Equity and Civil Rights Issues in the White House Executive Order on AI

By: James Gatto

The White House's Executive Order On The Safe Secure And Trustworthy Development And Use Of Artificial-Intelligence ("EO") addresses some of the equity and civil rights issues with AI and mandates certain actions to ensure that AI advances equity and civil rights. The accompanying Fact Sheet summarizes these issues, stating that the EO directs various agencies to:

- Provide clear guidance to landlords, Federal benefits programs, and federal contractors to keep AI algorithms from being used to exacerbate discrimination;

- Address algorithmic discrimination through training, technical assistance, and coordination between the Department of Justice and Federal civil rights offices on best practices for investigating and prosecuting civil rights violations related to AI; and

- Ensure fairness throughout the criminal justice system by developing best practices on the use of AI in sentencing, parole and probation, pretrial release and detention, risk assessments, surveillance, crime forecasting and predictive policing, and forensic analysis.

These high level goals are addressed extensively and in much greater detail throughout the EO. This paper further explains the issues and actions.

Background

It is well documented that AI models and algorithms often exhibit bias and can provide discriminatory results. One excellent source to help understand these issues is *Coded Bias*. This documentary is about artificial intelligence and the biases that can be embedded into this technology. It is eye opening! It chronicles how MIT media researcher, Dr. Joy Buolamwini's computer science studies uncovered that her (black) face was unrecognizable in certain facial recognition systems and how she found out why these systems failed. She discovered that the facial recognition programs only worked when she wore a white mask because the data was trained primarily on white faces. She further explored how artificial technology can affect minorities and other protected groups in other ways. *Coded Bias* highlights how some algorithms and artificial intelligence technologies discriminate by race and gender status in domains such as housing, career opportunities, healthcare, consumer credit, education, and others.

More recently she wrote *Unmasking AI*, a book that explores existential risks produced by Big Tech and addresses what she calls, "the coded gaze"—the evidence of encoded discrimination and exclusion in tech products—and how she galvanized the movement to prevent AI harms by founding the Algorithmic Justice League.

Dr. Buolamwini's work is just one example of efforts to raise awareness of and address algorithmic bias. Many other people and organizations are focused on this critical issue as well.

Prior White Efforts to Address Algorithmic Bias

The EO builds on the Executive Order Directing Agencies To Combat Algorithmic Discrimination (February 16, 2023). In part, this order to combat algorithmic discrimination:

- instructs agencies to focus their civil rights authorities and offices on emerging threats, such as algorithmic discrimination in automated technology; improve accessibility for people with disabilities; improve language access services; and consider opportunities to bolster the capacity of their civil rights offices;

- directs agencies to ensure that their own use of artificial intelligence and automated systems also advances equity; and

- directs the Interagency Working Group on Equitable Data to facilitate better collection, analysis, and use of demographic data to advance equity, and to regularly report on progress to the White House and the American public.

The EO

Many parts of the EO on AI implicate AI-driven equity and civil rights issues. The following are some issues raised and how the EO proposes to addresses them.

High Level Goals

The EO declares that AI policies must be consistent with the dedication to advance equity and civil rights. It recognizes that protections are especially important in critical areas such as hiring and workplace monitoring, healthcare, financial services, education, housing, law, and transportation. It observes that AI systems deployed irresponsibly have reproduced and intensified existing inequities, caused new types of harmful discrimination, and exacerbated online and physical harms. It finds it is necessary to hold those developing and deploying AI accountable to standards that protect against unlawful discrimination and abuse, including in the justice system and the Federal Government, so Americans can trust AI to advance civil rights, civil liberties, equity, and justice for all.

Addressing Unlawful Discrimination That May Be Exacerbated By AI

The EO addresses unlawful discrimination, in part, by:

- Requiring the Attorney General to coordinate with and support agencies in their implementation and enforcement of existing Federal laws to address civil rights and civil liberties violations and discrimination related to AI;

- Requiring the Assistant Attorney General in charge of the Civil Rights Division to convene within 90 days of the order, a meeting of the heads of Federal civil rights offices (and optionally the heads of civil rights offices within independent regulatory agencies) to discuss comprehensive use of their respective authorities and offices to:

    o prevent and address discrimination in using automated systems, including algorithmic discrimination;

- o increase coordination between the Department of Justice's Civil Rights Division and Federal civil rights offices concerning issues related to AI and algorithmic discrimination;

- o improve external stakeholder engagement to promote public awareness of potential discriminatory uses and effects of AI;

- o develop additional training, technical assistance, guidance, or other resources; and

- o provide guidance, technical assistance, and training to State, local, Tribal, and territorial investigators and prosecutors on best practices for investigating and prosecuting civil rights violations and discrimination related to automated systems, including AI.

Strengthening AI and Civil Rights in the Criminal Justice System

AI has been used in the criminal justice system for some time. It has been used in decisions on bail and sentencing, as well as in predictive policing. Its use has been controversial, and some studies have found that the AI used is trained on biased data and leads to discriminatory results.

