

February 2, 2024

The Honorable Gina Raimondo
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

Submitted via www.regulations.gov to NIST-2023-0309

Re: Comment by States of Utah, Alabama, Arkansas, Florida, Idaho, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, and West Virginia on RFI Related to NIST's Assignments under Sections 4.1, 4.5 and 11 of the Executive Order Concerning Artificial Intelligence

Dear Secretary Raimondo,

As attorneys general, we have substantial experience enforcing consumer protection, competition, and civil rights laws. We also have been leaders in litigation involving Big Tech. We are cognizant of how technology can affect our citizens, and we are vigilant about enforcing laws to protect them. Artificial Intelligence ("AI") has the potential to transform industries ranging from internet search to social media, education, law, and health care. It also will undoubtedly impact critical business processes that affect every industry, including hiring, lending, investing, and underwriting. There is broad, bipartisan agreement that, like other significant advancements in human history, AI carries not only the promise of substantial economic benefits but also brings risks that should be understood and addressed.¹

We submit this response to the National Institute of Standards and Technology ("NIST") Request for Information ("RFI")² because the recent Biden administration Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (the "Executive Order"), which the RFI relies on, moves in the

¹ This comment uses "AI" to refer to AI generally, but unless context otherwise requires, the focus of this comment is on generative AI to be responsive to the RFI. In addition, this comment is not intended to apply to AI that is used in our nation's national defense activities.

² 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).

wrong direction.³ The Executive Order seeks—without Congressional authorization—to centralize governmental control over an emerging technology being developed by the private sector. In doing so, the Executive Order opens the door to using the federal government’s control over AI for political ends, such as censoring responses in the name of combatting “disinformation.” Through the RFI, NIST seeks to implement the Executive Order by setting standards for AI risk management, evaluation, and red-teaming.⁴ Some portions of this comment are broader than the specific requests in the RFI but are offered to set forth key issues that must govern the federal government’s approach to AI. We urge you not to attempt to centralize control over AI being developed in the U.S. or otherwise create barriers to entry in this critical and growing sector of our economy.

First, the Executive Order creates 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.⁵ The Executive Order’s newly created supervisory regime for the Department of Commerce to review AI models lacks legal authority. The Executive Order relies on a generic citation to the Defense Production Act, which allows for the federal government to promote and prioritize production, not to gatekeep and regulate emerging technologies. The Executive Order also creates an opaque and undemocratic process by forcing AI developers to submit information for review behind closed doors by the federal government. We are further concerned that the Executive Order’s bureaucratic and nebulous supervisory process will discourage AI development, further entrench large tech incumbents, and do little to protect citizens. Given this, NIST should not be in the business of developing standards for government supervision of private-sector AI until Congress has acted to authorize such supervision.

Second, the Executive Order injects partisan purposes into AI decision-making, including by potentially forcing AI designers to prove that AI will squelch “disinformation.” Under the heading of AI risk management, the RFI seeks information regarding the potential for AI to cause “interference with democratic processes and institutions.”⁶ And under the heading of red-teaming, the RFI seeks information regarding “[c]urrent red-teaming best practices for AI safety, including identifying threat models and associated limitations or harmful or dangerous capabilities.”⁷ NIST should not use its assignment under the Executive Order to push a partisan agenda of censorship.

³ Executive Order 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 88 Fed. Reg. 75191 (Nov. 1, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-11-01/pdf/2023-24283.pdf>.

⁴ RFI, 88 Fed. Reg. at 88369

⁵ Executive Order § 4.2(a), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>.

⁶ RFI, 88 Fed. Reg. at 88369.

⁷ *Id.*

We look forward to engaging on this critical issue to ensure that the rule of law is upheld and that robust competition is promoted, and our citizens' constitutional rights are not violated.

I. The RFI is Premised on the Executive Order's Unlawful Supervisory Regime.

A. The Executive Order Creates a Sweeping Supervisory Regime.

The Executive Order's fact sheet states that the order requires "sweeping actions."⁸ Most notably, the Executive Order directs the Secretary of Commerce to require companies "developing or *demonstrating an intent to develop* potential dual-use foundation models to provide the Federal Government, on an ongoing basis, with information, reports, or records" related to their AI models.⁹ Companies even intending to develop certain models would be required to provide information to the Department of Commerce in three broad categories: (1) "any ongoing or planned activities related to training, developing, or producing" the models; (2) "the ownership and possession of the model weights"; and (3) "the results of any ... model's performance in relevant AI red-team testing based on guidance developed by NIST."¹⁰ In sum, President Biden seeks to require companies to report to the federal government on their "ongoing or planned activities," to conduct various tests based on federal regulations, and to report to the government on the results of those tests.¹¹

The RFI seeks to implement in part the above steps by setting standards and guidance for red-teaming as well as more generally setting standards for AI risk management and evaluation.¹² It is clear that these standards are an important first step for many of the more ambitious goals of the Executive Order. Moreover, the sole authority cited for the RFI is the Executive Order.¹³ Because the Executive Order in large part is fundamentally flawed as lacking congressional authority, the RFI is improper at this time.

