law and best practices<sup>27</sup>. Executive orders and OMB Memoranda are binding authority on executive branch federal agencies<sup>28</sup>.

In July 2025, the Trump administration unveiled its long awaited AI Action Plan, which outlines the administration’s priorities and agenda for AI development. The agenda has three “pillars:” i) accelerate AI innovation, ii) build U.S. AI infrastructure, and iii) lead in international AI diplomacy and security<sup>29</sup>. The administration’s plans are focused on deregulation and acceleration of AI use in the private sector to later apply innovations in the public sector.

First, the AI Action Plan includes a plan for “Accelerat[ing] AI Adoption in Government” with six agenda points to set the foundation for future AI use in the U.S. federal government. The first recommends that the Chief AI Officer Council (CAOC) become the primary avenue for coordination and sharing of AI tools across agencies. The CAOC was a group established by the Biden administration in the “Advancing Government Innovation” OMB Memorandum, which required each agency to designate a Chief AI Officer<sup>30</sup>. Both administrations agreed that this position is vital to innovation and AI use in government; however, the Trump administration’s focus has been for the CAOCs to remove regulatory barriers to government AI use, while the Biden administration required a strong emphasis on transparent and safe AI<sup>31</sup>.

Second, the AI Action Plan recommended that agencies create a talent-exchange program to coordinate between agencies and the Office of Personnel Management to share specialized AI talent<sup>32</sup>.

Third, the federal executive is encouraged to create an AI procurement toolbox, managed by the General Services Administration (GSA) and OMB to create uniformity of systems across the federal government<sup>33</sup>. This would encourage adoption as agencies are able to pick from ready-made models which would be pre-vetted to ensure compliance with “relevant privacy, data governance, and transparency

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<sup>27</sup> Nat’l Instit. of Standards and Tech., *Artificial Intelligence Risk Management Framework*, cit. at 5.

<sup>28</sup> See The White House, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>.

<sup>29</sup> The White House, *Winning the Race: Am.’s AI Action Plan 1–2* (2025).

<sup>30</sup> “Advancing Government Innovation” OMB Memorandum, cit. at 9, 4.

<sup>31</sup> *Ibid.* at 5, 23.

<sup>32</sup> The White House, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, at 11.

<sup>33</sup> *Ibid.*

laws”<sup>34</sup>. Agencies are also encouraged to customize their models and learn from other agencies.

Fourth, agencies should implement an Advanced Technology Transfer and Capability Sharing Program with GSA for inter-agency transfer of AI tools and use cases. Fifth, agency personnel should be trained in the use of AI systems. Finally, OMB should convene a group of agencies and government contractors to create pilot programs and increase the use of AI within agencies<sup>35</sup>.

The Trump AI Action Plan builds upon two previously released April 2025, memoranda. The first, the “Accelerating Use of AI” OMB Memorandum keeps core parts of the Biden administration’s agenda<sup>36</sup>, such as empowering Chief AI Officers to accelerate AI adoption in federal agencies and requiring reporting of all AI use cases<sup>37</sup>. The second, the “Efficient Acquisition of AI” OMB Memorandum emphasizes that while agencies must comport with laws protecting privacy, the balance should be skewed towards protecting government and contractor intellectual property<sup>38</sup>. Both memoranda emphasize de-regulation and focus on building partnerships with the private sector, which put the AI Action Plan’s goals for government acquisition in context within the administration’s overall priorities: the private sector’s AI innovation comes first<sup>39</sup>. In the public sector, too, current guidance pushes agencies in the direction of integrating AI into their workflows.

### **III. Do public authorities rely on algorithmic automation/AI in their daily operations? If yes, to what extent? Which areas are most affected by automation (e.g., security, policing, immigration, transport, tax management, welfare, health and employment services, education, justice, or digital identity)?**

The federal government is greatly expanding its use of AI in daily operations to support diverse regulatory functions. AI is used across all segments of the government, including social welfare, environment,

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Executive Order 14110, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence and the “Advancing Governance Innovation” OMB Memorandum established requirements and guidance for federal agencies’ AI governance. See Exec. Order No. 14,110; “Advancing Government Innovation” OMB Memorandum, cit. at 9.

<sup>37</sup> See “Accelerating Use of AI” OMB Memorandum, cit. at 6, 2.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

labor and employment, and housing, but the top three areas of use cases by policy area are in law enforcement, health, and financial regulation<sup>40</sup>.

The most comprehensive source detailing federal government AI use is the Federal AI Use Case Inventory, which includes a survey of 2,133 public AI use cases from 41 different federal agencies. According to the Inventory, health and law enforcement agencies utilized AI most<sup>41</sup>. The top three agencies with the most use cases are the Department of Health and Human Services (271 cases), the Department of Justice (240 cases), and the Department of Veteran Affairs (227 cases). Together, these three agencies account for about 35 percent of the total number of use cases<sup>42</sup>.

This survey reaffirms and updates previous findings in the 2020 ACUS Report, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, which is the most comprehensive report to date by external researchers. This report included a survey of 157 agency AI use cases across 142 federal departments<sup>43</sup>. It found that the agencies with the greatest number of use cases were the Office of Justice Programs (12 cases), the Food and Drug Administration (8 cases), and Customs and Border Patrol (4 cases)<sup>44</sup>. The difference in numbers demonstrates, in part, the proliferation of AI use within government agencies from 2020 to present.

A February 2024 survey suggested that many agencies are likely to continue to pursue the acquisition of AI<sup>45</sup>. Of the twenty-four agencies polled, sixteen had appointed a Chief AI Officer and nineteen had a responsible AI Official. Of the nineteen agencies with AI Officials, four are law-enforcement related and three are health-related<sup>46</sup>.

