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The Impending Judicial Regulation of Artificial Intelligence in the Administrative State

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I.   Introduction

Artificial Intelligence (AI) algorithms are being deployed in executive branch agencies at a brisk pace and with no executive branch account for their use.[1] The Administrative Conference of the United States (ACUS), an independent federal research and recommendatory agency, has studied AI use in federal administrative agencies and observed in a report that little is known about how such algorithms are actually being used.[2] This is significant because over sixty agencies have experimented with AI to enforce regulatory mandates, adjudicate government benefits and privileges, and draw information from large data streams for consumer complaints, among other uses.[3] The proliferation of this new technology in government that has generally

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[†] Professorial Lecturer in Law, The George Washington University Law School. Thanks to Steve Platt for his helpful comments. All errors are my own.

[1] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES (Feb. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf. (Nearly 45% of federal agencies have used either AI or machine learning in some capacity, but only 12% of agencies were rated as being "high in sophistication" of use by computer science researchers at Stanford University).

[2] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 6-7 (Feb. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf.

[3] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 6-7 (Feb. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf.

been found to succumb to racial and gender biases[4] when incompetently or intentionally[5] trained to do so raises civil rights concerns.[6]

Though the Obama and Trump administrations made efforts to address the responsible technological advancement of AI in government in broad strokes, there are currently no constraints on the procedures, if any, that agencies use to adopt AI in their administrative actions. In late 2016, the Obama Administration issued a report, *Preparing for the Future of Artificial Intelligence*,[7] alongside the *National Artificial Intelligence Research and Development Strategic Plan*.[8] The Trump Administration made progress in the federal response to AI development by taking preliminary steps in organizing and regulating AI systems being deployed by government agencies under two executive orders.[9] Executive Order 13,859, *Maintaining American Leadership in Artificial Intelligence* and Executive Order 13,960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, were the first presidential actions

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[4] James Zou & Londa Schiebinger, AI Can Be Sexist and Racist—It's Time to Make It Fair, 559 NATURE 324 (2018), https://www.nature.com/articles/d41586-018-05707-8; Solon Barocas and Andrew D. Selbst, *Big Data's Disparate Impact*, 104 C<small>AL</small>. L. R<small>EV</small>. 671, 677 (2016); Cathy O'Neil, Weapons of Math Destruction (2016) (discussing how contrary to intuitive perception, mathematical models which in theory are designed to be more fair than human decision makers often reinforce bias and are also opaque, unregulated, and uncontestable).

[5] MIT Technology Review, Artificial Intelligence/Machine Learning, *Podcast: Playing the job market – AI hiring tools pose risks to workforce equality*, interview of Keith Sonderling, Commission, Equal Employment Opportunity Commission (July 21, 2021) https://www.technologyreview.com/2021/07/21/1029868/podcast-playing-the-job-market-ai-hiring/.

[6] *See, e.g.*, Exec. Order No. 13,960, Executive Order on Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government (Dec. 3, 2020), https://www.federalregister.gov/documents/2020/12/08/2020-27065/promoting-the-use-oftrustworthy-artificial-intelligence-in-the-federal-government

[7] Nat'l Sci. & Tech. Council, Comm. on Tech., Preparing for the Future of Artificial Intelligence, https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai.pdf (Oct. 2016).

[8] Nat'l Sci. & Tech. Council, Comm. on Tech., National Artificial Intelligence Research and Development Strategic Plan (Oct. 2016), https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/national_ai_rd_strategic_plan.pdf.

[9] Exec. Order No. 13,859, Executive Order on Maintaining American Leadership in Artificial Intelligence, 84 Fed. Reg. 3967 (Feb. 14, 2019), https://www.federalregister.gov/documents/2019/02/14/2019-02544/maintaining-americanleadership-in-artificial-intelligence; Exec. Order No. 13,960, Executive Order on Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government (Dec. 3, 2020), https://www.federalregister.gov/documents/2020/12/08/2020-27065/promoting-the-use-oftrustworthy-artificial-intelligence-in-the-federal-government.

to be specifically focus on AI. Together, they initiated a whole-of-government process to develop guidance for the regulation of AI applications at the macroscopic level. That process is characteristically unhurried and not keeping pace to account for actuals in administrative implementations of AI in government.

