

Calendar No. 192

118TH CONGRESS }
1st Session }

SENATE

{ REPORT
118-89

TRANSPARENT AUTOMATED GOVERNANCE
ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1865

TO DIRECT AGENCIES TO BE TRANSPARENT WHEN USING
AUTOMATED AND AUGMENTED SYSTEMS TO INTERACT WITH
THE PUBLIC OR MAKE CRITICAL DECISIONS, AND FOR OTHER
PURPOSES



AUGUST 22, 2023.—Ordered to be printed
Filed, under authority of the order of the Senate of July 27, 2023

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Mr. PETERS, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 1865]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1865) to direct agencies to be transparent when using automated and augmented systems to interact with the public or make critical decisions, and for other purposes, having considered the same, reports favorably thereon with an amendment, in the nature of a substitute, and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 1865, the *Transparent Automated Governance Act*, requires the Director of the Office of Management and Budget (OMB) to issue guidance to agencies requiring them to notify individuals when they are interacting with, or subject to critical decisions made using, certain artificial intelligence (AI) or other automated systems. OMB's guidance would also direct agencies to institute an

appeal process for individuals who believe an adverse critical decision impacting them was made in error using such a system. These processes would involve alternative human review of the decision.

II. BACKGROUND AND NEED FOR THE LEGISLATION

Agencies across the federal government are already using AI and other automated systems to interact with and make—or assist in making—critical decisions about members of the public, and deployment of these systems is expected to continue to grow.¹

AI systems can allow government agencies to provide more efficient services, automating routine tasks and drawing new insights from existing data sets. The federal government is already using AI, and the opportunities for new efficiencies will increase as AI capabilities continue to improve. For example, the Social Security Administration is developing AI tools with the goal of improving the accuracy and efficiency of formal adjudications, and agencies like the Federal Communications Commission and the Consumer Financial Protection Bureau are increasingly using AI and machine learning tools to streamline their processing and analysis of public comments.²

While AI use is widespread and continues to grow, there is no comprehensive information on the use cases and contexts in which government agencies use these technologies.³ These systems are not monitored or evaluated in any comprehensive or standardized way, and most agencies do not have dedicated governance structures to oversee policies in this space.⁴ As a result, governments are leaving the door open to risks posed by AI technologies that do not work as intended, such as lack of accuracy, bias in decision-making, and breaches of privacy.⁵ These systems also pose deep accountability challenges if bias or privacy violations are detected. This is because, as these systems become more complex, it is not always possible to accurately describe how an algorithm reached a particular output.⁶ When the stakes are high, these problematic outputs can cause significant, and sometimes life-threatening, harms, as discussed below.

These harms are not hypothetical; they are already occurring both at the federal level and in states across the country. For example, CBP began to require the use of a facial recognition technology in order for migrants to apply for asylum at the U.S.-Mexico border. However, the app failed to register many people with darker skin tones, effectively barring them from their right to request entry into the United States.⁷ In another example, algorithms deployed across at least a dozen states to decide who is eligible for Medicaid benefits erroneously stripped critical assistance from

¹David Freeman Engstrom et al., *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, Administrative Conference of the United States (Feb. 19, 2020).

²*Id.*

³*Id.*

⁴National AI Advisory Committee (NAIAC), *Year 1 Report* (May 2023) (www.ai.gov/wp-content/uploads/2023/05/NAIAC-Report-Year1.pdf).

⁵*Id.*; National Institute of Standards and Technology, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* (Jan. 2023) (nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf).

⁶*Id.*

⁷*Facial recognition bias frustrates Black asylum applicants to US, advocates say*, The Guardian (Feb. 8, 2023).

thousands of Americans who relied on disability benefits.⁸ In at least one state, when the applicants tried to understand how their benefits were determined, they were told the formula could not be disclosed because it was a “trade secret.”⁹

As the above examples show, transparency and the opportunity for members of the public to seek help correcting harms are critical steps to ensuring that agencies are using AI and other automated systems with purpose, forethought, and care, and that individuals are not left at the whim of erroneous decision-making assisted by these systems. The *Transparent Automated Governance Act* would increase transparency regarding the federal government’s use of artificial intelligence and other automated systems when these systems interact with or make critical decisions about members of the public through required notice and opportunity for redress.

III. LEGISLATIVE HISTORY

Senator Gary Peters (D–MI) introduced S. 1865, the *Transparent Automated Governance Act*, on June 7, 2023, with original cosponsors Senator Mike Braun (R–IN) and Senator James Lankford (R–OK). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 1865 at a business meeting on June 14, 2023. At the business meeting, Senator Peters offered a substitute amendment to the bill, as well as a modification to that amendment. The Peters amendment, as modified, added a definition for artificial intelligence. It also changed an OMB consultation with other agencies from a required consultation to a suggested consultation and removed specific mentions of the National Institute for Standards and Technology, the Office of Science and Technology Policy, and academia from the consultation list. The provision now recommends OMB consult with the Government Accountability Office (GAO), the Government Services Administration (GSA), other agencies with relevant expertise, the private sector, and the nonprofit sector. The Committee adopted the modification to the Peters substitute amendment and the Peters substitute amendment, as modified, by unanimous consent, with Senators Peters, Hassan, Sinema, Rosen, Padilla, Ossoff, Blumenthal, Paul, Lankford, Romney, Scott, and Hawley present.

