



July 7, 2023

To: Nik Marda

White House Office of Science and Technology Policy
Executive Office of the President
1650 Pennsylvania Avenue NW
Washington, DC 20504

Re: Request for Information on National Priorities for Artificial Intelligence, Docket No. 2023-11346

The Center for Democracy & Technology (CDT)¹ respectfully submits these comments in response to the Office of Science and Technology Policy’s (OSTP) request for information on national priorities and future actions on artificial intelligence (AI). AI touches many areas of modern life, putting its uses and impacts within the purview of nearly every federal agency. Yet, federal regulations and enforcement have not kept up with technological advances that are increasingly affecting the public, especially marginalized groups who face the greatest harms. To ensure the U.S. is truly a global leader on AI, it needs an effective and cohesive whole-of-government strategy to advance AI governance that centers civil rights, democratic values, and the public interest.²

¹ CDT is a nonprofit 501(c)(3) organization that advocates to advance civil rights and civil liberties in the digital age. CDT has addressed relevant issues of AI governance in our responses to prior requests for comments mentioned in OSTP’s current request. See CDT, *Comments to OSTP on Worker Surveillance* (Jun. 29, 2023), <https://cdt.org/wp-content/uploads/2023/06/CDT-et-al-Workplace-Surveillance-Comments-to-OSTP-revised.pdf>; CDT, *Comments to NTIA on AI Accountability* (Jun. 13, 2023), <https://cdt.org/insights/cdt-comments-to-ntia-on-ai-accountability/>; CDT, *Comments to OSTP Highlight How Biometrics Impact Disabled People* (Jan. 18, 2022), <https://cdt.org/insights/cdt-comments-to-ostp-highlight-how-biometrics-impact-disabled-people/>.

² See Letter to Director Tanden et al., *Next Steps to Advance Equity and Civil Rights in Artificial Intelligence and Technology Policy*, Jun. 13, 2023, <https://cdt.org/wp-content/uploads/2023/06/6-13-23-WH-DPC-OSTP-OMB-Letter-on-AI-and-Civil-Rights.pdf>. See also CDT CEO Alexandra Givens Testimony Before Senate Committee on Homeland Security & Governmental Affairs on “Artificial Intelligence: Risks and Opportunities,” Center for Democracy & Technology (Mar. 8, 2023), <https://cdt.org/insights/cdt-ceo-alexandra-givens-testimony-before-senate-committee-on-homeland-security-governmental-affairs-on-artificial-intelligence-risks-and-opportunities/>; CDT CEO Alexandra Givens Testimony Before Senate Judiciary Committee on “AI and Human Rights,” Center for Democracy & Technology (Jun. 13, 2023), <https://cdt.org/insights/cdt-ceo-alexandra-givens-testimony-before-senate-judiciary-on-artificial-intelligence-and-human-rights/>.

Strong AI governance protections are needed not only to prevent harms to people whose lives are affected by AI-based decisions and processes, but also to sustain and promote innovation and competition. Without measures in place to ensure the responsible development of AI systems, businesses and government actors can face legal consequences and financial loss when using systems whose design or deployment is not fit for purpose or leads to arbitrary or discriminatory results. Stakeholders across society will benefit from robust frameworks and standards to guide AI development and use. The core of the National AI Strategy should therefore be *responsible and rights-respecting* innovation.

The federal government’s leadership on AI must center civil rights, democratic values and the public interest.

(Questions 10, 12, 20)

As technology has evolved, so has public understanding of what actually constitutes “AI” and what risks it presents.³ Common narratives regarding the risks of technological advancements tend to emphasize the potential that AI will replace human intelligence to displace the U.S. workforce and to introduce new threats to national security. Although these concerns are important, the federal government must also focus on the current harms caused by automated systems with which people interact day-to-day.⁴ The public and private sector already depend on these systems to make decisions about people’s access to housing, education, employment, credit, health care, and public benefits; to determine how people communicate, create and share ideas, and access information online; and to target law enforcement resources and actions. The federal government must act urgently to ensure these tools are developed and used responsibly, and do not violate people’s rights.