Policy solutions have been put forth to mitigate the issue of incompetent and irresponsible AI uses in government. These include calls for legislation[10] and the application of executive branch constraints that range from specific process changes in design and implementation of AI[11] to those of a more structural nature.[12] The question is when—rather than if—discrete solutions will be considered and adopted by the executive branch or Congress. Such solutions are implied by Executive Orders in 13,859 and 13,960.[13] Executive Order 13,859 mandates the United States to drive technological breakthroughs in "Federal Government" and that the country must "foster public trust and confidence in AI technologies and protect civil liberties, privacy, and American values in their application."[14] Executive Order 13,960 lays out nine principles to which agencies should adhere when "designing, developing, acquiring, and using AI."[15] These executive orders are expected to remain unrevoked.[16] The Biden Administration has been active in AI, especially in fostering AI research and integrating AI into

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[10] S. 2551, AI TRAINING Act (117th Cong.) https://www.congress.gov/bill/117th-congress/senate-bill/2551/; H.R. 2575 AI in Government Act of 2020 (116th Cong.) https://www.congress.gov/bill/116th-congress/house-bill/2575/text.

[11] Ryan Calo and Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797 (2021).

[12] Aram A. Gavoor and Raffi Teperdjian, *A Structural Solution to Mitigating Artificial Intelligence Bias in Administrative Agencies*, 89 GEO. WASH. L. REV. ARGUENDO 71 (2021).

[13] Executive Order 13960, Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, 85 Fed. Reg. 78939 (Dec. 3, 2020); Executive Order 13589, Maintaining American Leadership in Artificial Intelligence, 84 Fed. Reg. 3967 (Feb. 11, 2019).

[14] Executive Order 13589, Maintaining American Leadership in Artificial Intelligence, 84 Fed. Reg. 3967 at Sec. 1(a) and (d) (Feb. 11, 2019).

[15] Executive Order 13960, Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, 85 Fed. Reg. 78939 Sec. 3 (Dec. 3, 2020).

[16] John Frank Weaver, *The Federal Government and Trustworthy AI*, 4 THE JOURNAL OF ROBOTICS, ARTIFICIAL INTELLIGENCE & LAW 227 (2021).

the national security strategy.[17] And yet, the government has not sufficiently delved into the nuance to establish procedures by which to satisfy its lofty mandates.

In June 2021, the National Institute of Standards and Technology of the U.S. Department of Commerce issued in draft proposal to identify and mitigate AI bias as a general matter.[18] That same month, the Office of Science and Technology Policy of the White House and National Science Foundation formed a task force for AI research.[19] Despite these gains, the political branches of the federal government have limited time to act before their primary policymaking authority is diluted or potentially ceded to the Judiciary. This essay argues that in the absence of timely action of the Executive or Legislative branches to establish procedures to mitigate for administrative agency AI accountability gaps (like bias) and transparency gaps (like being understandable and traceable),[20] the Judiciary may dictate such procedures via remands under the administrative record provision of the Administrative Procedure Act of 1946[21] as it first did 50 years ago with informal adjudications.[22]

II.   *The* Overton Park *Administrative Record Rule and Its Enduring Legacy*

In *Citizens to Preserve Overton Park v. Volpe* (1971), the Supreme Court imposed upon agencies a requirement to establish procedures that would generate a contemporaneous record of

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[17] E.g., Press Release, The Biden Administration Launches the National Artificial Intelligence Research Resource Task Force, THE WHITE HOUSE (June 10, 2021) https://www.whitehouse.gov/ostp/news-updates/2021/06/10/the-biden-administration-launches-the-national-artificial-intelligence-research-resource-task-force/; National Artificial Intelligence Initiative, https://www.AI.gov (Overseeing and implementing the United States National AI Strategy).

[18] U.S. Department of Commerce, National Institute for Standards and Technology, Draft NIST Special Publication 1270, A Proposal for Identifying and Managing Bias in Artificial Intelligence (June 20, 2021) https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270-draft.pdf?_sm_au_=iHVbf0FFbP1SMrKRFcVTvKQkcK8MG; Executive Order 13589, Maintaining American Leadership in Artificial Intelligence, 84 Fed. Reg. 3967 at Sec. 6(d) (Feb. 11, 2019).

