TRP Special Report: Artificial Intelligence Policy

June 26, 2023
IN THIS REPORT, WE EXPLORE...

- AI & Congress
- AI & The Executive Branch
- What to Watch For
INTRODUCTION

With the advent of new artificial intelligence (AI) tools — in particular, generative AI models such as OpenAI’s ChatGPT and Google’s Bard — Congress has demonstrated a heightened interest in regulating AI technology, driven by a recognition of both its promise and the need to address potential risks and ethical considerations.

Moreover, as the European Union and China pursue their own regulatory strategies, U.S. policymakers are eager to have a regulatory framework for AI established sooner rather than later lest the U.S. lose out on the opportunity to lead in this space.

The AI industry itself has also expressed a desire for regulatory "rules of the road" to guide continued advancements in AI. Industry leaders have acknowledged that building trust in AI and fostering a supportive environment for this burgeoning technology in the U.S. will necessitate proactive engagement with Congress to develop a well-defined and resilient regulatory framework.

AI is already permeating various sectors of the U.S. economy, and lawmakers are actively exploring ways to strike the right balance between fostering innovation and safeguarding the public interest.
AI POLICY ECOSYSTEM: WHAT CONGRESS IS SAYING

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Given AI’s broad applicability, lawmakers have expressed interest in learning more about how this technology impacts various sectors of the economy, existing policy issues, and more.

Health Care

- Some lawmakers — including Senate Finance Committee Chair Ron Wyden (D-OR), Sen. Richard Blumenthal (D-CT), Sen. Ron Johnson (R-WI), and Rep. Brett Guthrie (R-KY) — have expressed concerns about health care companies’ use of AI algorithms to process insurance claims.
- Specifically, members are looking at whether health insurers are using AI to quickly reject large numbers of patients’ claims without conducting human reviews.
- Sen. Blumenthal has expressed a particular interest in scrutinizing the use of AI in Medicare Advantage (MA) coverage decisions.

Intellectual Property

- There remains disagreement between lawmakers over whether usage of copyrighted works for AI training purposes is protected by U.S. copyright law’s fair use doctrine, as well as whether, and to what extent, inventions produced using AI are eligible for copyright protections.
- During a House Judiciary Committee hearing earlier this year, lawmakers expressed some bipartisan agreement on the need to compensate or at least ensure transparency for copyright holders whose works are used to train AI models, but members have yet to propose a specific framework for what that might entail.
- The question of patent protections for AI-produced innovations has also been of interest to lawmakers on the House and Senate Judiciary panels.
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**Data Privacy**

- Policymakers have expressed concerns about the implication of personally identifiable information or other potentially sensitive data in AI development. Because the large datasets used to train AI models are built on data “scrapped” from a variety of sources, they can include information such as names, phone numbers, birth dates, and addresses without individual consent.
- In response, some lawmakers have renewed calls for the enactment of a national standard to shore up the existing patchwork of sector-specific and state data privacy laws.
- During a House Energy and Commerce panel hearing on data brokers, Chair Cathy McMorris Rodgers (R-WA) called for the passage of the bicameral, bipartisan American Data Privacy Protection Act to prevent personal information from being used to train and develop AI “that may or may not align with our values.”

**Section 230**

- A frequently expressed, bipartisan sentiment underlying some congressional thinking on AI is that, under Section 230 of the Communications Decency Act, Congress ultimately erred in providing tech companies immunity from liability pertaining to user-created content posted on online platforms.
- Given ongoing disputes over potentially amending or replacing Section 230 after-the-fact, some members are eager to avoid a similar problem involving AI-generated products, especially as AI has proven capable of producing highly convincing — but also false and potentially harmful — content.
- Some lawmakers are looking to potential legislative avenues to clarify that Section 230 protections do not cover cases of generative AI.
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Financial Services

- Several Democratic lawmakers have expressed concerns about the use of AI, especially for the impact in discriminatory bias, primarily as it could be used to make lending decisions.
- House Financial Services Committee (HFSC) Ranking Member Maxine Waters (D-CA) recently urged Chair Patrick McHenry (R-NC) to hold a hearing on the impact of generative AI on housing and financial services, although no such hearing has been scheduled for the July work period.
- During the 116th and 117th Congresses, HFSC held more than 20 hearings on the topic of AI and the need for “equitable and responsible” guardrails that do not stifle innovation.

Other Key Issues: Security, Safety, & Automation

- While congressional interest in AI’s potential uses in the national security and defense spaces predates the current 118th Congress, this topic has received increased attention amid recent AI developments.
-Lawmakers have been particularly focused on how AI can improve U.S. cyber and analytical capabilities, as well as the potential for malicious AI use by foreign actors, including China and Russia.
- Congress is also grappling with how to respond to AI’s anticipated impact on the U.S. labor market, with some focus on increasing education and training tools to help workers displaced by AI automation.
- On crime, Congress has expressed rising concern about increased use of AI voice generator and other tools to facilitate fraud in the financial services, health care, and other sectors.
Earlier this year, Senate Majority Leader Chuck Schumer (D-NY) announced plans to develop a comprehensive, bipartisan policy proposal for regulating AI.

As a part of this effort, Leader Schumer and other senators are working to craft a new “SAFE Innovation” policy framework for AI that is informed by input from a series of leading AI industry experts.

The “SAFE Innovation” framework includes five key pillars of focus:

I. Security
II. Accountability
III. Protecting Foundations
IV. Explainability
V. Innovation

The framework will also be guided by four main questions:

1. What is the proper balance between collaboration and competition by AI companies?
2. How much federal intervention in terms of taxation and spending on AI should there be?
3. What is the proper balance between private and open AI systems?
4. How do we ensure that AI innovation and competition [are] open to more than just a few powerful companies?
Reps. Ted Lieu (D-CA), Anna Eshoo (D-CA), and Ken Buck (R-CO) have introduced legislation that would create a commission to review, recommend, and establish AI regulations.

