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Artificial Intelligence – White House Issues Sweeping Executive Order on AI as Congress and Executive Agencies Continue to Take Action

by Stephen M. Anstey

The White House, Congress, and Executive Agencies are continuing to explore, solicit information on, and develop regulations and guidance concerning artificial intelligence (AI). These efforts include the White House's recent issuance of the landmark Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.

I. The White House –

a. Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence

On October 30, 2023, President Biden issued a "landmark Executive Order to ensure that America leads the way in seizing the promise and managing the risks of artificial intelligence." Per the associated Fact Sheet published by the White House, the Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence establishes "new standards for AI safety and security, protects Americans' privacy, advances equity and civil rights, stands up for consumers and workers, promotes innovation and competition, advances American leadership around the world, and more."

As noted in the Fact Sheet, the Executive Order establishes guidelines and dictates actions under the following broad categories: New Standards for AI Safety and Security; Protecting Americans' Privacy; Advancing Equity and Civil Rights; Standing Up for Consumers, Patients, and Students; Supporting Workers; Promoting Innovation and Competition; Advancing American Leadership Abroad; and Ensuring Responsible and Effective Government Use of AI.

Of the more specific actions addressed in the Fact Sheet for the Executive Order, some of the furthest reaching include:

- In accordance with the Defense Production Act, the developers of the most powerful AI systems must share their safety test results and other critical information with the U.S. government.
- A combination of the National Institute of Standards and Technology, Department of Homeland Security, and Department of Energy will develop standards, tools, and tests to help ensure that AI systems are safe, secure, and trustworthy.
- The Department of Commerce will protect Americans from AI-enabled fraud and deception by establishing standards and best practices for detecting AI-generated content and authenticating official content, including developing guidance for content authentication and watermarking to clearly label AI-generated content.

- Establish an advanced cybersecurity program to develop AI tools to find and fix vulnerabilities in critical software.
- Order the development of a National Security Memorandum that directs further actions on AI and security, to be developed by the National Security Council and White House Chief of Staff.
- Strengthen privacy-preserving research and technologies, such as cryptographic tools that preserve individuals' privacy, by funding a Research Coordination Network to advance rapid breakthroughs and development.
- Develop guidelines for federal agencies to evaluate the effectiveness of privacy-preserving techniques, including those used in AI systems.
- Address algorithmic discrimination through training, technical assistance, and coordination between the Department of Justice and Federal civil rights offices on best practices for investigating and prosecuting civil rights violations related to AI.
- With the support of the Department of Health and Human Services, advance the responsible use of AI in healthcare and the development of affordable and life-saving drugs.
- Develop principles and best practices to mitigate the harms and maximize the benefits of AI for workers.
- The State Department, in collaboration, with the Commerce Department will lead efforts to expand bilateral, multilateral, and multistakeholder engagements to collaborate on AI.

As noted, the Executive Order establishes sweeping standards and requires significant executive agency involvement concerning AI development and use, with the Fact Sheet characterizing the Executive Order as "the most sweeping actions ever taken to protect Americans from the potential risks of AI systems."

II. Congress –

a. Meetings

i. Senator Schumer's Second Bipartisan Forum on AI

On October 24, 2023, Senate Majority Leader Chuck Schumer (D-NY) hosted the second AI Insight Forum. The First Forum was held on September 13, 2023. The Forums have hosted "labor, academi[c], business, tech, civil rights," and political leaders and experts in AI.

In his opening statement for the Second Forum, Senator Schumer noted that, "[w]e had strong bipartisan turnout at our inaugural forum, and it's good to see the same thing again today [,as i]t underscores how bipartisan and how seriously we are taking this issue here in the Senate." Senator Schumer also stated that, "AI will reshape practically every corner of life, so we need voices from every corner of life here at the table. That's why it's been a top priority for us to assemble a balanced, diverse, and wide-ranging group for today's debate."