As this Administration has recognized in publications and policy actions such as the Blueprint for an AI Bill of Rights, the NIST AI Risk Management Framework, Executive Order 14091 and accompanying materials, algorithm-driven systems are increasingly being used in ways that deny people access to critical opportunities and resources. Further, the opacity of these systems

³ “AI” is generally understood to refer to computerized systems trained by large datasets that are designed to analyze and interpret data as reliably as humans with little to no human intervention. Automated systems may vary in complexity. Some may involve AI that renders decisions about people based on data or inferences about them, or AI that generates text, images, or other content that people use or rely upon when seeking information or generating content. Others involve much simpler processes that may nevertheless lead to inaccurate or unfair outcomes. The concerns and recommendations discussed in these comments apply to all of these systems.

⁴ Annie Lowery, *AI Isn’t Omnipotent. It’s Janky.*, The Atlantic (Apr. 3, 2023), <https://www.theatlantic.com/ideas/archive/2023/04/artificial-intelligence-government-amba-kak/673586/>.

prevents affected people from challenging the systems' outcomes and vindicating their rights under existing civil rights and consumer protection laws — while making it harder for regulators to investigate and enforce those laws. Any national AI strategy must directly address these issues, considering both public and private sector uses of AI.

CDT, the Leadership Conference on Civil & Human Rights, and a coalition of 60 civil rights and consumer organizations recently submitted a letter to the White House outlining steps the Administration should take to address civil rights and equity concerns in AI policy.⁵ This includes, for example, making the Administration's AI Bill of Rights binding administration policy through guidance and other actions, and effectively implementing Executive Order 14091 to ensure that agencies only deploy AI in ways that advance civil rights and equity. The National AI Strategy must reflect the Administration's ongoing prioritization of this work. It should also demonstrate the Administration's clear commitment to engaging public interest organizations and affected communities. As communities, businesses, and policymakers across all levels of government grapple with the effects of AI on people's daily lives, the Administration can model an inclusive approach that centers the concerns of people directly impacted by AI systems.

The federal government should lead by example in its own development, procurement, funding and use of AI systems.

(Questions 24, 25, 26, 27, 28)

The National AI Strategy should set a clear path for how the federal government will lead by example in its development, procurement, funding and use of AI systems. The federal government can have direct impact by adopting robust auditing and assessment policies — an opportunity to set norms not only for the broad range of federal agencies and their contractors and grantees, but that will also influence practices adopted by State and local governments and by the private sector.

The Office of Management and Budget (OMB) is currently working on one aspect of this strategy, developing guidance to federal agencies on the acquisition and use of AI-enabled technologies as mandated by Congress in the AI in Government Act of 2020.⁶ This guidance is an important opportunity to set forth the Administration's vision for the responsible design and use of AI systems, and the Administration should ensure it directly incorporates the substantive

⁵ See Letter to Director Tanden, *supra* note 2.

⁶ Consolidated Appropriations Act, Pub. L. No. 116-260.

standards, best practices, and decision making rubrics contained in the Administration's AI Bill of Rights, AI Risk Management Framework, and EO 14091. Guidance should make clear that agencies considering developing, procuring, using or funding AI systems must interrogate if such uses are appropriate in the first place.⁷ Going forward, the Administration should issue further policies and guidance on specific high risk uses (such as the use of facial recognition technology), including bright line bans when appropriate.

OMB guidance is only a first step to ensure consistent processes in the federal government's use of AI. The Administration should address how OMB's guidance and further directives, such as EO 14091's mandates regarding AI and equity, will be developed and implemented by federal agencies on an ongoing basis. The Administration should also address how existing requirements for federal agencies to inventory their uses of AI and to annually report on their compliance with OMB guidance⁸ can be implemented more effectively to support oversight and accountability. One small but important intervention would be to ensure that the inventories of agency AI uses are compiled into a single standardized, machine-readable resource that can be more easily accessed and interpreted by outside researchers and public interest groups.