According to the Federal Inventory, the majority of use cases, about 40 percent, supported what agencies called “Mission-Enabling”

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<sup>40</sup> D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, cit. at 11, 17.

<sup>41</sup> See Off. Fed. Chief Info. Officer, *2024 Federal Use Case AI Inventory* (Dec. 17, 2024), <https://github.com/ombegov/2024-Federal-AI-Use-Case-Inventory> [hereinafter Federal AI Use Case Inventory].

<sup>42</sup> *Ibid.*

<sup>43</sup> See D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, cit. at 11, 15.

<sup>44</sup> *Ibid.* at 16.

<sup>45</sup> R. Heilweil, M. Alder, *Here’s Who’s Responsible for AI in Federal Agencies*, Fedscopeo (Nov. 28, 2023), <https://fedscoop.com/heres-whos-responsible-for-ai-in-federal-agencies/> (demonstrating that many agencies began to comport with the “Advancing Government Innovation” OMB Memorandum even before it was released, when they received a draft of the memo from the Biden administration).

<sup>46</sup> *Ibid.*

services, which provided internal agency support<sup>47</sup>. This may include building internal tools, regulatory research, analysis, monitoring, and gathering data and information to inform agency policy decisions<sup>48</sup>. For example, the FDA uses AI to facilitate post-market surveillance and risk assessment based on data about adverse drug events and medication error reports, which supports drug approval decisions, guidance, and rulemaking as part of its Federal Adverse Event Reporting System<sup>49</sup>. This category also made up the majority of use cases when surveyed in 2020. The ACUS report found that almost eighty out of 157 AI use cases supported regulatory research, analysis, and monitoring<sup>50</sup>.

Federal agencies also commonly use AI for the enforcement of laws, which accounted for 247 use cases labeled “Law and Justice” and 69 dedicated to Financial Regulation<sup>51</sup>. This was the second most prevalent category in 2020, accounting for approximately one-third of all use cases (roughly fifty use cases)<sup>52</sup>. The most prominent examples include predictive enforcement tools that can flag possible fraudulent activity for further review as used by the Securities and Exchange Commission (SEC), Center for Medicare and Medicaid Services, and Internal Revenue Service (IRS)<sup>53</sup>. For example, the SEC – which utilizes AI across all five of its divisions and other standalone offices<sup>54</sup> – uses the Form ADV Fraud Predictor to predict which financial services professionals are violating federal securities laws<sup>55</sup>. The tool analyzes and parses information using Natural Language Processing algorithms from Form ADVs, annual filings required by the SEC for investment advisors who manage over \$25 million in assets<sup>56</sup>. The algorithm identifies topics in the documents and uses a supervised learning, random forest model to flag submissions as “high,” “medium,” and

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<sup>47</sup> See Federal AI Use Case Inventory, cit. at 41.

<sup>48</sup> D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, cit. at 11, 53–58.

<sup>49</sup> *Ibid.* at 53; see also *ibid.* at 59 (analyzing the Consumer Financial Protection Bureau’s analysis of consumer complaints).

<sup>50</sup> *Ibid.* at 17.

<sup>51</sup> See Federal AI Use Case Inventory, cit. at 41.

<sup>52</sup> D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, cit. at 11, 17.

<sup>53</sup> *Ibid.* at 10.

<sup>54</sup> *Ibid.* at 23.

<sup>55</sup> *Ibid.* at 24. The SEC, moreover, has its sights on further expansions including automated decision making, computer vision, and collaborating with the private sector after it can better obscure data. *Ibid.* at 27.

<sup>56</sup> *Ibid.* at 24.

“low” priority for further investigation by SEC administration<sup>57</sup>. It includes an explanation for the flag and an approximation of the feature’s importance<sup>58</sup>.

The SEC’s AI tool helps solve a central dilemma that plagues decision makers in the administrative state: discretion versus accountability<sup>59</sup>. Resources are limited, and the agency cannot reasonably enforce against every person who violates a law. However, the agency must make decisions as to which violators it chooses to enforce against because not enforcing also incurs risk<sup>60</sup>. Agencies like the SEC use such AI tools to narrow the pool of potential violators to which human decision makers can then turn their attention<sup>61</sup>.

Finally, there are 162 reported use cases that utilize AI to aid in the provision of “Government Services,” which includes benefits, service delivery, and sometimes, adjudication<sup>62</sup>. These agencies use AI for formal and informal agency adjudication of benefits or rights. For example, the Social Security Administration (SSA) uses AI for correcting adjudicatory errors, and the U.S. Patent and Trademark Office uses tools for adjudicating patent and trademark applications, including finding relevant prior art<sup>63</sup>.

The SSA has been described as “likely the largest adjudication agency in the western world,” in 2016 receiving more than 2.5 million disability claims with 700,000 appealed<sup>64</sup>. The agency has been a trailblazer in adopting AI because of the efficiency the technology can bring to processing cases. During the Biden administration, the agency used AI to categorize claimants at the initial application level. The AI made a determination into whether candidates qualified for Quick Disability Determination (QDD) using medical history, treatment protocols, and medical findings<sup>65</sup>. This program is for claimants who are likely to be awarded benefits and who have the information needed to make a determination readily available<sup>66</sup>. After the AI referred the patients, the decision required approval by a human examiner and

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<sup>57</sup> *Ibid.* at 24-25.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.* at 22.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> See Federal AI Use Case Inventory, cit. at 41.

<sup>63</sup> See D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, cit. at 11, 17.

<sup>64</sup> *Ibid.* at 38.

<sup>65</sup> *Ibid.* at 39-40.

