RECOMMENDATION: Expand the AI Use Case Inventory by Limiting the 'Common Commercial Products' Exception

The National Artificial Intelligence Advisory Committee (NAIAC)
Law Enforcement Subcommittee (NAIAC-LE Subcommittee)

February 2024

NAIAC MEMBERS

Miriam Vogel, *Chair*
President and CEO of EqualAI

James Manyika, *Vice Chair*
Senior Vice President, Google, President for
Research, Technology & Society

Amanda Ballantyne
Director of the AFL-CIO Technology Institute

Jack Clark
Co-founder of Anthropic

David Danks
Professor of Data Science and Philosophy at
the University of California, San Diego

Victoria A. Espinel
President and CEO of BSA | The Software
Alliance

Paula Goldman
Chief Ethical and Humane Use Officer at
Salesforce

Susan Gonzales
Founder and CEO of AIandYou

Janet Haven
Executive Director of Data & Society

Daniel E. Ho
William Benjamin Scott and Luna M. Scott
Professor of Law, Professor of Political Science,
and Professor of Computer Science (by
courtesy), Senior Fellow, Stanford Institute for
Human-Centered AI, Stanford University

Ayanna Howard
Dean of Engineering at The Ohio State
University

Jon Kleinberg
Professor in the Departments of Computer
Science and Information Science at Cornell
University

Ramayya Krishnan
W. W. Cooper and Ruth F. Cooper Professor of
Management Science and Information
Systems, Carnegie Mellon University

Ashley Llorens
Vice President, Distinguished Scientist, and
Managing Director at Microsoft Research

Haniyeh Mahmoudian
Global AI Ethicist at DataRobot, Inc.

Christina Montgomery
Chief Privacy & Trust Officer and Vice President
at IBM

Liz O'Sullivan
CEO of Vera

Fred Oswald
Professor and Herbert S. Autrey Chair in Social
Sciences, Rice University

Trooper Sanders
CEO of Benefits Data Trust

Navrina Singh
Founder and CEO of Credo AI

Swami Sivasubramanian
Vice President for Data and Machine Learning
Services at Amazon Web Services

Keith Strier
Vice President for Worldwide AI Initiatives at
NVIDIA

Reggie Townsend
Vice President of Data Ethics at SAS Institute

<u>Recommendation:</u>
Expand the AI use case inventory by limiting the 'common commercial products' exception.

A. Background:

Since 2020, the executive branch has required that federal agencies create and make public an inventory of how they are using AI.[1] These "AI Use Case Inventories" (UCIs) serve as a tool to support a national strategy of transparent and accountable AI use by the federal government.[2] Recently, the Biden administration declared that the AI UCI would be an even "more central part" of its national AI strategy.[3] OMB's draft guidance on AI bears this out. The draft guidance requires agencies, including federal law enforcement agencies, to report additional details — such as "risks to equity" and "how they are managing those risks" — about a broad range of high-risk AI applications.[4]

But the UCIs are not comprehensive. At present, guidance from the Federal Chief Information Officers Council (CIO Council) regarding these inventories instructs agencies to exclude "AI embedded within common commercial products."[5] The definition of this exemption cites "word processors" and "map navigation systems" as qualifying examples but does not further define the exception. The language of this exception — "common commercial products" — does not appear to be used elsewhere in federal law,[6] so there is little interpretive guidance available.

---

[1] Executive Order 13960 of December 3, 2020, "Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government," Code of Federal Regulations, 78939-78943, https://www.federalregister.gov/documents/2020/12/08/2020-27065/promoting-the-use-of-trustworthy-artificial-intelligence-in-the-federal-government.

[2] E.O. 13960 of Dec 3, 2020.

[3] Madison Alder and Caroline Hill, "Inventories to be 'more central part' of understanding how agencies use AI under White House guidance," FedScoop, November 7, 2023, https://fedscoop.com/ai-inventories-more-central-under-white-house-guidance.

[4] Shalanda D. Young, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," U.S. OMB, November 2023, https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf.

[5] "Guidance for AI Use Case Inventories," U.S. CIO, 2023, https://www.cio.gov/assets/resources/2023-Guidance-for-AI-Use-Case-Inventories.pdf.

[6] The Federal Acquisition Regulations (FAR), which regulates government procurement, has some definitions that seem relevant, but were not relied upon by OMB. The FAR distinguishes between "commercial products" and "commercially available off-the-shelf" items. Neither is exactly on point.

This exception has value, but also presents some risk. On the one hand, there is little reason to require law enforcement agencies (or any government agency) to disclose the use of widely used off-the-shelf software (such as Microsoft Office) or hardware (such as Apple's iPhone), at least when the agencies are putting those tools to common commercial uses. On the other hand, one can imagine a variety of relatively common AI tools that, when used by law enforcement, might foreseeably impact a member of the public's rights or safety. Facial recognition software and license plate readers come to mind. Both of these tools are widely used by the private sector and are available for public purchase. One could also imagine law enforcement agencies building predictive models with commonly available software (such as Microsoft Excel). It would not make sense to exempt these AI uses from a law enforcement agency's use case inventory.

B. Recommendation:

The CIO Council, OMB, or other appropriate executive actor should narrow the exception for "common commercial products" so that it does not apply to law enforcement uses of AI that are rights- or safety-impacting. In other words, the key factor should not be the commercial availability of the AI tool, but the purpose for which the law enforcement agency is using the tool.

ACKNOWLEDGEMENTS

ABOUT NAIAC-LE SUBCOMMITTEE

The Law Enforcement Subcommittee of the National Artificial Intelligence Advisory Committee (NAIAC) has the responsibility to make recommendations and provide advice on matters relating to the development, adoption, or use of AI in the context of law enforcement.

The Subcommittee was established in Section 5104 (e) of the National Artificial Intelligence Initiative Act of 2020. It is charged with providing advice to the President, through recommendations that will be considered by the full NAIAC, on a range of legal and ethical issues that will arise as law enforcement increases its use of AI tools. These issues include AI bias, data security, adoption protocols, and legal standards. (Section 5104 (e) (2).)

The Law Enforcement Subcommittee was established in the summer of 2023 and began its work in August 2023.

<div style="background-color:#1a3a9e; color:white; padding:8px; font-weight:bold;">

ABOUT NAIAC

</div>

The National Artificial Intelligence Advisory Committee (NAIAC) advises the President and the White House National AI Initiative Office (NAIIO) on the intersection of AI and innovation, competition, societal issues, the economy, law, international relations, and other areas that can and will be impacted by AI in the near and long term. Their work guides the U.S. government in leveraging AI in a uniquely American way — one that prioritizes democratic values and civil liberties, while also increasing opportunity.

NAIAC was established in April 2022 by the William M. (Mac) Thornberry National Defense Authorization Act. It first convened in May 2022. It consists of leading experts in AI across a wide range of domains, from industry to academia to civil society. https://www.ai.gov/naiac/

###