The Administration can take further steps to advance the federal government's leadership in responsible, rights-respecting governance of AI systems. As one initiative, the federal government should explicitly establish a definition of AI that is broad enough to encompass all automated systems that risk violating fundamental rights. The National AI R&D Strategic Plan recognizes that the federal government uses multiple definitions of AI, and applies to all of these definitions.⁹ However, legal obligations under existing laws and executive orders on AI are tied to the definitions provided or referenced in those authorities. The lack of a uniform definition impacts agencies' compliance with AI governance obligations. For example, the

⁷ For example, the use of face recognition technology as an identity verification technique for government services raises troubling concerns because of the historical inaccuracy of face recognition systems for people with darker skin tones. However, accuracy is not the only issue: even if a face recognition system were accurate, this method of identity verification raises significant equity, privacy and security concerns. See Letter to White House from CDT and Rights Groups Warns of Risks from Using Biometric Info for ID Verification (June 8, 2023), <https://cdt.org/insights/letter-to-white-house-from-cdt-and-rights-groups-warns-of-risks-from-using-biometric-info-for-id-verification/>.

⁸ *Id.*; Exec. Order 13859, *Maintaining American Leadership in Artificial Intelligence*, Feb. 14, 2019; Exec. Order 13960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, Dec. 3, 2020.

⁹ National Science and Technology Council, National Artificial Intelligence Research and Development Strategic Plan 2023 Update (2023), fn. 1, <https://www.whitehouse.gov/wp-content/uploads/2023/05/National-Artificial-Intelligence-Research-and-Development-Strategic-Plan-2023-Update.pdf>.

National Aeronautics and Space Administration (NASA) explains that it has three different AI guidance documents that each provide a different definition of AI, and NASA personnel report AI uses based on their individual understanding of what should be classified as AI.¹⁰ Further, Executive Order 13960 does not apply to AI embedded within common “commercial products,” which can be interpreted to exclude numerous AI uses.¹¹

Robust federal leadership on responsible AI procurement and use can have positive downstream effects beyond federal agencies. Such guidance can inform industry’s AI practices irrespective of rulemaking efforts. It would also obligate agencies’ private vendors to improve their practices, shaping new industry norms. Additionally, the processes that federal agencies adopt would serve as a useful model for state, Tribal, local, and territorial governments.

Federal agencies should continue leading on AI policy, and the Administration should focus on formal mechanisms to improve interagency coordination, resources and staffing on AI.

(Questions 13, 19, 29)

Upon the release of the Blueprint for an AI Bill of Rights, the White House highlighted agencies’ recent actions and commitments to advance the Blueprint’s principles.¹² The Administration should make a renewed push for agencies to provide leadership and enforcement in their respective sectors. The Equal Employment Opportunity Commission, the Consumer Financial Protection Bureau, the Department of Justice’s Civil Rights Division, and the Federal Trade Commission have continued to sustain AI policy work through guidance and enforcement actions,¹³ and the Department of Housing and Urban Development and the Department of Education have signaled new efforts to address AI harms.¹⁴ Other agencies should do more to examine AI uses in their respective sectors, identify potential risks and harms, issue guidance

¹⁰ Office of Inspector General, National Aeronautics and Space Administration, *NASA’s Management of Its Artificial Intelligence Capabilities* 11-13 (2023), <https://oig.nasa.gov/docs/IG-23-012.pdf>.

¹¹ Exec. Order 13960, *supra* note 8. See also 41 USC § 103 (defining “commercial product” as it applies to federal acquisitions).

¹² White House, *Fact Sheet: Biden-Harris Administration Announces Key Actions to Advance Tech Accountability and Protect to Rights of the American Public* (Oct. 4, 2022), <https://www.whitehouse.gov/ostp/news-updates/2022/10/04/fact-sheet-biden-harris-administration-announces-key-actions-to-advance-tech-accountability-and-protect-the-rights-of-the-american-public/>.

¹³ See Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf.