<sup>66</sup> *Ibid.*

medical expert<sup>67</sup>. Starting in 2010, the SSA revised its regulations to allow examiners to grant claims after the AI's initial determination of eligibility without involving a medical expert<sup>68</sup>. The SSA also used AI at the appeals level to triage cases, by allowing cases with higher probabilities of winning the appeal, or having a disability, to move ahead of cases with lower probabilities. The agency allowed this on the ground that those who are more likely to be disabled should be heard and receive their decisions first<sup>69</sup>. However, at no point were these probabilities shared with the human decision makers so as not to bias their decision making<sup>70</sup>. The AI also searched for cases dismissed on purely procedural reasons that would have otherwise been granted to ensure that they receive "proper review"<sup>71</sup>.

The Trump administration has injected even more AI into the SSA, removing human workers and replacing them with AI decisionmakers. Between January and June 2025, the administration lost or terminated approximately 3,700 SSA employees and closed the agency's civil rights and transformation offices<sup>72</sup>. Instead, the administration used AI to handle requests to improve productivity. According to the administration, 90 percent of calls are handled by automated systems, which has resulted in a 35 percent reduction in call times. However, other reports indicate that this change may be short-term or even inflated. Reports by employees claim that the decline in wait times is due to customers requesting that a human call them back and hanging up instead of waiting on hold<sup>73</sup>. Additionally, Jessica LaPointe, president of the American Federation of Government Employees Council 220 has alleged that such reassignments are a violation of the union's collective bargaining agreement<sup>74</sup>. Such legal considerations will need to be

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<sup>67</sup> *Ibid.* at 40.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> See D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, cit. at 11, 40.

<sup>71</sup> *Ibid.*

<sup>72</sup> N. Alms, *SSA Head Wants to Beef Up Agency Tech as it Sheds Thousands of Staff*, NextGovFWC (June 26, 2025), <https://www.nextgov.com/digital-government/2025/06/ssa-head-wants-beef-agency-tech-it-sheds-thousands-staff/406351/>.

<sup>73</sup> J. Heckman, *SSA Will Get Call Wait Times Down to 'Single Digits' Using AI*, Commissioner Tells Employees, Fed. News Network (May 30, 2025, 10:12 AM), <https://federalnewsnetwork.com/it-modernization/2025/05/ssa-will-get-call-wait-times-down-to-single-digits-using-ai-commissioner-tells-employees/>.

<sup>74</sup> E. Wagner, *SSA Touts Service Improvements, but Reassignments Tell a Different Story*, Gov't Exec. (July 9, 2025), <https://www.govexec.com/workforce/2025/07/ssa-touts-service-improvements-reassignments-tell-different-story/406618/>.

litigated or settled in the future to understand the broader picture that AI can play in worker reassignments.

**IV. What legal requirements - e.g. in terms of privacy, cybersecurity, quality of the datasets, impact assessments, transparency obligations, access to codes, the right to explanations, compulsory human involvement, and the right to obtain a review or remedy - apply to the use of algorithmic automation or AI by public authorities? Are there sector-specific regulations on Automated Administrative Decisions (e.g., public procurement, taxation etc.)?**

There is currently no national legislation explicitly outlining the legal requirements for the use of AI in public administration<sup>75</sup>; however, any such uses of AI must comply with both the U.S. Constitution and the Administrative Procedure Act (APA)<sup>76</sup>. Agencies must also ensure that the use of AI comports with additional laws that they are subject to at the federal, state, and local levels<sup>77</sup>. Current and past administrations have also put forth guidance encouraging federal agencies to adopt AI, while explaining how agencies should implement AI within their ranks to ensure compliance with existing law and best practices<sup>78</sup>.

*a) Constitutional Due Process*

Agencies' use of AI must comport with the principles of Due Process under the Fifth and Fourteenth Amendments to the U.S. Constitution<sup>79</sup>. The Fifth and Fourteenth Amendments provide that the state and federal governments must follow delineated procedures and actions before they may deprive someone of life, liberty, or property<sup>80</sup>. Such deprivations take place not only in the criminal justice context but

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<sup>75</sup> See the answer given to question number two.

<sup>76</sup> See S. Landau et al., *Challenging the Machine: Contestability in Government AI Systems* (2024), <https://arxiv.org/pdf/2406.10430>.

<sup>77</sup> See, e.g., U.S. Dep't of Just. C.R. Div., *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring* (2022), <https://www.ada.gov/resources/ai-guidance/>; U.S. Equal Emp. Opportunity Comm'n, *The American with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>.

<sup>78</sup> See the answer given to question number two; see also Nat'l Inst. of Standards and Tech., *Artificial Intelligence Risk Management Framework* (AI RMF 1.0), cit. at 5, 20.

<sup>79</sup> U.S. Const. amend. V; U.S. Const. amend. XIV.

<sup>80</sup> See also C. Coglianese, *A Framework for Governmental Use of Machine Learning* (2020), <https://www.acus.gov/sites/default/files/documents/Coglianese%20ACUS%20Final%20Report.pdf>, at 52-53.

also in regulatory contexts where people receive government benefits and/or are subject to fines<sup>81</sup>.

In the context of such deprivations, due process requires that the Government must give people notice, the opportunity to be heard, and a neutral arbiter<sup>82</sup>. First, the government must give a citizen notice, or a person the right to know that an adverse action is being taken against them and why a government decision is being made<sup>83</sup>. Trump's OMB Memoranda do not have a notice requirement as long as agencies document and provide notice to OMB on AI as part of accountability reviews. It does not appear to require specific notice to the person impacted by the AI<sup>84</sup>. This represents a change from the prior Biden administration. The Biden administration's Advancing Government Innovation OMB Memorandum delineated specific steps for federal agencies to take in order to provide notice to citizens<sup>85</sup>. It required each agency to publish an inventory for each of its use cases with accessible documentation in plain language to provide general public notice of AI to users and the public<sup>86</sup>. Agencies were also required to provide "reasonable and timely notice" about the use of AI and a means to access such documentation<sup>87</sup>.