The EO on AI includes many mandates that address use of AI in the criminal justice system, including requiring the Attorney General to address issues with use of AI in the criminal justice system by submitting to the President, within 365 days of the order, a report that addresses the use of AI in the criminal justice system, including any use in:

A. sentencing;

B. parole, supervised release, and probation;

C. bail, pretrial release, and pretrial detention;

D. risk assessments, including pretrial, earned time, and early release or transfer to home-confinement determinations;

E. police surveillance;

F. crime forecasting and predictive policing, including the ingestion of historical crime data into AI systems to predict high-density "hot spots;"

G. prison-management tools; and

H. forensic analysis.

The report is required to:

A. identify areas where AI can enhance law enforcement efficiency and accuracy, consistent with protections for privacy, civil rights, and civil liberties;

B. recommend best practices for law enforcement agencies, including safeguards and appropriate use limits for AI, and

C. provide appropriate recommendations to the President, including any requests for necessary legislation.

Advance Technical Expertise of Law Enforcement

To advance the presence of relevant technical experts and expertise (such as machine-learning engineers, software and infrastructure engineering, data privacy experts, data scientists, and user experience researchers) among law enforcement professionals, the EO mandates:

- an interagency working group (created pursuant to section 3 of Executive Order 14074 shall), within 180 days of the order, shall identify and share best practices for recruiting and hiring law enforcement professionals with the requisite technical skills mentioned and for training law enforcement professionals about responsible application of AI;

- within 270 days of the order, the Attorney General shall, in consultation with the Secretary of Homeland Security, consider best practices and guidance (developed under section 3(d) of Executive Order 14074) and develop additional general recommendations for law enforcement agencies and criminal justice agencies seeking to recruit, hire, train, promote, and retain highly-qualified and service-oriented officers and staff with relevant technical knowledge; and

- within 365 days of the order, the Attorney General shall reassess the existing capacity to investigate law enforcement deprivation of rights under color of law resulting from the use of AI, including through improving and increasing training of Federal law enforcement officers, their supervisors, and Federal prosecutors on how to investigate and prosecute cases related to AI involving the deprivation of rights under color of law under 18 U.S.C. 242.

Protecting Civil Rights Related to Government Benefits and Programs

The EO provides for several actions to address inequities in various government benefits and program administration, including directives that:

- agencies shall use their respective civil rights and civil liberties offices and authorities to prevent and address unlawful discrimination and other harms that result from uses of AI in Federal Government programs and benefits administration;

- agencies shall consider opportunities to ensure that their respective civil rights and civil liberties offices are appropriately consulted on agency decisions regarding the design, development, acquisition, and use of AI in Federal Government programs and benefits administration; and

- to further these objectives, agencies shall also consider opportunities to increase coordination, communication, and engagement about AI with community-based organizations; civil-rights and civil-liberties organizations; academic institutions; industry; State, local, Tribal, and territorial governments; and other stakeholders.

To further promote equitable administration of public benefits, the Secretary of HHS shall, within 180 days of this order, publish a plan addressing the use of automated or algorithmic systems in the implementation by States and localities of public benefits and services administered by the Secretary, to promote:

- assessment of access to benefits by qualified recipients;

- notice to recipients about the presence of such systems;

- regular evaluation to detect unjust denials;

- processes to retain appropriate levels of discretion of expert agency staff;

- processes to appeal denials to human reviewers; and

- analysis of whether algorithmic systems in use by benefit programs achieve equitable and just outcomes.

The Secretary of Agriculture shall, within 180 days of this order, issue guidance to State, local, Tribal, and territorial public-benefits administrators on the use of automated or algorithmic systems in implementing benefits or in providing customer support for benefit programs administered by the Secretary, to ensure that programs using those systems:

A. maximize program access for eligible recipients;

B. employ automated or algorithmic systems in a manner consistent with any requirements for using merit systems personnel in public-benefits programs;

C. identify instances in which reliance on automated or algorithmic systems would require notification by the State, local, Tribal, or territorial government to the Secretary;

D. identify instances when applicants and participants can appeal benefit determinations to a human reviewer for reconsideration and can receive other customer support from a human;

E. enable auditing and remediation of the logic used to arrive at an individual decision or determination to facilitate the evaluation of appeals; and

F. enable the analysis of whether algorithmic systems in use by benefit programs achieve equitable outcomes.

Strengthening AI and Civil Rights in the Broader Economy

To prevent unlawful discrimination from AI used for *hiring*, the Secretary of Labor shall, within 365 days of the order, publish guidance for Federal contractors regarding non-discrimination in hiring involving AI and other technology-based hiring systems.