¹⁴ See e.g., White House, *Blueprint for a Renters Bill of Rights* (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/White-House-Blueprint-for-a-Renters-Bill-of-Rights.pdf> ; Department of Education, *Artificial Intelligence (AI) and the Future of Teaching and Learning* (2023), <https://www2.ed.gov/documents/ai-report/ai-report.pdf>.

and explore enforcement actions when appropriate to advance responsible practices in the private sector.

In addition, the National AI Strategy should address ways in which the Administration can better coordinate and support AI policy across the federal government. A key step would be further supporting and resourcing the National Artificial Intelligence Initiative Office (NAIIO) that Congress created in the National AI Initiative Act, to ensure it can reach its potential as an effective resource.¹⁵ The NAIIO has an additional important mandate to “conduct regular public outreach to diverse stakeholders, including through the convening of conferences and educational events”, which should be leveraged as the Administration and Congress develop AI strategy at this important time.

In addition to resourcing the NAIIO, the Administration should develop an official position on whether the nation would benefit from the creation of a formal AI policy coordination function within the Executive Office of the President. In the short term, this could take the form of an “AI policy czar”. In the long term, the Administration could urge Congress to create and fund an office modeled on the Office of the National Cyber Director, or a similar approach within existing infrastructure. The National Cyber Director advises the President on the national cybersecurity strategy and coordinates across the federal government to execute this strategy. Crucially, it does so with a robust staff (up to 75 full time employees per its founding statute) and resources, and with a Congressional mandate to ensure its structural security over time.¹⁶ A centralized, well-resourced function focused on AI policy and implementation could advise on national strategy, coordinate across government agencies, and ensure agencies have the technical expertise and resources necessary to initiate and sustain robust enforcement and regulatory efforts, while keeping pace with evolving technologies. Any such office should have an express obligation to support and advance the responsible governance of AI systems with an explicit focus on civil rights and the public interest.

¹⁵ National Artificial Intelligence Initiative, *About Artificial Intelligence: NAIIO – National Artificial Intelligence Initiative Office*, <https://www.ai.gov/about/#NAIIO> - [National Artificial Intelligence Initiative Office](https://www.ai.gov/about/#NAIIO).

¹⁶ Consolidated Appropriations Act, Pub. L. No. 116-283.

In addition to centralized coordination, the Administration should also consider ways to amplify other shared technical resources within the federal government. This includes the General Services Administration’s AI Center of Excellence and the United States Digital Service, as well as the work the Administrative Conference of the United States (ACUS) is currently leading to ensure agencies comply with due process obligations and other administrative law requirements when procuring, designing, developing or using AI.¹⁷

The Administration should promote the development of an ecosystem that enables independent and effective audits for AI systems.

(Questions 1, 2, 3, 11, 12, 13)

Any effort to support the responsible design and governance of public-sector and private-sector AI will require robust frameworks for AI auditing and assessment. The National AI Strategy should set a clear goal of fostering the development of an ecosystem for effective, independent AI auditing. Such audits and assessments should focus on the elements of trustworthy, rights-respecting AI articulated in the Blueprint for an AI Bill of Rights and NIST AI Risk Management Framework: safety and effectiveness, transparency and explainability, nondiscrimination, privacy, and security.¹⁸ These characteristics are especially crucial in settings where there is a heightened risk that the use of poorly designed or unaccountable AI practices would violate people’s rights, such as where AI outputs are used to deny access to critical opportunities.

The Administration can and should support legislation that promotes effective auditing and assessments of AI systems. Even without legislation, however, federal agencies can issue guidance on independent auditing measures, building on existing work taking place at NIST and the National Telecommunications & Information Administration (NTIA). Other agencies should issue guidance tailored to their respective regulated sectors.

A critical piece of an effective auditing regime is the development of standards. AI auditing standards will often embody policy and value judgments and should not be left to companies or

¹⁷ See Administrative Conference of the United States, *Artificial Intelligence*, <https://www.acus.gov/ai>.

