



October 7, 2024

Submitted Via Regulations.gov

U.S. Department of Commerce
Bureau of Industry and Security

Re: Notice of Proposed Rulemaking, BIS-2024-0047-0001, RIN 0694-AJ55, 89 Fed. Reg. 73612 (Sep. 11, 2024)

Dear Assistant Secretary Kendler:

We write on behalf of Americans for Prosperity Foundation (“AFP Foundation”), a 501(c)(3) nonpartisan organization that educates and trains citizens to be advocates for freedom, creating real change at the local, state, and federal levels.¹ Americans for Prosperity Foundation runs the [Emergency Powers Reform Project](#) to end the rampant government abuse of emergency powers that undermines the separation of powers and imperils individual rights.² AFP Foundation appreciates the opportunity to comment on the Bureau of Industry and Security (“BIS”) notice of proposed rulemaking (“NPRM”) on the “Establishment of Reporting Requirements for the Development of Advanced Artificial Intelligence Models and Computing Clusters,” 89 Fed. Reg. 73612 (Sep. 11, 2024).

Regulating AI requires a deep understanding of cutting-edge, rapidly evolving technology and its wide-ranging applications. Forcing these reporting requirements onto this emerging technology will lead to unintended consequences that stifle innovation, discourage the use of AI in creative and transformative ways, and ultimately retard the proliferation of this promising technology.

President Biden’s invocation of the Defense Production Act (“DPA”)³ in the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (EO 14110),⁴ and this notice of proposed rulemaking issued pursuant thereto, is yet another misguided attempt by this administration to improperly wield emergency powers. The abuse of emergency powers laws has a corrosive impact on democratic governance and the rule of law.

This administration has repeatedly proven ready to invoke emergency powers to try and implement policies it does not have the legal authority to execute. The Supreme Court struck down

¹ See AMS. FOR PROSPERITY FOUND., <https://www.americansforprosperityfoundation.org> (last visited Oct. 7, 2024).

² See EMERGENCY POWERS REFORM PROJECT, <https://emergencypowersreform.com> (last visited Oct. 7, 2024).

³ 50 U.S.C. § 4501 et seq.

⁴ Exec. Order No. 14110, 3 C.F.R. 657 (2024).

the White House's attempts to unconstitutionally abuse emergency powers to forgive hundreds of billions of dollars in student loans⁵ and impose a vaccine-or-test mandate on businesses with more than 100 employees.⁶ President Biden has misused DPA authorities, specifically, for a variety of non-defense purposes, including infant formula,⁷ mineral mining,⁸ and solar panel components.⁹

Congress gave the president authority under the DPA to protect against shortfalls in the defense industrial base, but there is no shortfall with artificial intelligence ("AI"). Under this administration's expansive view of the DPA powers, the federal government can demand any industry or business turn over confidential or sensitive information in perpetuity. The DPA does not confer such power, so the BIS should rescind its attempt to invent this authority through this NPRM.

The DPA is meant for emergencies, not emerging technologies

The administration's decision to invoke emergency powers to require such draconian reporting requirements for dual-use foundation models begs the question: where is the AI emergency? The DPA authorities are meant to assess and address defined emergent or potential crises.¹⁰ Neither EO 14110 nor this NPRM defines the AI emergency these reporting requirements are meant to address.

Instead, the NPRM posits that dual-use foundation models can "potentially be disabled or manipulated by hostile actors," or may possess "potentially dangerous capabilities." These ambiguous hypotheticals are true for many technologies—not just powerful AI models—and fall short of constituting a crisis that necessitates invoking emergency powers to regulate an emerging technology.

Title VII of the DPA authorizes the president to "obtain information in order to perform industry studies assessing the capabilities of the United States industrial base to support the national defense...only after the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority[.]"¹¹ However, the scope of this information gathering has not been competently defined.

The NPRM reads, "In short, dual-use foundation models will likely drive significant advances in numerous industries on which the national defense depends. These advances require ***BIS to conduct an ongoing assessment of the AI industry*** to ensure that the U.S. Government has the most accurate, up-to-date information when making policy decisions about the international competitiveness of the industrial base and its ability to support the national defense." (emphasis added).

