



**The Journal of Robotics,
Artificial Intelligence & Law**

Editor's Note: Stablecoin
Victoria Prussen Spears

What 2021 Has in Store for Stablecoin
Robin Nunn, Sarah V. Riddell, and Steven Lightstone

U.S. State Department Issues Human Rights Compliance Guidance for Products and Services with Surveillance Capabilities
Michael R. Littenberg and Anne-Marie L. Beliveau

The Impact of COVID-19 on Blockchain Advancement
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FAA Releases Two Final Rules to Advance Drone Integration
Joel E. Roberson, Anita M. Mosner, Marina Veljanovska O'Brien, and Ben Slocum

NHTSA Proposes Rule on Safe Deployment of Self-Driving Vehicles
Rebecca Baden Chaney and Rukiya Mohamed

Facial Recognition, Racial Recognition, and the Clear and Present Issues with AI Bias
Daniel C. Wood

Digitalized Discrimination: COVID-19 and the Impact of Bias in Artificial Intelligence
Michael S. Horikawa

Everything Is Not *Terminator*: The Federal Government and Trustworthy AI
John Frank Weaver

- 161 Editor’s Note: Stablecoin**
Victoria Prussen Spears
- 165 What 2021 Has in Store for Stablecoin**
Robin Nunn, Sarah V. Riddell, and Steven Lightstone
- 185 U.S. State Department Issues Human Rights Compliance Guidance for Products and Services with Surveillance Capabilities**
Michael R. Littenberg and Anne-Marie L. Beliveau
- 199 The Impact of COVID-19 on Blockchain Advancement**
Keith B. Letourneau and Vanessa DiDomenico
- 205 FAA Releases Two Final Rules to Advance Drone Integration**
Joel E. Roberson, Anita M. Mosner, Marina Veljanovska O’Brien, and Ben Slocum
- 213 NHTSA Proposes Rule on Safe Deployment of Self-Driving Vehicles**
Rebecca Baden Chaney and Rukiya Mohamed
- 219 Facial Recognition, Racial Recognition, and the Clear and Present Issues with AI Bias**
Daniel C. Wood
- 223 Digitalized Discrimination: COVID-19 and the Impact of Bias in Artificial Intelligence**
Michael S. Horikawa
- 227 Everything Is Not *Terminator*: The Federal Government and Trustworthy AI**
John Frank Weaver

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Everything Is Not *Terminator*

The Federal Government and Trustworthy AI

John Frank Weaver*

Although President Biden has begun overturning the previous administration's executive orders, many of those prior orders will survive. One such order appears to be Executive Order 13,960, "Promoting the Use of Trustworthy Artificial Intelligence ["AI"] in the Federal Government" (the "Order").¹ The purpose of the Order is to provide guidance to federal agencies to ensure they "design, develop, acquire, and use AI in a manner that fosters public trust and confidence while protecting privacy, civil rights, civil liberties and American values."² The Order is intended to push forward the AI priorities of Executive Order 13,859,³ which implemented principles and objectives for federal agencies to rely on to drive American advancements in AI, and the 2020 memo from the Office of Management and Budget (the "OMB Memo"), which set out policy considerations to guide regulatory and non-regulatory approaches to AI applications developed and deployed outside the federal government.⁴

The Order does not provide sufficient direction regarding the results we want federal government AI to produce, but it will have direct and indirect effects on AI development and adoption in the public and private sectors. Below, I outline a few of those.

Federal Principles in the Process, But No Federal Values in the End Result

The OMB Memo provided 10 principles for federal agencies to use when developing—or declining to develop—regulations governing AI:

1. Promote public trust in AI;
2. Provide ample opportunities for the public to participate in and provide feedback on rulemaking governing AI;

3. Leverage scientific and technical information and processes;
4. Assess risks in subject AI;
5. Consider the costs and benefits of any AI;
6. Maintain a flexible approach to adapt to changes and updates to AI applications;
7. Consider impacts AI may have on fairness and discrimination;
8. Incorporate disclosure and transparency in the rulemaking process to increase public trust and confidence in AI applications;
9. Promote AI systems that are safe, secure, and operate as intended; and
10. Coordinate with other federal agencies on AI strategies.⁵