Second, the government must give a citizen an opportunity to be heard. The Trump OMB Memoranda allow an option for end users and the public to submit feedback on the design, development, and use of AI for high-impact AI uses cases only<sup>88</sup>. The Trump administration defines high-impact use cases as those with an output that serves as a principal basis for decisions or actions with legal, material, binding, or significant effect on: 1) civil rights, civil liberties, or privacy; 2) access to education, housing, insurance, credit, employment, and other programs; 3) access to critical government resources; 4) human health and safety; 5) critical infrastructure or public safety; or 6) strategic assets and resources<sup>89</sup>. The

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<sup>81</sup> S. Landau et al., *Challenging the Machine: Contestability in Government AI Systems*, cit. at 76, 19 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

<sup>82</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see also C. Coglianese, *A Framework for Governmental Use of Machine Learning*, cit. at 80, 52-53.

<sup>83</sup> J. Dempsey, S. Landau, *Challenging the Machine: Contestability in Government AI Systems*, Lawfare (Mar. 11, 2024), <https://www.lawfaremedia.org/article/challenging-the-machine-contestability-in-government-ai-systems>.

<sup>84</sup> "Accelerating Use of AI" OMB Memorandum, cit. at 6, 15.

<sup>85</sup> See "Advancing Government Innovation" OMB Memorandum, cit. at 9, 13-26.

<sup>86</sup> *Ibid.* at 21.

<sup>87</sup> *Ibid.*

<sup>88</sup> See "Accelerating Use of AI" OMB Memorandum", cit. at 6, 17.

<sup>89</sup> *Ibid.* at 19.

Biden administration’s “Advancing Government Innovation” OMB Memorandum had required agencies to provide an opportunity for public comment. It directed agencies to consult affected communities and gather feedback in the design, development, and use of AI to inform decision making<sup>90</sup>.

Third, due process requires that decisions be rendered by a neutral arbiter. NIST argues that this can be achieved by designing an AI while correcting for human bias<sup>91</sup>. The NIST Risk Management Framework alerts agencies to how bias—including systemic, computational/systemic, and human cognitive—can be introduced and how to remove and continuously check for it throughout the AI lifecycle<sup>92</sup>. However, just because an AI is free from bias does not necessarily mean that it comports with the third due process prong. Legal scholars debate whether a human decision maker satisfies the implicit requirement of due process, especially for higher-stakes decisions<sup>93</sup>. Some argue that affected parties might need to be given the chance to investigate and challenge the AI design<sup>94</sup>. Others argue that contestability should be incorporated from the very beginning into an AI system’s design, including in the decision for whether to have an AI in a decision making or supporting role in the first place<sup>95</sup>.

Trump’s Executive Order removed all mentions of algorithmic bias in AI systems. However, it directs that, when possible, individuals affected by “AI-enabled decisions” must have access to a timely human review and an opportunity to appeal any negative decisions<sup>96</sup>. The “Advancing Government Innovation” OMB Memorandum’s guidance under the Biden administration directed agencies to comply with a stricter conception of due process. The OMB Memorandum maintained that agencies “must” where practicable and consistent with other law, provide a mechanism for people to appeal adverse decisions rendered by an AI and appeal to a human review process<sup>97</sup>. Agencies that did not already have an appeal process were to establish one in a way that did

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<sup>90</sup> See “Advancing Government Innovation” OMB Memorandum, cit. at 9, 22.

<sup>91</sup> Nat’l Instit. of Standards and Tech., *Artificial Intelligence Risk Management Framework* (AI RMF 1.0), cit., at 40.

<sup>92</sup> *Ibid.* at 18.

<sup>93</sup> See C. Coglianese, *A Framework for Governmental Use of Machine Learning*, cit. at 80, 52-53.

<sup>94</sup> See S. Landau et al., *Challenging the Machine: Contestability in Government AI Systems*, cit. at 76, 4.

<sup>95</sup> *Ibid.*

<sup>96</sup> See “Accelerating Use of AI” OMB Memorandum, cit. at 6, 17.

<sup>97</sup> “Advancing Government Innovation” OMB Memorandum, cit. at 9, 23.

not place undue burden on the individual and provided oversight of the AI<sup>98</sup>. While the OMB memoranda are binding on federal agencies, they do not provide citizens a means to challenge agency action; in other words, there is no private enforcement mechanism.

In terms of constitutional challenges, the U.S. Supreme Court has held that adherence to due process is a balancing test between a citizen's private interests (notice, hearing, neutral arbiter), the risk of an erroneous deprivation of the interest, and the Government's interest<sup>99</sup>. Thus, while governmental use of AI can implicate each of these three private interests, courts would conduct a balancing test before finding that an AI use violates constitutional due process. And the constitutional due process violation bar has been set quite high. In *State v. Loomis*, for example, the Wisconsin Supreme Court rejected transparency arguments under the Fourteenth Amendment Due Process Clause, ruling against a criminal Defendant who contended that he should have been given more information about the algorithm the court had relied on to decide the length of his jail sentence<sup>100</sup>. The court claimed that the private company which created the algorithm had a right to protect its proprietary information and due process was satisfied because the Defendant had an opportunity to ensure the accuracy of his personal information that the algorithm used to arrive at its decision<sup>101</sup>.

#### *b) Administrative Procedure Act*

The Administrative Procedure Act (APA) is a federal act that governs the process by which federal agencies develop and issue rules (or regulations) and conduct adjudications<sup>102</sup>. A rule is defined broadly as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"<sup>103</sup>. Adjudication has a backwards-looking effect as it implements action against a person or an entity<sup>104</sup>. The APA also provides for judicial review for challenging an agency action on the grounds that it is

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<sup>98</sup> *Ibid.* at 23-24.

