



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Artificial Intelligence in Retrospective Review of Agency Rules

Committee on Regulation

Draft Recommendation for Committee | March 8, 2023

Commented [AS1]: For Committee consideration: Because the project encompasses tools broader than just AI, should the name of the Recommendation be changed to "Algorithmic Retrospective Review of Agency Rules" (consistent with the consultant report) or "Algorithmic Tools in Retrospective Review of Agency Rules"?

1 Retrospective review is the process by which agencies assess existing rules and decide
2 whether they need to be revisited. Consistent with longstanding executive-branch policy, the
3 Administrative Conference has endorsed the practice of retrospective review of agency rules,
4 encouraged regulatory agencies to cultivate a culture of retrospective review, and urged agencies
5 to establish plans to conduct retrospective reviews periodically.¹ The Conference has also
6 recognized, however, that agencies often have limited resources available to conduct
7 retrospective reviews. To encourage agencies to undertake retrospective reviews despite resource
8 limitations, the Conference has identified opportunities for agencies to conserve resources, for
9 example by taking advantage of internal and external sources of information and expertise.²

10 New technologies may offer additional opportunities for agencies to conserve resources
11 and conduct more robust retrospective review in a cost-effective manner. Most significantly,
12 algorithmic tools may enable agencies to automate some tasks associated with retrospective
13 review. An algorithmic tool is a computerized process that uses a series of rules to transform
14 specified inputs into outputs and is used to make decisions or support decision making.³ The use
15 of such tools may also help agencies identify issues that they otherwise might not detect. Several

¹ See Admin. Conf. of the U.S., Recommendation 2021-2, *Periodic Retrospective Review*, 86 Fed. Reg. 36,080 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61,783 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,108 (Aug. 18, 1995).

² Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

³ Algorithmic tools include, but are not limited to, applications that use artificial intelligence (AI) techniques.

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16 agencies have already begun experimenting with the use of algorithmic tools to conduct some
17 tasks in service of retrospective review or similar functions.⁴

18 Although algorithmic tools hold out the promise of lowering the cost of completing
19 governmental tasks and improving the quality, consistency, and predictability of agencies’
20 decisions, government agencies’ use of algorithmic tools also raises important concerns.⁵
21 Statutes, executive orders, and agency policies highlight many such concerns,⁶ and, in a prior
22 Statement, the Conference described concerns about transparency (especially given the
23 proprietary nature of some artificial intelligence (AI) systems), harmful bias, technical capacity,
24 procurement, data usage and storage, privacy, security, and the full or partial displacement of
25 human decision making and discretion that may arise when agencies rely on AI tools.⁷ Agencies
26 must also consider practical challenges, including potentially high startup costs associated with
27 developing or procuring algorithmic tools, development of internal capacity and expertise,
28 staffing and training needs, and ongoing maintenance and oversight.

29 The Conference recognizes that agencies may be able to leverage algorithmic tools to
30 more efficiently, cost-effectively, and accurately identify rules that are outdated or redundant,
31 contain typographic errors or inaccurate cross-references, or might benefit from elaboration or
32 clarification. Because agencies have only recently begun using algorithmic tools to support
33 retrospective review, this Recommendation does not address the potential use of those tools to
34 perform more complex tasks—such as identifying rules that may need to be modified,
35 strengthened, or eliminated to better achieve statutory goals or reduce regulatory burdens—for
36 which the potential risks and benefits are still unclear. At the same time, the Conference

⁴ Catherine M. Sharkey, *Algorithmic Retrospective Review of Agency Rules* (Mar. 1, 2022) (draft report to the Admin. Conf. of the U.S.).

⁵ David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (Feb. 2020) (report to the Admin. Conf. of the U.S.).

⁶ See, e.g., AI Training Act, Pub. L. No. 117-207, 136 Stat. 2237 (Oct. 17, 2022); Exec. Order No. 14,091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 88 Fed. Reg. 10,825 (Feb. 16, 2023); Exec. Order No. 13,960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, 85 Fed. Reg. 78,939 (Dec. 3, 2020); Exec. Order No. 13,859, *Maintaining American Leadership in Artificial Intelligence*, 84 Fed. Reg. 3967 (Feb. 11, 2019).

⁷ Admin. Conf. of the U.S., *Statement #20, Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021).



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37 recognizes important concerns regarding agencies' use of such tools, including those highlighted
38 above. This Recommendation offers best practices for agencies to implement algorithmic tools in
39 a way that accords with applicable legal requirements and promotes accuracy, efficiency,
40 transparency, and accountability.

RECOMMENDATION

- 41 1. Agencies should assess whether they can use algorithmic tools to more efficiently, cost-
42 effectively, and accurately identify rules that are outdated or redundant, contain
43 typographic errors or inaccurate cross-references, or might benefit from elaboration or
44 clarification.
- 45 2. When agencies contemplate using an algorithmic tool to support retrospective review,
46 they should consider whether it would be most efficient, cost-effective, and accurate to
47 develop a new tool in-house, implement a tool developed and made available by another
48 agency, or procure a tool from a commercial vendor or contractor. In making this
49 determination, agencies should assess whether there is an existing tool that meets their
50 needs and, in so doing, consult with other agencies that have experience using
51 algorithmic tools to support retrospective review. If there is no such tool, agencies should
52 consider whether they have sufficient in-house expertise and capacity to develop an
53 adequate tool.
- 54 3. Agencies should ensure that regulatory decision makers who use algorithmic tools to
55 support retrospective review (a) have adequate training on the capabilities and risks of
56 those tools and (b) carefully assess the output for further consideration.
- 57 4. To promote transparency and build internal expertise, agencies should, when developing
58 or selecting an algorithmic tool to support retrospective review, ensure that the source
59 code for the tool is publicly available and interoperable with other government systems.
60 If agencies do not use an algorithmic tool that is open-source, they should ensure that key
61 information about the tool's development, operation, and use is available to agency
62 personnel and the public.



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- 63 5. When agencies publish retrospective review plans and descriptions of specific
64 retrospective reviews, as described in Recommendation 2021-2, *Periodic Retrospective*
65 *Review*, they should disclose whether, and if so, explain how, they plan to use or used
66 algorithmic tools to support retrospective review. Additionally, when agencies
67 incorporate retrospective reviews in their Learning Agendas and Annual Evaluation
68 Plans, as described in Recommendation 2021-2, they should include information about
69 the use of algorithmic tools. |
- 70 6. When a retrospective review using an algorithmic tool serves as a basis for a new
71 rulemaking, agencies should explain how the tool contributed to the decision to develop
72 the new rule.
- 73 7. Agencies should also develop their own internal evaluation and oversight mechanisms for
74 algorithmic tools used in retrospective review, both for initial approval of a tool and for
75 regular oversight of the tool. Agency considerations should include risk management and
76 regular monitoring responsibilities.
- 77 8. The Office of Management and Budget should provide guidance on the acquisition and
78 use of algorithmic tools to support retrospective review.
- 79 9. The General Services Administration should continue to explore options for using
80 algorithmic tools to support retrospective review and share its findings and capabilities
81 with other agencies.
- 82 10. Agencies should consider piloting new algorithmic tools to test and measure their
83 effectiveness for purposes of retrospective review.

Commented [COR2]: Are there opportunities for explainability/interpretability here?

Commented [AS3]: Question for Committee: Should agencies that use algorithmic tools to support retrospective review develop generally applicable policies governing how they acquire and use such tools and make them publicly available, on their websites or otherwise?