The Second Forum focused on four main topics:

- Driving and sustaining U.S. leadership on AI through funding, led by Senator Rounds;
- Mechanisms to spur private sector AI innovation, led by Senator Heinrich;
- The need for transformational innovation, led by Senator Young; and

- The need for sustainable innovation, led by Senator Schumer.

Statements from the Second Forum can be found here. It has been reported that Senator Schumer will host a Third AI Forum focusing on business with financial leaders on November 1, 2023.

b. Pertinent Legislation

i. S.2770 - Protect Elections from Deceptive AI Act and H.R.3044 - REAL Political Advertisements Act

As elections again begin to take greater focus, increased attention has been placed on the potential role of AI in elections. For example, on September 12, 2023, Sen. Amy Klobuchar (D-MN), with cosponsors Sen. Josh Hawley (R-MO), Sen. Christopher Coons (D-DE), Sen. Susan Collins (R-ME), Sen. Michael Bennet (D-CO) and Sen. Pete Ricketts (R-NE) introduced S.2770 - Protect Elections from Deceptive AI Act. The purpose of the bill is to "[…] prohibit the distribution of materially deceptive AI-generated audio or visual media relating to candidates for Federal office, and for other purposes." The bill has since been referred to the Committee on Rules and Administration.

On May 3, 2023, Rep. Yvette Clark proposed related legislation in the House. The bill, H.R. 3044 - REAL Political Advertisements Act would "amend the Federal Election Campaign Act of 1971 to provide further transparency and accountability for the use of content that is generated by artificial intelligence (generative AI) in political advertisements by requiring such advertisements to include a statement within the contents of the advertisements if generative AI was used to generate any image or video footage in the advertisements, and for other purposes."

ii. Nurture Originals, Foster Art and Keep Entertainment Safe Act (NO FAKES Act)

On October 12, 2023, Sen. Chris Coons, Sen. Marsha Blackburn, Sen. Amy Klobuchar, and Sen. Thom Tillis released draft legislation for the Nurture Originals, Foster Art and Keep Entertainment Safe Act (NO FAKES Act). Per an associated Press Release, the NO FAKES Act "would address the use of non-consensual digital replications in these kinds of audiovisual works or sound recordings." The Press Release also noted that draft legislation would:

- Hold individuals or companies liable if they produce an unauthorized digital replica of an individual in a performance;
- Hold platforms liable for hosting an unauthorized digital replica if the platform has knowledge of the fact that the replica was not authorized by the individual depicted; and
- Exclude certain digital replicas from coverage based on recognized First Amendment protections.

The NO FAKES Act was released as a discussion draft to support continued work "with stakeholders to ensure that Congress appropriately balances the need to protect individuals and creators, First Amendment considerations, and fostering U.S. leadership and innovation in AI."

c. Hearings

The following Congressional Committee hearings concerning AI were held in recent weeks:

- October 19, 2023, House Judiciary Subcommittee on Courts, Intellectual Property
  - Hearing - Intellectual Property and Strategic Competition with China: Part III - IP Theft, Cybersecurity, and AI

- October 19, 2023, Energy, Climate, and Grid Security Subcommittee
  - Hearing - The Role of Artificial Intelligence in Powering America's Energy Future

III. Executive Agencies

Executive agencies, especially the Federal Trade Commission (FTC), continue to take a strong interest in AI regulation and enforcement. The FTC, for example, held the following roundtable with stakeholders from various creative fields:

- October 4, 2023, Federal Trade Commission
  - Roundtable - Creative Economy and Generative AI

The FTC has also solicited research presentations for its annual PrivacyCon event in March 2024 related to AI.

Next Steps –

As relevant AI Executive Orders, legislation, and regulation continue to develop and shift, those utilizing, or affected by, AI should be cognizant of necessary compliance frameworks, applicable existing regulations and the creation of new AI specific regulations, drafting and efforts to pass relevant legislation, solicited federal comments and rulemakings, enforcement concerns, and expanding use cases.

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