<sup>99</sup> S. Landau *et al.*, *Challenging the Machine: Contestability in Government AI Systems*, cit. at 76, 19 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>100</sup> C. Coglianese, *A Framework for Governmental Use of Machine Learning*, cit. at 80, 54 (citing *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016)).

<sup>101</sup> *Ibid.*

<sup>102</sup> S. Landau *et al.*, *Challenging the Machine: Contestability in Government AI Systems*, cit. at 76, 20.

<sup>103</sup> Administrative Procedure Act, 5 U.S.C. § 551(4).

<sup>104</sup> See *ibid.* §§ 551(6)-551(7).

“arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”<sup>105</sup>.

The APA notice-and-comment rulemaking requirement specifies how federal agencies create, modify, or repeal regulations; it involves publishing a notice, accepting public comments, considering the comments, and publishing a final rule<sup>106</sup>. First, the agency must publish a general notice of proposed rulemaking in the Federal Register with an explanation of the issues involved in the rule; a reference to the legal authority under which the rule is proposed; and the time, place, and nature of the public rulemaking proceeding<sup>107</sup>. Next, the agency must afford an opportunity for interested parties to comment by submitting written data, views, or arguments. Moreover, the agency must disclose evidence it relied on in formulating the rule to allow the public to meaningfully comment<sup>108</sup>. Such evidence includes any data, studies, or research, but does not include any obvious or public information<sup>109</sup>. The agency must respond to “vital questions of cogent materiality”<sup>110</sup>. Finally, when the agency issues the final rule, it must provide a concise statement with its reasoning and basis for adopting the rule<sup>111</sup>.

Federal agencies have used AI in the notice-and-comment rulemaking process, raising questions as to its legitimacy under the APA. Citizens are now more involved in the notice-and-comment rulemaking process due in part to the E-Government Act of 2002, which digitized public commenting<sup>112</sup>. Increased access has led to an explosion in participation, especially for hot-topic issues<sup>113</sup>. In the past many comments submitted were form letters, which the agency could readily respond to in batches<sup>114</sup>. However, the responses are becoming increasingly unique, in part due to the rise of GenAI which allows users to create unique submissions<sup>115</sup>. The agency must respond to substantive comments, expending significant resources as more comments are

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<sup>105</sup> *Ibid.* § 706(2)(A); see also *Motor Vehicle Mfrs’ Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>106</sup> See *Administrative Procedure Act*, 5 U.S.C. § 553.

<sup>107</sup> *Ibid.* § 553(b).

<sup>108</sup> *U.S. v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

<sup>109</sup> *Chamber of Com. v. Sec. and Exch. Comm’n.*, 443 F.3d 890, 906 (D.C. Cir. 2006).

<sup>110</sup> *Nova Scotia*, 568 F.2d at 252-253.

<sup>111</sup> *Administrative Procedure Act*, 5 U.S.C. § 553(c).

<sup>112</sup> P. Corcoran, *Preserving Democratic Legitimacy in the Application of A.I. to Notice-and-Comment Rulemaking*, 25 N.Y.U. J. of Legis. & Pub. Pol’y 501 (2021), at 503.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* at 503-04.

<sup>115</sup> *Ibid.*

individualized and not generated through forms<sup>116</sup>. Agencies have begun to utilize AI to reduce the resources needed to respond to comments, supply staff with summaries of the comments' content and the amount of support each topic summary receives, and allow agency staff to write responses<sup>117</sup>.

Courts may find that using AI to respond to comments comports with the APA. Administrators can take millions of comments—an impossible amount of data for the human brain to process efficiently—and boil them down to better capture consistent sentiments to influence policy. So long as the agency continues to address and respond to “vital questions of cogent materiality”<sup>118</sup> and concrete, proposed alternatives, utilizing AI could be an even more efficient way to adhere to the APA. However, some scholars argue that, despite offering increased accuracy, algorithms may undermine the democratic legitimacy that the APA is aimed at protecting<sup>119</sup>. While AI may aggregate public sentiment, the agency is not bound to follow the majority's preference, “only to consider it and provide a reasoned response sufficient to survive judicial review”<sup>120</sup>. Moreover, the comments on the rule itself will likely reflect only well-organized interests, not the general public, leading to capture by interest groups<sup>121</sup>.

The APA raises additional questions for the future of AI in agency rulemaking and adjudications. Scholars debate whether the entire algorithm or the model itself is akin to a legislative rule that needs to be published for notice-and-comment rulemaking when implemented in agency decision making<sup>122</sup>. Or, rather, the algorithm or model is an input into decision making that must be disclosed and explained such that the public can meaningfully comment<sup>123</sup>. If private entities continue to develop AI for federal agencies, agencies may face a trade-off between disclosing enough information to allow the public to meaningfully comment and protecting the private company's intellectual property and

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<sup>116</sup> B. C. E. Dooling, M. Febrizio, *Robotic Rulemaking*, Brookings (Apr. 4, 2023), <https://www.brookings.edu/articles/robotic-rulemaking/>.

<sup>117</sup> P. Corcoran, *Preserving Democratic Legitimacy in the Application of A.I. to Notice-and-Comment Rulemaking*, cit. at 112, 504.

<sup>118</sup> See *U.S. v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

<sup>119</sup> P. Corcoran, *Preserving Democratic Legitimacy in the Application of A.I. to Notice-and-Comment Rulemaking*, cit. at 112, 505.

<sup>120</sup> *Ibid.* at 513.

<sup>121</sup> *Ibid.* at 514.

<sup>122</sup> S. Landau et al., *Challenging the Machine: Contestability in Government AI Systems*, cit. at 76, 22.

<sup>123</sup> *Ibid.*

trade secrets<sup>124</sup>. Additionally, if a party petitions an agency to adopt AI and the agency does not, it remains unclear whether this can be reviewed and deemed arbitrary and capricious<sup>125</sup>.

