

Structural Challenges Loom for Biden's Executive Order on Artificial Intelligence

In brief...

President Biden's new Executive Order 14110, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," envisions a whole-of-government response to mitigating AI risks. As agencies look toward implementation, several challenges lay ahead.

By: Aram Gavoor | November 8, 2023

President Biden's [AI Executive Order](#) is a massive ~20,000 word document that lays out "eight guiding principles and priorities," focuses on a whole of government approach, and draws on the outer bounds of existing statutory authorities to advance a muscular Democratic vision of the future that could politicize the somewhat bipartisan AI waters in Congress and likewise relieve some pressure on Congress to act.

Several structural challenges have now arisen, which I initially lay out below.

Scope is Daunting

It will be exceptionally difficult to coordinate this much policy from the White House, even with the capable Bruce Reed calling the shots. Much of this Executive Order's thrust will be agency led with only minimal White House oversight.

Requirements Abound

An agency-led approach that features significant action by independent agencies will hit the AI industry like a battering ram on account of the various compliance, disclosure, red-teaming, and enforcement requirements. This will inevitably result in some blunting of innovation among the major players. To a small degree, this is needed because [as I have said before](#), a laissez faire approach likely won't work, but this Executive Order is a lot.

Open to New Entrants?

This battering ram of regulation under existing statutory authorities is designed, in part, with the input of market incumbents. But newer and less established market entrants who did not have a seat at the table will now have a much higher barrier to entry to the AI marketplace. That will inflame allegations of

industry capture against the Biden Administration in light of its harms reduction approach. The White House's bet is that new market entrants will still find it advantageous to invest in American innovation and not take their operations elsewhere.

Agency Coordination

The implementation of the Executive Order, by the entire executive branch, all at once, risks creating a disruptive array of regulatory crossfire in which various cabinet departments and independent agencies will stake overlapping regulatory authority over the same conduct. If the White House needs to prioritize which aspects of the policies to oversee, this needs to be it. Only the White House can meaningfully keep competing agencies in their respective lanes. Occasionally direct inter-agency coordination works; often it does not.

Is a Talent Surge Coming?

The executive branch is still woefully lacking in AI subject-matter expertise. Fresh PHDs will generally prefer a \$800k/yr paycheck that only private industry can offer. Without a major uptick in subject matter experts—even with the programs that the government is putting in place to attract talent—it will be difficult to ascertain compliance with the law and policies from within the executive branch, and there will be a higher risk of arbitrary behavior when it comes to enforcement.

Judicial Review

When the government elects to use its enforcement authority, it will be doing so in a judicial review landscape that imposes a regulatory speed limit on agencies' utilization of old statutes to do new and bold things under the Major Questions Doctrine and the potential abrogation of Chevron deference.