The bill, as amended by the Peters substitute amendment as modified, was ordered reported favorably by roll call vote of 10 yeas to 1 nay, with Senators Peters, Hassan, Sinema, Rosen, Padilla, Ossoff, Lankford, Romney, Scott, and Hawley voting in the affirmative, and Senator Paul voting in the negative. Senators Carper, Blumenthal, Johnson, and Marshall voted yea by proxy, for the record only.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the “Transparent Automated Governance Act” or the “TAG Act.”

⁸ *What happens when an algorithm cuts your healthcare*, The Verge (Mar. 21, 2018); *What happened when a ‘wildly irrational’ algorithm made crucial healthcare decisions*, The Guardian (July 2, 2021).

⁹ *What happens when an algorithm cuts your healthcare*, The Verge (Mar. 21, 2018).

Section 2. Definitions

This section defines the terms “agency,” “artificial intelligence,” “augmented critical decision process,” “automated system,” “critical decision,” “Director,” “plain language,” and “transparent automated governance guidance” for the purposes of this Act.

Section 3. Transparent automated governance guidance

Subsection (a) directs the Director of OMB to issue guidance to agencies to require them to disclose when they use certain automated systems to interact with or to help make a critical decision about a member of the public within 270 days.

Subsection (b) requires that the guidance include: the identification of additional agency actions that qualify as critical decisions, if appropriate; a list of automated systems that may be used in augmented critical decision processes that are not subject to the Act’s requirements; how agencies must provide plain language notice at the time and place of an individual’s interaction with certain automated systems; the proper contents of the plain language description of the automated system; examples of the plain language description for the automated system; how agencies must provide plain language notice to individuals when they receive a critical decision made using an automated system; the proper contents of the plain language description of the critical decision; examples of the plain language description for the critical decision; how an agency must provide an appeals process when an individual receives an adverse critical decision made using an automated system; how agencies shall provide for alternative review of adverse critical decisions made using an automated system, including by an individual; and the guidance must include criteria for agency information collection regarding issues that arise during the use of these systems.

Subsection (c) requires OMB to provide 180 days for public comment on a preliminary version of the guidance from subsection (a) as described in subsection (b).

Subsection (d) requires OMB to consider consulting with GSA, GAO, the private sector, and the nonprofit sector, including experts in privacy, civil rights, and civil liberties, when developing this guidance.

Subsection (e) allows for the guidance required by section 104 of the AI in Government Act of 2020 (40 U.S.C. 11301 note) to satisfy the requirements of the Act if it meets all the requirements of subsection (b).

Subsection (f) requires OMB to update this guidance every two years.

Section 4. Agency implementation

Subsection (a) requires agencies to implement the guidance provided by OMB in section 3 within 270 days.

Subsection (b) requires the Comptroller General to review agency compliance with the Act and submit a report to the Senate Homeland Security and Governmental Affairs Committee and the House Oversight and Accountability Committee within 2 years and then biannually thereafter.

Section 5. Sunset

The Act sunsets 10 years after enactment.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 1865, Transparent Automated Governance Act			
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on June 14, 2023			
By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	0	*	not estimated
Increases <i>net direct spending</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Statutory pay-as-you-go procedures apply? No	
Increases <i>on-budget deficits</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Mandate Effects	
		Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

* = between zero and \$500,000.

S. 1865 would require the Office of Management and Budget (OMB) to provide guidance to federal agencies on how to adopt secure artificial intelligence (AI) programs. The guidance would inform agencies how to notify the public that they are interacting with a federal system that uses artificial intelligence to make decisions regarding benefits or eligibility for federal programs. It also would instruct agencies how to provide a process for members of the public to appeal those AI-generated decisions. The bill would require the Government Accountability Office (GAO) to report to the Congress on the effectiveness of these efforts.

The Administration already has issued some orders and memorandums concerning the creation of federal AI programs that CBO expects will satisfy most of the requirements of the bill. Thus, the costs of implementing S. 1865 would stem mainly from the need for OMB provide any additional guidance that might be necessary and for GAO to publish the required report.

CBO estimates those costs would be less than \$500,000; any spending would be subject to the availability of appropriated funds.

The CBO staff contact for this estimate is Aldo Proserpi. The estimate was reviewed by Christina Hawley Anthony, Deputy Director of Budget Analysis.

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation would make no change in existing law, within the meaning of clauses (a) and (b) of subparagraph 12 of rule XXVI of the Standing Rules of the Senate, because this legislation would not repeal or amend any provision of current law.