Agency use of AI raises additional questions about the nature of judicial review under the APA. *Sierra Club v. Costle*, a seminal 1981 federal court of appeals decision, held that an agency's use of computer-assisted decision making is not arbitrary and capricious if: (a) its use is submitted to public scrutiny and public comments; (b) the agency identifies areas of uncertainties; and (c) responsibility for the decision rests with the agency<sup>126</sup>. However, a 2011 Massachusetts state court decision distinguished this case from another where a computer system made an autonomous decision that was held invalid under the *Sierra Club* standard<sup>127</sup>. And a 2016 federal district court case applying the Arkansas state APA applied a heightened standard to decisions taken by "determinative AI" systems, requiring agencies to understand their AI models and explain the reasons why the model made decisions and recommendations<sup>128</sup>. Such heightened standards, moreover, are in line with the guidelines put forward by NIST<sup>129</sup>.

### c) Additional Laws

In addition to the Constitution and APA, there is a web of laws at the federal, state, and local level that add constraints to the development and use of AI. For example, the Freedom of Information Act (FOIA) and its state law equivalents require that the government disclose information and documents to the public, improving transparency<sup>130</sup>.

Despite laws like FOIA and the federal government's expressed willingness to work towards transparency, agencies can also be constrained by laws protecting citizen privacy. For example, the Privacy Act establishes a code for fair information practices surrounding the collection, maintenance, use, and sharing of individual information kept

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<sup>124</sup> *Ibid.*

<sup>125</sup> D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, cit. at 11, 84.

<sup>126</sup> 657 F.2d 298, 335 (D.C. Cir. 1981).

<sup>127</sup> *Nordberg v. Mass. Dep't of Educ.*, 29 Mass. L. Rep. 163, 2011 Mass. Super. LEXIS 271 (Mass. Super. Ct. 2011).

<sup>128</sup> See *in re Estate of Jacobs v. Gillespie*, No. 16-cv-00119, 2017 WL 2960793 (E.D. Ark. Oct. 27, 2016).

<sup>129</sup> See Nat'l Instit. of Standards and Tech., *Artificial Intelligence Risk Management Framework* (AI RMF 1.0), cit., at 16.

<sup>130</sup> U.S. Dep't of State, *Learn About Records and Records Requests*, Freedom of Information Act, <https://foia.state.gov/Learn/>.

by federal agencies<sup>131</sup>. Under the Act, agencies cannot use data collected from people for secondary purposes without consent, and it significantly constrains the government's ability to combine datasets across agencies<sup>132</sup>. The Paperwork Reduction Act restricts an agency's ability to collect data from the public, and the Information Quality Act reduces agencies' ability to open source data holdings to achieve transparency<sup>133</sup>. When the Government comes into contact with the private sector especially, transparency can also be thwarted because the innerworkings of any AI system can be designated a trade secret and not released to the public<sup>134</sup>.

Many agencies and parts of the private sector they oversee are subject to additional legislative requirements<sup>135</sup>. Agencies like the DOJ, Equal Employment Opportunity Commission (EEOC), Federal Trade Commission (FTC), and Consumer Financial Protection Bureau (CFPB) are tasked with ensuring that decisions are bias-free and transparent for people accessing benefits. Decisions are subject not only to constitutional due process but also laws like the Americans with Disabilities Act, Title VII of the Civil Rights Act, Fair Credit Reporting Act (FCRA), and Equal Credit Reporting Act (ECRA)<sup>136</sup>, which enforce additional process to provide people notice and opportunity to be heard.

ECRA is a statute that applies to consumer credit decisions. It is just one example of an additional law with which AI must comply – but it is a powerful one. In the U.S., credit information may have significant impact on one's life, including eligibility for loans, insurance, rental housing, checking accounts, and some employers may use reports in hiring decisions<sup>137</sup>. ECRA requires that creditors give applicants a

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<sup>131</sup> U.S. Dep't of Just. Off. of Priv. and C.L., *Privacy Act of 1974*, <https://www.justice.gov/opcl/privacy-act-1974#:~:text=The%20Privacy%20Act%20of%201974%2C%20as%20amended%2C%205%20U.S.C.,of%20records%20by%20federal%20agencies>.

<sup>132</sup> D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, cit. at 11, 72.

<sup>133</sup> *Ibid.*

<sup>134</sup> J. Dempsey, S. Landau, *Challenging the Machine: Contestability in Government AI Systems*, cit. at 83.

<sup>135</sup> S. Landau et al., *Challenging the Machine: Contestability in Government AI Systems*, cit. at 76, 20.

<sup>136</sup> See U.S. Equal Emp. Opportunity Comm'n, *The American with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*.

<sup>137</sup> *Ibid.*; Consumer Fin. Prot. Bureau, *Consumer Financial Protection Circular 2022-07* (2022), <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2022-07-reasonable-investigation-of-consumer-reporting-disputes/>.

specific reason for any adverse outcome or consequence<sup>138</sup>. Regulation B further specifies that a statement of reasons for adverse action taken “must be specific and indicate the principal reason(s) for the adverse action”<sup>139</sup>. The notice requirements were designed to protect consumers, in part, because “if creditors know they must explain their decisions . . . they [will] effectively be discouraged from discriminatory practices”<sup>140</sup>.

AI is not the first technology to implicate these rules through its decision making<sup>141</sup>. For years, companies have been using “machine-based credit underwriting models” to determine credit scores and lending-worthiness, and the FTC deemed that FCRA and ECRA applied to these algorithms<sup>142</sup>. But, as AI is being used by more companies to render decisions, CFPB has firmly stated that AI is not exempt from the notice requirement: ECRA and Regulation B will not permit creditors to use AI when doing so means they cannot provide the specific and accurate reasons for adverse actions because the algorithms operate as a black box<sup>143</sup>.