B. The Executive Order's Supervisory Regime Lacks Authority.

The Executive Order is about regulating technological development, not about encouraging the production of anything. But the Executive Order's sole cited authority for its supervisory requirements is the Defense *Production* Act, 50 U.S.C. § 4501 *et seq.* ("DPA"),¹⁴ which contains no such authority. In our constitutional

⁸The White House, *FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence* (Oct. 30, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence>.

⁹ Executive Order § 4.2(a)(i) (emphasis added).

¹⁰ *Id.* § 4.2(i)(A)–(C).

¹¹ *Id.*

¹² RFI, 88 Fed. Reg. at 88369.

¹³ *Id.* at 88370.

¹⁴ Executive Order § 4.2.

system of government, the executive branch cannot set down these types of reporting requirements to regulate commerce without Congressional authorization.¹⁵

When Congress passed and periodically reauthorized the DPA, it gave the President the power to take specific types of actions to enhance the national defense, such as:

- Prioritizing contracts or orders made for the national defense¹⁶
- Providing incentives to develop, maintain, and expand the productive capacities of domestic sources for certain items¹⁷
- Providing certain loans, terms, and guarantees to ensure production of certain items¹⁸
- Purchasing or committing to purchase certain items¹⁹
- Developing production capabilities²⁰ and
- Using emerging technologies from commercial research for government applications, or vice versa.²¹

The Executive Order does not cite to any of these statutory provisions, and for good reason—none of these provisions come close to authorizing the Executive Order’s mandatory supervisory regime.²²

Typical usage of the Defense Production Act also bears no resemblance to the Executive Order. The DPA has been primarily used by the Department of Defense to obtain various types of materials for military use.²³ It also has been used to speedily procure materials, such as food, water, and electric generators, when responding to natural disasters.²⁴ The DPA was invoked over 100 times by Presidents Trump and Biden during the COVID-19 pandemic, primarily to increase production and prioritize delivery of vaccines and respirators.²⁵ As time has gone on, President Biden has pushed the envelope further and further, invoking the DPA to spur production of

¹⁵ See U.S. Const. art. I, § 8, cl. 3 (commerce clause).

¹⁶ 50 U.S.C. § 4511(a).

¹⁷ *Id.* § 4517.

¹⁸ *Id.* §§ 4531-4532.

¹⁹ *Id.* § 4533(a)(1)(A).

²⁰ *Id.* § 4533(a)(1)(C).

²¹ *Id.* § 4533(a)(1)(D).

²² See Executive Order § 4.2 (invoking the DPA generally, without citing to a specific provision).

²³ See Congressional Rsch. Serv., *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress* 1, 8 (updated Oct. 6, 2023), <https://crsreports.congress.gov/product/pdf/R/R43767>.

²⁴ See generally *id.* at 8-9.

²⁵ Gov’t Accountability Off., *COVID-19: Agencies Are Taking Steps to Improve Future Use of Defense Production Act Authorities* (Dec. 2021), <https://www.gao.gov/assets/gao-22-105380.pdf>.

baby formula,²⁶ electric vehicle batteries,²⁷ and even solar panel parts in order to push the administration’s climate agenda.²⁸ Nevertheless, even these more dubious uses of the DPA share a common bond with all of the other prior uses—in each case, the Defense *Production* Act was used to promote the *production* or distribution of materials or goods.

Here, the Biden administration invokes the DPA not to encourage production or distribution of anything, but instead to give the Department of Commerce a new supervisory role as the gatekeeper of emerging technology. Under that regime, businesses must report to the federal government on their “ongoing or planned activities,” perform tests prescribed by the government, and report their test results. If anything, these additional regulatory requirements and their associated costs and risks will lead to a *decrease* in the production of AI.

If the DPA could be interpreted in this way, it would allow the executive branch to invoke the DPA to supervise any industry and impose whatever requirements it deems fit. That position has no support in the text of the DPA or its historical use.

C. The Executive Order’s Supervisory Process Lacks Justification.

Ironically, a primary concern about AI is that it could create a “black box,” in which no one can understand the processes used to generate any particular output.²⁹

²⁶ The White House, *Memorandum on the Delegation of Authority Under the Defense Production Act to Ensure an Adequate Supply of Infant Formula* (May 18, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/05/18/memorandum-on-the-delegation-of-authority-under-the-defense-production-act-to-ensure-an-adequate-supply-of-infant-formula>.

²⁷ The White House, *Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, As Amended* (Mar. 31, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/31/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended>.

²⁸ The White House, *FACT SHEET: President Biden Takes Bold Executive Action to Spur Domestic Clean Energy Manufacturing* (June 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/fact-sheet-president-biden-takes-bold-executive-action-to-spur-domestic-clean-energy-manufacturing>; see also The White House, *Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, As Amended, on Electrolyzers, Fuel Cells, and Platinum Group Metals* (June 6, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/06/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended-on-electrolyzers-fuel-cells-and-platinum-group-metals>; The White House, *Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, As Amended, on Insulation* (June 6, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/06/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended-on-insulation>; The White House, *Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, As Amended, on Electric Heat Pumps* (June 6, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/06/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended-on-electric-heat-pumps>.