To address discrimination and biases against protected groups in *housing* markets and *consumer financial* markets, the Director of the Federal Housing Finance Agency and the Director of the Consumer Financial Protection Bureau are encouraged to consider using their authorities to require their respective regulated entities to use appropriate methodologies including AI tools to ensure compliance with Federal law and:

- evaluate their underwriting models for bias or disparities affecting protected groups; and

- evaluate automated collateral-valuation and appraisal processes in ways that minimize bias.

To combat unlawful discrimination enabled by automated or algorithmic tools used to make *decisions about access to housing and in other real estate-related transactions*, the Secretary of Housing and Urban Development shall (and the Director of the Consumer Financial Protection Bureau is encouraged to), issue additional guidance within 180 days of this order addressing:

- using tenant screening systems in ways that may violate the Fair Housing Act (Public Law 90-284), the Fair Credit Reporting Act (Public Law 91-508), or other relevant Federal laws, including how the use of data, such as criminal records, eviction records, and credit information, can lead to discriminatory outcomes in violation of Federal law; and

- how the Fair Housing Act, the Consumer Financial Protection Act of 2010 (Title X of Public Law 111-203), or the Equal Credit Opportunity Act (Public Law 93-495) apply to the *advertising of housing, credit, and other real estate-related transactions through digital platforms*, including those that use algorithms to facilitate advertising delivery and best practices to avoid violations of Federal law.

To help ensure that people with *disabilities* benefit from AI's promise while being protected from its risks, including unequal treatment from the use of biometric data like gaze direction, eye tracking, gait analysis, and hand motions, the Architectural and Transportation Barriers Compliance Board is encouraged to:

- solicit public participation and conduct community engagement;

- issue technical assistance and recommendations on the risks and benefits of AI in using biometric data as an input; and

- provide people with disabilities access to information and communication technology and transportation services.

Health Care, Public-health, and Human-services

To help ensure the safe, responsible deployment and use of AI in the healthcare, public-health, and human-services sectors, the EO mandates that the Secretary of HHS shall, within 90 days of this order (in consultation with the Secretary of Defense and the Secretary of Veterans Affairs), establish an HHS AI Task Force. This task force shall, within 365 days of its creation, develop a strategic plan that includes policies, frameworks, and possibly regulatory action on responsible deployment and use of AI, and AI-enabled technologies in the health and human services sector (including research and discovery, drug and device safety, healthcare delivery and financing, and public health), and identify appropriate guidance and resources to promote that deployment in these areas:

- development, maintenance, and use of predictive and generative AI-enabled technologies in healthcare delivery and financing, including quality measurement, performance improvement, program integrity, benefits administration, and patient experience, considering considerations such as appropriate human oversight in applying AI-generated output;

- long-term safety and real-world performance monitoring of AI-enabled technologies in the health and human services sector, including clinically relevant or significant modifications and performance across population groups, with a means to communicate product updates to regulators, developers, and users; and

- incorporation of *equity principles* in AI-enabled technologies used in the health and human services sector, using disaggregated data on affected populations and representative population data sets when developing new models, monitoring algorithmic performance against discrimination and bias in existing models, and helping to identify and mitigate discrimination and bias in current systems.

Within 180 days of this order, the Secretary of HHS shall consider appropriate actions to advance the prompt understanding of and compliance with, Federal non-discrimination laws by health and human services providers that receive Federal financial assistance, and how those laws relate to AI. Such actions may include:

- convening and providing technical assistance to health and human services providers and payers about their obligations under Federal nondiscrimination and privacy laws as they relate to AI and the potential consequences of noncompliance; and

- issuing guidance, or taking other action as appropriate, in response to any complaints or other reports of noncompliance with Federal nondiscrimination and privacy laws as they relate to AI.

Promoting Equity in Federal Government Use of AI

The Order bolsters the responsible use of AI by the Federal Government. It mandates the Director of OMB to convene and chair an interagency council to coordinate the development and use of AI in agencies' programs and operations (other than in national security systems) to provide guidance on Federal Government use of AI, to strengthen the effective and appropriate use of AI, advance AI innovation, and manage risks from AI in the Federal Government. This includes determining risk-management practices for Government uses of AI that impact people's rights or safety, including, assessing and mitigating disparate impacts and algorithmic discrimination.

Conclusion

AI holds tremendous potential to benefit society. However, it has been demonstrated that AI and other algorithmic tools can lead to biased and discriminatory results. This can be due to biased data used to train the AI models, bias built into algorithms and/or use of AI in a biased or discriminatory way. The EO's extensive focus on these issues will help raise awareness of these issues and the mandated actions hopefully will lead to better guidance and other tools to eliminate these issues. But these actions alone will not fully solve the problems.

I, and Sheppard Mullin's 110+ lawyer AI team, are focused on these issues and look forward to doing our part to combat the biased and discriminatory results of AI. We look forward to collaborating with clients and others on these initiatives. If you have thoughts or questions on this, or if there are projects on which we can help, I would welcome the opportunity to talk with you.

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