Algorithms must also comport with the Equal Protection Clause and Americans with Disabilities Act to protect against discrimination in hiring and other employment decisions<sup>144</sup>. These laws were created to protect against discrimination perpetrated by human actors, and some scholars even argue that a pivot towards algorithms can reduce biased decision making in agencies<sup>145</sup>. However, to reduce discrimination, NIST argues that careful attention must be afforded from the development of AI to implementation and use to limit the aggregation and amplification of bias in agency decision making<sup>146</sup>.

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<sup>138</sup> Consumer Fin. Prot. Bureau, *Consumer Financial Protection Circular 2022-03* (2022) <https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/> [hereinafter Circular 2022-03].

<sup>139</sup> Equal Credit Opportunity Act, 12 U.S.C. § 1002.9(b).

<sup>140</sup> *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 977–78 (7th Cir. 2004) (quotation omitted).

<sup>141</sup> A. Smith, *Using Artificial Intelligence and Algorithms*, Fed. Trade Comm’n Bus. Blog (Apr. 8, 2020), <https://www.ftc.gov/business-guidance/blog/2020/04/using-artificial-intelligence-algorithms>.

<sup>142</sup> *Ibid.*

<sup>143</sup> Circular 2022-03, cit. at 138.

<sup>144</sup> S. Landau et al., *Challenging the Machine: Contestability in Government AI Systems*, cit. at 76, 23.

<sup>145</sup> C. Coglianese, *A Framework for Governmental Use of Machine Learning*, cit. at 80, 48-49, 61.

<sup>146</sup> Nat’l Instit. of Standards and Tech., *Artificial Intelligence Risk Management Framework* (AI RMF 1.0), cit., at 18.

The DOJ oversees how AI makes hiring decisions with respect to state and local employers, while the EEOC enforces them in federal government and in the private sector<sup>147</sup>. Currently, AI is being used in a variety of ways to more easily screen and hire candidates in the private and public sector through the use of resume scanners, employee monitoring software, video interview software, and testing software with job fit scores<sup>148</sup>. Algorithms are tested against Title VI standards protecting against racial and gender discrimination<sup>149</sup>. The ADA requires even more, namely distinct steps to avoid disability bias<sup>150</sup>. For example, if an interviewing software flags a person as a poor candidate for reasons that have nothing to do with their ability to perform essential functions of the job with a reasonable accommodation, this violates their right under the ADA, and the EEOC has grounds to conduct an investigation<sup>151</sup>. Employers are responsible for the decisions AI takes with respect to hiring, even if designed by an outside entity or third party. Employers must take additional precautions and testing to ensure that they comport with all hiring laws, even if they did not create the algorithm in-house<sup>152</sup>.

**V. Who builds the algorithmic technologies used by public authorities? Are these developed by public entities, private companies, or a hybrid body?**

Algorithmic technologies are created both in-house by agency talent and by outside contractors<sup>153</sup>. In the Federal AI Use Case Inventory survey of the federal government's administrative agencies, of the 1,134 use cases that had information included about development, forty percent of the applications – 454 use cases – were built in-house<sup>154</sup>. Forty-

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<sup>147</sup> U.S. Dep't of Just. C.R. Div., *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring*, cit.

<sup>148</sup> U.S. Equal Emp. Opportunity Comm'n, *The American with Disabilities Act and the Use of Software*, cit.

<sup>149</sup> *Ibid.*

<sup>150</sup> See *ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, cit. at 11, 88.

<sup>154</sup> Federal AI Use Case Inventory, cit. at 41.

two percent came from private commercial sources, and eighteen percent were developed with a mix of both public and private resources<sup>155</sup>.

The Trump administration announced a private sector investment of a maximum of \$500 billion to fund AI infrastructure in the U.S. using private sector contracts. This agreement is called Stargate, and it includes companies like OpenAI, SoftBank and Oracle<sup>156</sup>. By contrast, the Biden administration had enlisted more than 200 private-sector companies to join the AI Safety Institute Consortium under the Commerce Department to work with NIST, state and local governments, and other groups to establish safety standards for AI<sup>157</sup>. The companies involved include OpenAI, Microsoft, Meta, Google, IBM, Apple, and Amazon<sup>158</sup>.

The Trump administration's focus in engaging the private sector has been to reduce government interference and allow U.S. companies to flourish, especially encouraging partnerships in the military and defense space<sup>159</sup>. The Biden administration likewise engaged the private sector to bolster governmental initiatives, but placed equal emphasis on ensuring compliance with risk and safety standards<sup>160</sup>. This portion of Biden's agenda which outlined safety standards has been explicitly revoked by the Trump administration<sup>161</sup>.

## **VI. Is there a centralised infrastructure for digital data management, or are there several infrastructures? If the latter is true, is**

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<sup>155</sup> *Ibid.* Compare these numbers to the 2020 ACUS report which found that of the 142 federal administrative agencies, fifty-three percent of the use cases (eighty-four use cases) were developed in-house. Thirty-one percent came from private commercial sources or traditional government contractors, and thirteen percent were created in collaboration with academia and agency-hosted competitions. See D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, cit. at 11, 88.

<sup>156</sup> See S. Holland, *Trump Announces Private-Sector \$500 Billion Investment in AI Infrastructure*, Reuters (Jan. 21, 2025, 10:42 PM), <https://www.reuters.com/technology/artificial-intelligence/trump-announce-private-sector-ai-infrastructure-investment-cbs-reports-2025-01-21/>.

<sup>157</sup> O. Seddig, M. Hawkins, *Top AI Companies Join Government Effort to Set Safety Standards*, Bloomberg (Feb. 8, 2024), <https://www.bloomberg.com/news/articles/2024-02-08/top-ai-companies-join-government-effort-to-set-safety-standards>.

<sup>158</sup> *Ibid.*

<sup>159</sup> See generally, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, cit.