⁵ *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

⁶ *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109 (2022) (per curium).

⁷ Presidential Determination No. 2022-13, 3 C.F.R. 511 (2023).

⁸ Presidential Determination No. 2022-11, 87 FR 19775 (2022).

⁹ Presidential Determination No. 2022-15, 87 FR 35071 (2022).

¹⁰ See, e.g., Gary J. Schmitt, *The Use and Abuse of the Defense Production Act*, AEIdeas (Nov. 2, 2023), <https://www.aei.org/social-cultural-and-constitutional-studies/the-use-and-abuse-of-the-defense-production-act/>.

¹¹ 50 U.S.C. § 4555.

Rather than address a (potential) crisis, the foregoing excerpt makes clear that the invocation of the DPA is meant to fabricate a never-ending AI emergency.¹² No specific crisis to mitigate or avert is identified. AI is here to stay; it's not going away. Although Congress intended for such delegations of authority to the president to be temporary, this NPRM was issued with no apparent endgame. BIS seems to claim DPA authority to require AI producers to report on their models to the U.S. government in perpetuity.¹³

Moreover, while BIS has defined which AI models are subject to these reporting requirements based on a specific threshold of computing capacity, these conditions are subject to change. Indeed, this NPRM seeks public comments on those technical parameters. Accordingly, the scope of this Title VII inquiry is most certainly undefined.

The use of the DPA here is not only inappropriate; it is unnecessary. The administration's goals for the "safe, secure, and trustworthy development and use" of AI can be achieved without subjecting AI companies to these compulsory reporting requirements. U.S. history is rife with examples where the government adopted a more appropriate approach to emerging technologies, facilitating innovation and working with U.S. companies, when necessary, to protect, expand, and expedite materials and services from the domestic industrial base.

The data encryption standard, for example. Rather than compulsory information gathering, the National Bureau of Standards put out a request for proposals for encrypting sensitive information ("NBS" is now the National Institute of Standards and Technology where the newly formed A.I. Safety Institute is housed).¹⁴ Private tech companies voluntarily submitted cryptographic algorithms. After consulting with the National Security Agency, NBS selected a submission as the standard. The standard has evolved over time as technology has advanced.

If BIS, or any other agency, wishes to issue reporting regulations for AI models, they should do so through traditional, non-emergency protocols, provided, of course, that Congress has granted the agency the authority and appropriations to do so.

BIS must respect the separation of powers

The executive branch agencies derive their regulatory authority from Congress. An agency "must point to 'clear congressional authorization' for the power it claims."¹⁵ To date, our elected

¹² Thomas Kimbrell & James Czerniawski, *Fabricating an artificial emergency isn't intelligent*, THE HILL (Nov. 24, 2023), <https://thehill.com/opinion/congress-blog/4325977-fabricating-an-artificial-emergency-isnt-intelligent/>.

¹³ See Letter from Att'y Gen. Sean D. Reyes et al. to Hon. Gina Raimondo, Secretary of Commerce (Feb. 2, 2024) ("[T]he Executive Order fashions a governmental black box by requiring detailed reports on AI to be sent to the federal government, without disclosing or restricting how the federal government will use that information. The lack of definition on the government's supervisory process also demonstrates the flimsiness of the administration's purported justification for the requirement, as it is unclear how reporting requirements would make AI "safe and secure."), *available at* https://attorneygeneral.utah.gov/wp-content/uploads/2024/02/2024-02_02_Comment_response_letter_on_NIST_RFI_re_AI.pdf.

¹⁴ National Bureau of Standards, *Cryptographic Algorithms for Protection of Computer Data During Transmission and Dormant Storage*, 38 Fed. Reg. 12763 (May 15, 1973).