[19] The White House, Press Release, The Biden Administration Launches the National Artificial Intelligence Research Resource Task Force (June 10, 2021), available at https://www.whitehouse.gov/ostp/news-updates/2021/06/10/the-biden-administration-launches-the-national-artificial-intelligence-research-resource-task-force/.; William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, P.L. 116-283, Title LI, Sec. 5106.

[20] Cary Coglianese and David Lehr, *Transparency and Algorithmic Governance*, 71 ADMIN. L. REV. 1 (2019).

[21] 5 U.S.C. § 706

[22] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

their informal adjudications so that courts could fulfil their judicial review duties. Though informal adjudications account for the majority of actions that are reviewable under the APA,[23] the statute does not enumerate procedures for how agencies should go about with this class of action as it does for formal adjudication, informal rulemaking, and formal rulemaking.[24] Upon remand in *Overton Park*, it took the agency four months to produce an informal adjudication "record."[25] By 1976, a quantitative study concluded that agencies coalesced on now-familiar procedures in their informal adjudications: (1) notice; (2) an opportunity to present data and arguments in oral or written format; (3) a decision by a neutral decisionmaker, and (4) a statement of reasons in support of the decision.[26] Three years later, the Court enunciated the general principle that the Judiciary may not impose additional procedural requirements on agencies than those contained in the APA in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.* (1974).[27] Notwithstanding, it reinforced its *Overton Park* holding in *Pension Benefit Guaranty Corporation v. LTV Corporation* in 1990.[28]

In *LTV*, the Court described *Overton Park* as standing for the proposition that 5 U.S.C. § 706(2)(A), which requires courts to ensure "agency action is not arbitrary and capricious or otherwise contrary to law, imposes a general "procedural" requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision."[29] Applying that logic to the lack of transparency in administrative agency uses of AI algorithms and their troubling propensity for

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[23] Kristine E. Hickman and Richard J. Pierce, Jr., FEDERAL ADMINISTRATIVE LAW at 345, Foundation Press (3d ed. 2020).

[24] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417-19 (1971).

[25] Nathanial L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721 (1975).

[26] Paul Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

[27] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1974)

[28] *Pension Ben. Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 654 (1990); Aram A. Gavoor and Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 24 (2018).

[29] *Pension Ben. Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 654 (1990).

bias, the executive branch may be soon face an *Overton Park II* moment. The factual predicate

for such an event is already in place.

III.   *The Implementation of AI In the Administrative State Is Susceptible To Judicial Regulation Under The Administrative Record Rule.*

Authored by some of the most consequential minds in AI, the 2020 ACUS report,

Government by Algorithm: Artificial Intelligence in in Federal Administrative Agencies (ACUS

Report), is the first comprehensive account of how federal agencies are using AI systems. The

report canvassed the use of AI in 142 of the most significant departments, agencies, and sub-

agencies.[30] It offered five findings: (1) the government's AI toolkit is diverse with 45% of

surveyed agencies (or 64 agencies) having experimented with AI and related machine learning

tools; (2) despite wide agency embrace of AI, agencies do not use sophisticated techniques for

AI; (3) AI poses "deep accountability challenges" in terms of transparency of processes and the

integration of such processes into administrative law norms; (4) agencies need to develop

internal technical capacity in AI; and (5) AI "has the potential to raise distributive concerns and

fuel political anxieties."[31]

In 2020, at least 10 agencies have used AI in the course of adjudication.[32] These include

the Social Security Administration using AI tools in a variety of ways to improve decisional

quality in disability benefits formal adjudication and the U.S. Patent and Trademark Office using

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[30] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 6 (Feb. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf.

[31] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 6-7 (Feb. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf.

[32] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 17 (Feb. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf.

AI to improve patent and mark classifications and prior patent or mark searches.[33] Adding to the obfuscation to the ACUS-studied use cases, 53% of agencies surveyed developed their algorithms in-house without private contracting.[34] And, 88% of agencies were unable or unwilling to articulate sufficient technical details to furnish the ACUS team of computer scientists to assign a basic low/medium/high sophistication standard on their AI use behavior.[35] These facts and others led the ACUS report authors to conclude that "algorithmic governance tools trigger a profound collision between administrative law's requirement of transparency and reason-giving and the fact that many algorithmic decision tools are not, by their structure, fully explainable."[36] The authors' aforementioned reference to "administrative law" pertained to procedural promulgation and substantive review under the arbitrary and capricious standard. They do not contemplate the risk associated with judicial regulation of administrative AI implementation as contemplated in this essay. As aggrieved parties challenge adjudications that are empowered by AI algorithms that the agencies cannot adequately explain or trace, the common law that courts will develop as to AI-based administrative records will stand apart from normative common law development under arbitrary and capricious review or under the *Chevron*, *Skidmore*, or *Kisor* standards of judicial deference to agency interpretations of law.