¹⁸ See White House Blueprint for an AI Bill of Rights (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>; NIST, AI Risk Management Framework, AI Risks and Trustworthiness, at 12-18 (2022), <https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>.

standards bodies that do not reflect true multistakeholder participation. Ultimately, any standards-development process must be open and incorporate the necessary expertise in how algorithmic systems work at a technical level, what kinds of risks they may pose to human rights and civil liberties, and input from affected stakeholders about mitigation of those risks.

The federal government should facilitate the development of robust auditing standards and frameworks. For example, NIST has described its intention to develop use-case profiles on how to apply the AI Risk Management Framework in different sectors.¹⁹ Such profiles can be especially valuable because the different legal standards across sectors may necessitate different approaches. The federal government should ensure that such profiles are developed in consultation and collaboration with civil society so that the profiles reflect the public interest and meaningfully address potential harms. In doing so, the federal government should consider disparities in different stakeholders' capacities to engage in standards-related work, and use inclusive techniques such as those outlined in the Office of Information & Regulatory Affairs' findings on broadening public engagement in the federal regulatory process.²⁰

The federal government should also act to ensure auditing standards are robust. There are many different approaches and proposed frameworks for auditing, some of which provide for greater accountability, while others merely offer assurances that an AI system is fit for purpose without explanation of how it was tested. Without defined parameters or metrics for addressing the full spectrum of AI harms, there is a risk that audit standards will be structured to examine only the potential harms of an AI system that are easy to measure (such as financial and physical harm), while neglecting harms to people's privacy, dignity, reputation, and pursuit of fundamental economic opportunities.²¹

Standards development is an international process, and the U.S. should work with international partners to support auditing and assessment norms through mechanisms such as the U.S.-EU Trade and Technology Council or work taking place in international standards bodies, including

¹⁹ NIST, Roadmap for the NIST Artificial Intelligence Risk Management Framework (Jan. 2023), <https://www.nist.gov/itl/ai-risk-management-framework/roadmap-nist-artificial-intelligence-risk-management-framework-ai>.

²⁰ Office of Management & Budget, Broadening Public Engagement in the Federal Regulatory Process (March 2023), <https://www.whitehouse.gov/omb/information-regulatory-affairs/broadening-public-engagement-in-the-federal-regulatory-process/>.

²¹ See Alexandra Givens Remarks Before 4th EU-US Trade and Technology Council (May 30, 2023), <https://cdt.org/insights/cdt-ceo-alexandra-reeve-givens-remarks-as-civil-society-delegate-to-u-s-e-u-trade-technology-council/>.

by facilitating U.S. civil society engagement in such fora. The U.S. can also use such fora to gather and share information with the international community on emerging AI risks. Collective information sharing about incidents of harm will provide a common foundation to help policymakers and civil society mobilize against these risks globally.²²

In addition to the development of standards, another fundamental question is *who* should conduct these types of audits and assessments. Experts in civil society, academia, and the technical community may have the necessary independence, but they will often lack the resources and capacity to engage in rigorous audits, particularly as AI systems become more widespread. Companies auditing their own systems, or professional firms hired by those companies, may have greater expertise and access to information, but generally lack independence. Meaningful evaluations of company practices may require some combination of auditing firms with access to highly sensitive business information and broad consultations with independent experts who can contribute to audits and assessments and also serve as a check on their rigor and validity. The National AI Strategy should make it a priority to help develop substantive standards for auditing in relevant sectors, and an ecosystem of auditors with sufficient independence and expertise to help make AI audits meaningful and effective.

Conclusion

As new technological practices proliferate, the national AI strategy should build on the White House's continued dedication to advancing equity and protecting civil rights. It is in all stakeholders' interest to have robust, comprehensive AI governance that puts these values first. A strategy that protects the public from AI harms will foster innovation and solidify U.S. leadership on AI globally. CDT looks forward to providing input on OMB's forthcoming draft guidance on agency AI use and procurement, and supporting future actions from federal offices and agencies to ensure a cohesive approach to AI that rigorously protects human rights.

²² *Id.*