¹⁵ *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)); see *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) ("If administrative agencies seek

representatives have not authorized special regulations for AI. To that end, Congress has signaled its intent, at least for now, to take a “hands-off” approach to regulating AI.¹⁶ In a recent interview, Speaker Johnson raised concerns about “red tape” that would stifle AI innovation.¹⁷ The Speaker indicated that a forthcoming report from the House Bipartisan AI Taskforce will avoid creating a “massive regulatory scheme.”¹⁸ In other words, this NPRM relies upon nonexistent authority and is likely to undermine its stated purpose to develop safe, secure, and trustworthy AI.

In the months since EO 14110 was issued, multiple members of Congress have questioned and criticized the administration’s misuse of the DPA to regulate AI. At a House Financial Services Committee hearing in March 2024, titled “Mission Critical: Restoring National Security as the Focus of Defense Production Act Reauthorization,” Representative Young Kim noted the Order’s novel use of the DPA’s Title VII compulsory information-gathering authorities. She asked Mr. Luke Nicastro from the Congressional Research Service whether the DPA had previously been used this way. Mr. Nicastro responded that this was the first time the DPA had been used to regulate AI and that raises the question “as to which areas Congress believes are the most appropriate [for] the application of DPA authorities.”¹⁹

Also in March 2024, the House Subcommittee on Cybersecurity, Information Technology, and Government Innovation held a hearing entitled “White House Overreach on AI,” led by Chairwoman Nancy Mace. Representative Mace also expressed concern at the administration’s bizarre use of the DPA, asking, “What does [AI] have to do with defense production?”²⁰ She states, “Congress wisely hasn’t authorized the Administration to go out and regulate AI differently than other technologies. But this Executive Order does so anyway.”²¹

A few days later, Senator Ted Cruz and former Senator Phil Gramm published an article in the Wall Street Journal decrying the Biden administration’s overreach, writing:

Particularly painful is Mr. Biden’s use of the Defense Production Act of 1950 to force companies to share proprietary data regarding AI models with the Commerce Department. That a law passed during the Korean War and designed for temporary national security emergencies could be used to intervene permanently in AI development is a frightening precedent. It begs for legislative and judicial correction.

What’s clear is that the Biden regulatory policy on AI has little to do with AI and everything to do with special-interest rent-seeking. The Biden AI regulatory demands

to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.”).

¹⁶ Maria Curi & Ashley Gold, *Exclusive: Johnson’s hands-off plans for AI*, AXIOS (Sep. 19, 2024), <https://www.axios.com/pro/tech-policy/2024/09/19/johnsons-hands-off-plans-for-ai>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Mission Critical: Restoring National Security as the Focus of Defense Production Act Reauthorization: Hearing Before the H. Fin. Serv. Comm.*, 118th Congress (2024).

²⁰ *White House Overreach on AI: Hearing Before the Subcomm. On Cybersecurity, Information Technology, and Government Innovation of the H. Comm. On Oversight and Accountability*, 118th Congress (2024).

²¹ *Id.*

and Mr. Schumer's AI forum look more like a mafia shakedown than the prelude to legitimate legislation and regulatory policy for a powerful new technology.²²

Senator Cruz and Mr. Gramm contrast the Biden administration's heavy-handed approach to AI with the Clinton administration's approach to the internet.²³ Rather than stifle a promising new technology with regulations, the Clinton administration adopted a disposition of "First, do no harm," and let the private sector lead so that "the Internet should develop as a market-driven arena, not a regulated industry."²⁴

In June 2024, Secretary of Commerce Gina Raimondo appeared before the House Committee on Energy and Commerce. Representative Jay Obernolte pointed out that the AI developers BIS is proposing to regulate "have nothing to do with our defense supply chain."²⁵ He asks, "[H]ow is the Defense Production Act an appropriate source of authority for the Department of Commerce to require this reporting?"²⁶

Attorneys general representing 20 states note that "the Biden administration invokes the DPA not to encourage production or distribution of anything," and accuse the administration of "creating a gatekeeping function for the federal government, and the Department of Commerce in particular, to supervise AI development through mandatory testing and reporting requirements imposed on private companies."²⁷ In response to a NIST request for information related to EO 14110 issued on December 21, 2023,²⁸ the attorneys general objected to the Order which seeks "to centralize governmental control over an emerging technology being developed by the private sector."²⁹ They write that "[t]he Executive Order's newly created supervisory regime for the Department of Commerce to review AI models lacks legal authority."³⁰