<sup>160</sup> See e.g., Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

<sup>161</sup> See e.g., Exec. Order No. 14,179, 90 Fed. Reg. 8741 (Jan. 23, 2025) (revoking Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023)).

**interoperability guaranteed, and to what extent? Are there any rules or procedures governing the exchange of information between different administrative bodies?**

Prior to the Trump administration, there was no serious attempt at any centralized infrastructure for digital data management, although the Biden administration had made fledgling attempts<sup>162</sup>. In actuality, many U.S. systems have been set up to avoid such a centralization of data to protect citizen privacy, especially after Watergate spurred the passage of the Privacy Act<sup>163</sup>. Each agency collected necessary citizen data independently<sup>164</sup>. While protecting privacy, this also created inefficiencies in data collection across agencies.

The Trump administration's Department of Government Efficiency (DOGE) is upending this longstanding tradition by pushing for the centralization of data. It aimed to create one, single government database to enable access across agencies<sup>165</sup>. This, in turn, will create one interoperable dataset so that AI can be more easily trained in the federal government<sup>166</sup>.

This centralization effort is in response to President Trump's Executive Order on Stopping Waste, Fraud, and Abuse by Eliminating Information Silos, which forces inter-agency information sharing<sup>167</sup>. Elon Musk has used this order to draw data from 23 systems and access more than 300 separate fields of data from people to create an interoperable dataset<sup>168</sup>. This dataset combines a wealth of sensitive

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<sup>162</sup> See "Advancing Government Innovation" OMB Memorandum, cit. at 9, 11-13 (requiring Chief AI Officers to confer and share data when possible, including via the public Federal AI Use Case Inventory).

<sup>163</sup> S. K. Pell, et al., *Privacy Under Siege: DOGE's One Big, Beautiful Database*, Brookings (June 25, 2025), <https://www.brookings.edu/articles/privacy-under-siege-doges-one-big-beautiful-database/>.

<sup>164</sup> For example, the Internal Revenue Service (IRS) had a longstanding commitment to confidentiality and privacy; it only shared information in very narrow and specific circumstances to help certain law enforcement. In April 2025, under direction of the Trump administration, the IRS broke precedent and made an agreement with U.S. Immigration and Customs Enforcement to use taxpayer data to target undocumented immigrants in the U.S. See *IRS & ICE Immigration Data Sharing Agreement: Explainer* (Forum, 2025).

<sup>165</sup> S. K. Pell et al., *Privacy Under Siege: DOGE's One Big, Beautiful Database*, cit.

<sup>166</sup> See D. M. West, A. Stanger, *How DOGE is Using AI in Government*, Brookings (Apr. 21, 2025), <https://www.brookings.edu/articles/how-doge-is-using-ai-in-government-the-techtank-podcast/>.

<sup>167</sup> Exec. Order No. 14,243, 90. Fed. Reg. 13681 (Mar. 20, 2025).

<sup>168</sup> E. Badger, S. Frenkel, *Trump Wants to Merge Government Data. Here Are 314 Things It Might Know About You*, N.Y. Times (Apr. 9, 2025),

personal data like Social Security numbers, tax returns, background checks, and medical information. This action was challenged but ultimately allowed by the courts<sup>169</sup>. However, more Privacy Act lawsuits loom<sup>170</sup>.

Agencies also share hiring and outreach data to improve talent across the federal government. Each agency must select an AI Talent Lead who is accountable for reporting to agency leadership and the AI Talent Task Force<sup>171</sup>. This task force provides AI Talent Leads with opportunities to improve AI hiring across agencies through sharing position descriptions, coordinating marketing and outreach, sharing hiring actions, and sharing applicant information across agencies<sup>172</sup>.

Besides DOGE, other agencies have taken a much less aggressive stance on monitoring the sharing of information related to AI across agencies—but the Trump administration has elaborated that additional regulation is not a priority. The FTC, EEOC, CFPB, and DOJ issued a joint statement noting that “existing legal authorities apply to the use of automated systems,” and each agency will continue to regulate AI within its respective spheres<sup>173</sup>. The CAOC continues to coordinate agency AI use and yearly plans with OMB<sup>174</sup>. The Commerce Department has also taken a role in AI monitoring and promotes competition and innovation in the space. Finally, ACUS has dedicated resources and efforts to determine and promote agency AI best practices, but the agency likewise has no regulatory authority<sup>175</sup>.

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[https://www.nytimes.com/2025/04/09/us/politics/trump-musk-data-access.html?unlocked\\_article\\_code=1.-U4.uH01.6U-H6T\\_tBr7c&smid=url-share](https://www.nytimes.com/2025/04/09/us/politics/trump-musk-data-access.html?unlocked_article_code=1.-U4.uH01.6U-H6T_tBr7c&smid=url-share).

<sup>169</sup> See J. Stempel, *Musk’s DOGE Team Can Access Sensitive Data for Now, Appeals Court Rules*, Reuters (Apr. 7, 2025), <https://www.reuters.com/world/us/musks-doge-team-can-access-government-data-now-appeals-court-rules-2025-04-07/>.

<sup>170</sup> S. K. Pell et al., *Privacy Under Siege: DOGE’s One Big, Beautiful Database*, cit.

<sup>171</sup> *Ibid.* at 11-12.

<sup>172</sup> *Ibid.*

<sup>173</sup> R. Chopra et al., *Joint Statement on Enforcement of Civil Rights, Fair Competition, Consumer Protection, and Equal Opportunity Laws in Automated Systems* (Apr. 3, 2024), <https://www.eeoc.gov/joint-statement-enforcement-civil-rights-fair-competition-consumer-protection-and-equal-opportunity>.

<sup>174</sup> *Ibid.*

<sup>175</sup> See Statement No. 20, cit.