The Order seeks to impose similar (although not identical) principles on federal agencies as they design, develop, or acquire AI applications:

- Lawful and “respectful of our Nation’s values”;
- Purposeful and performance-driven;
- Accurate, reliable, and effective;
- Safe, secure, and resilient;
- Understandable;
- Responsible and traceable;
- Regularly monitored;
- Transparent; and
- Accountable.⁶

In general, although the OMB Memo prioritizes innovation and growth and the Order prioritizes building trust in the federal government’s AI applications, both do so by requiring development processes that balance similar, competing interests (i.e., the principles): accuracy, safety, transparency, accountability, well-reviewed, etc. This is done on a case-by-case basis.

The principles in the Order (and the OMB Memo) therefore provide a checklist for AI designers and developers to measure their application development processes against. Private companies that provide AI services and applications to the federal government will need to incorporate the principles into their development cycles and be able to demonstrate them. These requirements will likely necessitate significant research, development, and marketing investment in order to properly appeal to the federal government

as a customer. For companies that market AI to both Washington and private companies, that investment is likely to influence its development of private-sector AI as well. Depending on how well known the Order's principles become, consumers and business clients may also start to expect AI designers to incorporate the Order's principles into the development of private-sector AI.

Although I respect the need to apply the principles above on a case-by-case basis, I hope that the Biden administration lifts its eyes to see the forest for the trees, moving beyond imposing principles on the development of AI regulations and applications to the impact those regulations and applications have in the world. Will Americans experience less discrimination because of AI? Will AI materially improve their economic status or quality of life? Will they feel they have more oversight of the forces in their lives because of AI? These are the big picture questions that lawmakers and policymakers should be forced to consider when adopting AI regulations and applications.⁷

Timelines for Federal AI Actions

The Order also sets deadlines for certain AI actions by the federal government, including:

1. June 1, 2021 (180 days after the date of the order)—The Director of OMB shall publicly post a “roadmap for the policy guidance that OMB intends to create or revise” to support the use of AI by the federal government.⁸
2. February 1, 2021 (60 days after the date of the order)—The Federal Chief Information Officers Council (“CIO Council”) shall “identify, provide guidance on, and make publicly available the criteria, format, and mechanisms for agency inventories of non-classified and non-sensitive use cases of AI by agencies.”⁹
3. Within 180 days of the CIO Council completing its task in #2 above, each federal agency shall prepare an inventory of its non-classified and non-sensitive use cases of AI, including current and planned uses.¹⁰
4. Within 120 days of completing its inventory, each agency shall “develop plans either to achieve consistency with this order for each AI application or to retire AI applications

found to be developed or used,” and the relevant official shall approve those plans within the same 120-day period.¹¹ Agencies shall aim to implement their plans within 180 days after approval.¹²

5. Within 120 days of completing its inventory, each agency shall make its inventory available to the public, as permitted by law and policy.¹³

Assuming that these timelines are not changed by future executive orders and the agencies are able to hold to the prescribed schedules (a big assumption), we will know substantially more about how the federal government currently uses AI, how it plans to use AI, and how federal agencies will consider future AI applications. This could have major implications on (i) private development of AI, as private companies shift their research and development strategies to appeal to federal customers, and (ii) individuals who interact with the federal government, as they may have a better idea of the AI resources available to them in those interactions.

Definition of AI

There is a persistent debate in technical and legal circles about how to define AI. It can be difficult to find consensus regarding the qualities necessary for an application or device to qualify as AI. There is also a sliding scale that the industry constantly encounters; as one expert laments, “[a]s soon as it works, no one calls it AI anymore.”¹⁴ In legal documents and contracts, this debate manifests itself by the parties having competing interests dictating how specifically or broadly to define AI. A party that is obligated to make representations concerning its AI, or to perform certain training or diagnostics, is incentivized to make the contractual language of AI narrow, possibly naming specific applications in the definition. On the other hand, a party that is relying on a contractor’s AI to provide services wants to ensure all the AI applications are trustworthy and unbiased, meaning it wants the definition of AI to be as broad as possible.¹⁵

The Order continues the trend of federal statutes, regulations, and orders relying on the definition of AI in Section 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (the “McCain Act”). Per that section, AI includes any of the following:

- 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.
- 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.
- An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
- A set of techniques, including machine learning, that is designed to approximate a cognitive task.
- 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.¹⁶

That is a broad definition of AI. If federal law continues to rely on this definition, that could influence how contractual language defines AI between private parties.