The NPRM raises serious national security concerns and threatens to defeat its stated purpose of developing safe and secure AI

This rule will jeopardize the highly sensitive proprietary information AI companies are required to report. As John Villasenor, co-director of the UCLA Institute for Technology, Law, and Policy, notes, Executive Order 14110 "mandates the creation of what amounts to a target list for any

²² Ted Cruz and Phil Gramm, *Biden Wants to Put AI on a Leash*, WALL STREET JOURNAL (Mar. 25, 2024), available at <https://www.wsj.com/articles/biden-wants-to-put-artificial-intelligence-on-a-leash-progressive-regulation-45275102>.

²³ *Id.*

²⁴ *Supra* note 17; see also President William J. Clinton & Vice President Albert Gore, Jr., *A Framework For Global Electronic Commerce* (July 1, 1997), available at <https://clintonwhitehouse4.archives.gov/WH/New/Commerce/read.html>.

²⁵ *The Fiscal Year 2025 Department of Commerce Budget: Hearing before the Subcomm. On Innovation, Data, and Commerce of the H. Comm. On Energy and Commerce*, 118th Congress (2024).

²⁶ *Id.*

²⁷ *Supra* note 13.

²⁸ NIST, *Request for Information (RFI) Related to NIST's Assignments Under Sections 4.1, 4.5 and 11 of the Executive Order Concerning Artificial Intelligence (Sections 4.1, 4.5, and 11)*, 88 Fed. Reg. 88368 (Dec. 21, 2023).

²⁹ *Supra* note 13 at 2.

³⁰ *Ibid.*

geopolitical adversary that might want to engage in cyber espionage or launch a large-scale cyberattack on U.S. AI computing infrastructure.”³¹

Recognizing that “the information collected through these reporting requirements is extremely sensitive,” the BIS requests “comments related to how this data should be collected and stored.” However, the companies developing these AI models are most incentivized and best positioned to secure their sensitive data. Paradoxically, the BIS claims this rulemaking is necessary to “minimize the vulnerability of dual-use foundation models to cyberattacks,” but it defeats its own purpose by requiring AI companies to report proprietary data the BIS does not appear equipped to store and secure safely.³²

Conclusion

It’s clear that this rulemaking is not an endeavor to assess the AI industry’s capacity to provide for the national defense. Instead, it is a blatant attempt to regulate an emerging technology and steer its development to favor the administration’s political aspirations and policy preferences. The administration should abandon this course of action and rescind the compulsory reporting requirements described in this NPRM. The government has not defined the emergency it seeks to mitigate with these measures, nor has it competently defined the scope of this inquiry.

This NPRM is yet another example of the DPA being misused for non-defense purposes and to bypass Congress. The DPA is scheduled to expire in 2025 unless reauthorized. Without significant reform that tightens definitions, gives Congress a more prominent role in the process, and provides for stronger transparency and oversight, Congress should consider allowing the DPA to lapse.

Facilitating AI innovation while encouraging the safe, secure, and trustworthy development of AI is a laudable pursuit, but the executive agencies may only regulate when Congress specifically delegates the authority to do so. If such broad and significant oversight of AI development is warranted, then it is Congress’s responsibility to do so through legislation.

Respectfully Submitted

/s/

Thomas Kimbrell
Investigative Analyst
Americans for Prosperity Foundation

James Czerniawski
Senior Policy Analyst, Technology and Innovation
Americans for Prosperity

³¹ Mishaela Robinson, *Will the White House AI Executive Order deliver on its promises?*, BROOKINGS INSTITUTION (Nov. 2, 2023), <https://www.brookings.edu/articles/will-the-white-house-ai-executive-order-deliver-on-its-promises/>.

³² See *supra* note 13.