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[33] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 36, 46-49 (Feb. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf.

[34] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 18 (Feb. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf.

[35] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 20 (Feb. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf.

[36] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, Mariano-Florentino Cuéllar, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 28 (Feb. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf.

Consider the following scenario that illustrates one of several ways in which the administrative record rule would result in cyclical remand-based regulation of administrative AI promulgation procedures and quality standards.

In the course of APA litigation that involves an informal adjudication that is empowered by an unexplainable or untraceable AI (among other possible flaws), the agency would lodge with the court or serve upon opposing counsel what it deems as a complete and certified administrative record. The plaintiff would then challenge the sufficiency of the record with open source, Freedom of Information Act-derived, or other information that evidences the agency's use of AI to rebut the presumption of regularity that courts assign agency administrative records. In some circumstances, the plaintiff may simply point to the existence of AI in the agency's adjudicative process as a basis to speculate that more records exist. The court would side with the plaintiff over the government's opposition papers and order the record to be "completed." That order would come with an instruction for the agency to lay out with sufficient clarity for 5 U.S.C. § 706(2)(A) arbitrary and capricious review the procedures that the agency used to "enable the court to evaluate the agency's rationale at the time of decision."[37] The agency would fail to do comply with the court's instruction because it lacks the technical ability to do so. The agency might attempt to furnish the court with an affidavit or declaration from a sufficiently senior agency official to lay out the decision-making process and the role that the AI has within it. The explanation would be in broad strokes and insufficiently specific to satisfy the court. And though the agency may move for relief the merits at this juncture,[38] the court would enter a limited order for traditional deposition discovery and possibly require the agency to furnish under seal to the court an emulator that is loaded with the AI algorithm that assisted the

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[37] *Pension Ben. Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 654 (1990).
[38] Fed. R. Civ. P. 12(c) or 56(a).

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challenged adjudication for the court to consider on the merits. As described, *infra*, the court could alternatively move directly to the merits and presumptively rule in favor of plaintiffs under the arbitrary and capricious standard because the agency cannot explain the result of its adjudication.[39]

At this juncture, the government may consider granting underlying relief that plaintiff seeks to moot the case. If the court concludes that the case is not moot on account of the voluntary cessation[40] standard or another application of the mootness doctrine, the government will have multiple options at its disposal. It could comply with the court's discovery order, seek to defeat a potential contempt motion with the impossibility defense by declaring under perjury that the record is complete to its knowledge, move the court to certify an interlocutory appeal, or seek emergency mandamus relief with the appropriate Court of Appeals. The government will likely lose an attempt at emergency relief because the case law on administrative records offers only a general bulwark to shield against the courts "inquiring into the mental processes of administrative decisionmakers."[41] Here, the administrative record completion that plaintiff seeks via traditional discovery relates to the agency's algorithmic governance information that was not performed by a human.

Regardless of the outcome, the agency will find itself facing a Hobson's choice where it could find itself under internal management, political, and extrinsic pressure to either scrap the AI tool altogether, subordinate its influential effect on decision-making, or attempt to establish AI promulgation and transparency procedures that will satisfy the *Overton Park* standard of

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[39] *See infra* at 10.

[40] *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

[41] *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2574 (2019) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) ("we have recognized a narrow exception to the general rule against inquiring into "the mental processes of administrative decisionmakers" in the context of a bad faith showing) (cleaned up); Aram A. Gavoor and Steven A. Platt, *Administrative Records After* Department of Commerce, 72 ADMIN. L. REV. 87, 98 (2020).

generating a contemporaneous administrative record. Macroscopically, this process of courts

determining the suitability of AI promulgation and transparency procedures will repeat on a

cyclical basis across agency and executive branch litigations. From it, an AI administrative

record common law will develop that is advanced by virtue of an absence of negative outcomes

for the government. Put another way, agency AI procedures that do *not* result in onerous

administrative record discovery orders will be adopted across agencies in the place of those that

do not meet the mark.