Conclusion

With the impacts described above in mind, AI developers should start considering how to incorporate the Order's principles and the McCain Act's definition of AI into their research and development processes. Whether they market to governments, private companies, or consumers, that definition and those principles are likely to emerge as the industry's best practices and the regulatory standards.

Having said that, there still remains a void regarding value-based guidance for the end results of AI. What do we want that to look like? Some of the principles in the Order and the OMB Memo are desirable in AI—we want AI to be safe, accurate, etc.—but what do we want the world with AI to look like? Should AI make the world less discriminatory? Should it promote the value of human labor? If AI applications will be as revolutionary as some people in the sector believe, federal regulations and adoption of AI should be based more on the principles of the evaluator process, but also on the values of the outcome. That AI would be genuinely trustworthy.

Notes

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1. Exec. Order No. 13,960, 85 Fed. Reg. 78939 (December 3, 2020), available at <https://www.federalregister.gov/documents/2020/12/08/2020-27065/promoting-the-use-of-trustworthy-artificial-intelligence-in-the-federal-government> (the "Order").

2. *Id.*, at Sec. 1.

3. Exec. Order No.13,859, 84 Fed. Reg. 3967 (February 14, 2019), available at <https://www.federalregister.gov/documents/2019/02/14/2019-02544/maintaining-american-leadership-in-artificial-intelligence>; see John Frank Weaver, "Everything Is Not Terminator: What Does the Executive Order Calling for Artificial Intelligence Standards Mean for AI Regulation?," *The Journal of Artificial Intelligence & Law* (Vol. 2, No. 5; September-October 2019), 373-379.

4. Office of Management and Budget Memorandum, Guidance for Regulation of Artificial Intelligence Applications (November 17, 2020), available at <https://www.whitehouse.gov/wp-content/uploads/2020/11/M-21-06.pdf> ("OMB Memo").

5. *Id.*, at 3-7. The OMB Memo's conflation of regulatory and non-regulatory approaches to governing AI is problematic, as it could limit the federal government's ability to make qualitative decisions about outcomes and benefits concerning AI and slow down needed AI regulation. See John Frank Weaver, "Everything Is Not Terminator: The White House Memo on Regulating AI Addresses Values but Not the Playing Field," *The Journal of Artificial Intelligence & Law* (Vol. 3, No. 3; May-June 2020) (describing how the draft memo predating the OMB Memo overemphasizes growth and innovation at the expense of the government's ability to timely and effectively regulate AI).

6. Order, *supra* note 1, at Sec. 3.

7. See John Frank Weaver, "Everything Is Not Terminator: Value-Based Regulation of Artificial Intelligence," *The Journal of Artificial Intelligence & Law* (Vol. 2, No. 3; May-June 2019), 219-226 ("We need to regulate AI now in order to set early expectations for AI developers: what should consumers reasonably expect, what processing behavior is acceptable, what information must be disclosed, etc.").

8. Order, *supra* at note 1, at Sec. 4(b).

9. *Id.*, at Sec. 5(a). As of the writing of this article, the CIO Council has missed this deadline and has not produced the required guidance and information.

10. *Id.*, at Sec. 5(b).
11. *Id.*, at Sec. 5(c)(i).
12. *Id.*, at Sec. 5(c)(ii).
13. *Id.*, at Sec. 5(e).
14. Moshe Y. Vardi, “Artificial Intelligence: Past and Future,” *Communications of the Association for Computing Machinery* (Jan. 2012), 5, at 5.
15. See John Frank Weaver, “Everything Is Not Terminator: Defining AI in Contracts,” *The Journal of Artificial Intelligence & Law* (Vol. 3, No. 6; November-December 2020), 435-441 (“where the contract governs a relationship in which one or more parties may or may not rely on AI, defining what the contract will consider and treat as AI may be heavily negotiated”).
16. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 238(g) (2019).