²⁹ See, e.g., Saurabh Bagchi, *Why We Need to See Inside AI’s Black Box*, *Sci. Am.* (May 26, 2023), <https://www.scientificamerican.com/article/why-we-need-to-see-inside-ais-black-box>.

But the 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.³⁰ 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.”³¹ Making AI “safe and secure” assumes the government has the authority to change the models. The only way that can be achieved by a testing-and-reporting process is through the exercise of closed-door pressure by the administration. The reporting requirements appear to be merely a pretext for ensuring that the federal government can find out who is developing AI models, supervise that process, and exert pressure to bend those AI models to the administration’s liking.

The Executive Order attempts to justify the Department of Commerce’s new gatekeeping role by asserting that the “Federal Government should lead the way to global societal, economic, and technological progress, as the United States has in previous eras of disruptive innovation and change.”³² This statement wrongfully credits the federal government (rather than entrepreneurs) with America’s global innovation success and ignores the fact that federal supervision and approval slows innovation and change. The Food and Drug Administration, for example, has no doubt prevented harmful products from coming to market, but federal regulators like the FDA are not the reason for America’s innovation leadership—drug development under the FDA’s purview takes an average of *12 years*.³³

II. Government Regulation Should Not Be Used to Introduce Political Bias by Stifling What the Administration Views As “Disinformation.”

The Executive Order also references the need to regulate AI so that AI does not “exacerbate societal harms such as ... disinformation.”³⁴ The prominent placement of this term raises concerns, especially given the administration’s past conduct. The RFI, under the heading of AI risk management, seeks information regarding the potential for AI to cause “interference with democratic processes and institutions, gender-based violence, and human rights abuses.”³⁵ The RFI also seeks information regarding “[c]urrent red-teaming best practices for AI safety, including identifying threat models and associated limitations or harmful or dangerous capabilities.”³⁶

³⁰ See Executive Order § 4.2.

³¹ *Id.* § 2(a).

³² *Id.* § 2(h).

³³ See Gail A. Van Norman, *Drugs, Devices, and the FDA: Part 1: An Overview of Approval Processes for Drugs*, 1 JACC: Basic to Translational Sci. 170 (Apr. 2016), available at <https://www.sciencedirect.com/science/article/pii/S2452302X1600036X>.

³⁴ Executive Order § 1.

³⁵ RFI, 88 Fed. Reg. at 88369. The RFI cites a speech by Vice President Harris. *Id.* (citing <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/11/01/remarks-by-vice-president-harris-on-the-future-of-artificial-intelligence-london-united-kingdom>).

³⁶ *Id.*

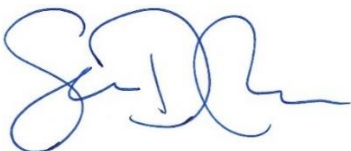
The Biden administration already has shown its willingness to pressure tech companies behind closed doors into complying with the administration's views on "disinformation." In *Missouri v. Biden*, after Missouri Attorney General Eric Schmitt and Louisiana Attorney General Jeff Landry sued the administration, the Fifth Circuit concluded that "the White House ... likely (1) coerced the platforms to make their moderation decisions by way of intimidating messages and threats of adverse consequences, and (2) significantly encouraged the platforms' decisions by commandeering their decision-making processes, both in violation of the First Amendment."³⁷ Nonetheless, the Biden administration remains recalcitrant, and Missouri Attorney General Andrew Bailey and Louisiana Attorney General Liz Murrill are now defending that suit in the U.S. Supreme Court.

The Executive Order contains no safeguards on federal government pressure on companies. This situation would enable the administration to once again engage in behind-the-scenes coercion campaigns to force tech companies to refrain from publishing what the administration deems to be "disinformation," this time by supervising and influencing those companies' AI models. NIST should be very cognizant of the harms of government censorship, and it should not adopt any standards that would facilitate such censorship.

III. Conclusion

As the chief law-enforcement officers of our states, we share the goal of safe, trustworthy AI. The issues related to AI are complex and important, but they must be addressed by our constitutional, democratic process, not by executive fiat. The administration should work with Congress and states across the political spectrum to find bipartisan solutions that can help our country harness the power of AI and use it for the good of all, rather than only for one political party or specific groups of people.

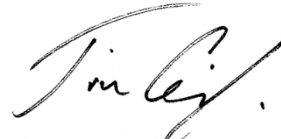
Sincerely,



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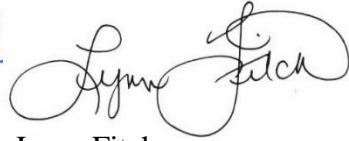
³⁷ *Missouri v. Biden*, 83 F.4th 350, 381-82 (5th Cir. 2023), cert. granted sub nom. *Murthy v. Missouri*, No. 23-411, 2023 WL 6935337 (U.S. Oct. 20, 2023).



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