Though AI record problems could arise in rulemaking and formal adjudication scenarios,

especially where the agency decisionmaker expressly or in-effect cedes decisional authority to an

algorithm, the existence of positive APA procedures for these classes of agency action should

not significantly affect the evidence in litigation that challenges them. Informal agency actions

are striking different because the APA imposes no positive procedures on them, save for the

basic duty to notify a private party of a completed adjudication under 5 U.S.C. § 555(e). Similar

to the 5 U.S.C. § 706(2)(A) review of informal agency adjudications, the net effect of this

cyclical behavior would be the judicial imposition of administrative law procedural norms for AI

that dilute or outright exercise the policy-making authority of the executive branch or Congress.

Depending on the wisdom of agencies' AI implementations, the transparency and limiting

principles that they put in place, this judicial process may be forestalled entirely if timely

governmentwide AI implementation procedures are put into place by the executive branch.[42]

Stepping back from this predictive scenario, there remains an open question of *whether*

the federal courts ought to be in a posture to wield in-effect policymaking authority over

executive branch AI promulgation and transparency procedures through the exercise of

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[42] *E.g.*, Ashley Deeks, *The Judicial Demand for Explainable Artificial Intelligence*, 119 COLUM. L. REV. 1829, 1830-31 (2019); Aram A. Gavoor and Raffi Teperdjian, *A Structural Solution to Mitigating Artificial Intelligence Bias in Administrative Agencies*, 89 GEO. WASH. L. REV. ARGUENDO 71, 75 (2021)

successive administrative record-insufficiency remands. Though the Court did not address that question as it is framed, here, it reinforced and strengthened the *Overton Park* record rule in *Department of Commerce v. New York*.[43] If a court were inclined to seek an alternative to remanding an insufficient administrative record to an agency for completion or ordering traditional discovery at great expense to the agency, it could set aside the underlying agency action on the merits. Because an incomplete administrative record furnishes an insufficient body of facts to enable a jurist to draw a rational connection between the facts found and the decision made, the agency's evidentiary flaw doubles as a merits problem.

It is sometimes preferable for an agency to lose a case and have an opportunity to take a second bite at the apple then undergo a highly disruptive record completion or record supplementation order of the sort that encumbered the Department of Homeland Security in Trump-era Deferred Action for Childhood Arrivals ("DACA") recission litigation. In one such DACA case (in which AI was not implicated), 30,000 documents were ordered to be produced in a matter of days. At oral argument, a government attorney reported: "[o]ne out of every 14 [Immigration and Customs Enforcement] lawyers is devoted to considering the discovery requests in this case. Every [Department of Homeland Security] litigation lawyer at [Department of Homeland Security] headquarters is considering the discovery requests in this case. Programmatic interests are being subordinated to follow the discovery requests in this case."[44]

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[43] *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573-74 (2019) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)).

[44] Josh Gerstein, *Appeals Courts Block Access to DACA Cancellation Files*, POLITICO (Oct. 24, 2017), https://www.politico.com/story/2017/10/24/dreamers-daca-appeals-courts-access-244138 (quoting Civil Division Deputy Assistant Attorney General Hashim Mooppan). *See, e.g.*, *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127 (E.D.N.Y. 2017); *In re United States*, 138 S. Ct. 443 (2017).

IV.   *Conclusion*

Notwithstanding the permutations and consequences of an eventual series of APA

challenges that would place the federal courts in the posture of cyclical administrative record

remands on AI-based adjudications, sound public policy dictates that the executive branch at

minimum should expressly and publicly begin the process of enunciating both discrete

procedures and limiting principles for AI use in administrative agencies. Such a process, itself,

could go a long way to earning judicial stays in contentious litigations until the procedures can

be adequately developed in the interest of continuity of government operations. Having draft

procedures publicly available, or better yet, available for public comment could also serve as a

guidepost for courts to fashion orders with indirect governmental policy input. In litigation, the

government could rely on such draft procedures in problem-case discovery proposals. Until such

advances have materialized, the clock is ticking on the federal government's ability to

methodically determine AI procedural implementation policy under its own terms.