Sen. Brian Schatz (D-HI) is slated to introduce companion legislation in the Senate at some point this session.

The 20-member commission would consist of 10 members appointed by each party.

The scope of work for the commission includes reviewing the government’s current approach to AI oversight, recommending new safeguards, and establishing a risk-based approach to regulating the industry.

In the first sixth months, the commission will submit a report including any proposals for urgent regulatory or enforcement action.

A “final” report will be submitted at the end of one year and include final recommendations for a comprehensive, binding regulatory framework.

The following year, the commission must submit a follow-up report that includes any new findings and revised recommendations.
### Other Notable Bills

As congressional interest in AI continues to grow, lawmakers have introduced several measures that seek to govern its use and modernize the federal government’s approach to this emerging technology.

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<tr>
<td><strong>No Section 230 Immunity for AI Act (S.1993)</strong></td>
<td>Sens. Josh Hawley (R-MO) and Richard Blumenthal (D-CT)</td>
<td>This bill seeks to clarify that Section 230 liability protections do not apply to claims involving generative AI.</td>
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<td><strong>Transparent Automated Governance Act (S.1865)</strong></td>
<td>Sens. Gary Peters (D-MI), Mike Braun (R-IN), and James Lankford (R-OK)</td>
<td>This bill would require federal agencies to disclose when they utilize AI.</td>
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<td><strong>Global Technology Leadership Act (S.1873)</strong></td>
<td>Sens. Michael Bennet (D-CO), Todd Young (R-IN), and Mark Warner (D-VA)</td>
<td>This bill would establish a new Office of Global Competitive Analysis to cover AI and other emerging technologies.</td>
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<td><strong>AI Leadership Training Act (S.1564)</strong></td>
<td>Sens. Gary Peters (D-MI) and Mike Braun (R-IN)</td>
<td>This bill would establish a training program on AI for federal management officials and supervisors.</td>
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The Biden administration's approach to AI has included engagement with various stakeholders on AI to solicit input and secure commitments aimed at ensuring "responsible" AI innovation.

In May, the administration met with the CEOs of four major AI-producing companies: Alphabet, Anthropic, Microsoft, and OpenAI.

These companies are also collaborating with the White House on a set of to-be-unveiled, voluntary privacy and security commitments.

These developments follow an earlier commitment by companies to permit their systems to be publicly evaluated for alignment with the Biden administration's AI Bill of Rights and Risk Management Framework.

In addition to its collaboration with AI companies, the White House is pushing for the federal government to "lead by example" in its adoption of AI and mitigation of associated risks.

Accordingly, the Office of Management and Budget (OMB) will release guidance — reportedly sometime this summer — that will establish policies for federal agencies to follow in adopting AI systems.

Separately, in April, the Consumer Financial Protection Bureau (CFPB), Department of Justice (DOJ), Equal Employment Opportunity Commission (EEOC), and Federal Trade Commission (FTC) released a joint statement detailing an intent to monitor potentially "harmful" AI use for compliance with existing laws.
In addition to its collaboration with AI companies, the White House is pushing for the federal government to “lead by example” in its adoption of AI and mitigation of associated risks. Some recent examples from Executive Branch agencies include:

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| • In a recently published report, the CFPB examined financial institutions’ increasing usage of AI chatbots as customer support tools.  
  • That report ultimately identified several concerns, including that chatbots are limited in their ability to handle more complex inquiries; can reduce access to human support; and may not sufficiently protect customers’ personal information.  
  • CFPB concluded that financial institutions’ usage of “deficient” chatbots could run afoul of federal consumer financial laws. | • The FTC issued a report that evaluates the use of AI and how it impacts certain online harms.  
  • The report outlines significant concerns that AI tools can be inaccurate, biased, and discriminatory by design as well as incentivize relying on increasingly invasive forms of commercial surveillance. | • The SEC has indicated that it is weighing a series of new rules pertaining to AI in the financial services sector, with a focus on AI’s implications for fiduciary obligations.  
  • This includes rules — to potentially be introduced as early as October of this year — regarding conflicts of interest in the use of AI or similar technologies by investment advisers and broker-dealers. | • The U.S. Patent and Trademark Office (USPTO) has been tackling and soliciting public comment on several issues related to AI and inventorship.  
  • Notably, USPTO is examining the different ways a natural person can contribute to the conception of an AI invention and whether current laws need to be revised to consider contributions from entities other than natural persons — i.e., whether AI models can themselves be inventors. |
As a part of the Senate’s process for crafting AI legislation, Leader Schumer has invited outside experts to participate in a series of “AI Insight” briefings starting in September of this year.

These forums — which are intended to complement, not replace, traditional congressional hearings — will serve to provide members ideas for legislation and cover a range of topics:

1. Asking the right questions;
2. AI innovation;
3. Copyright and IP;
4. AI use cases and risk management;
5. Workforce;
6. National security;
7. Guarding against “doomsday scenarios;”
8. AI’s role in our social world;
9. Transparency, explainability, and alignment; and

Congress has a few avenues to explore in packaging new AI rules, but divided government will ultimately serve as an obstacle to agreement on any proposal.

- **“CHIPS 2.0.”** Senate Democrats have expressed interest in crafting a follow-up package to the CHIPS and Science Act that would encapsulate bipartisan priorities that were not included in the first U.S.-China competition legislation. However, this idea has been met with resistance from the GOP Conference.

- **NDAA.** Should a comprehensive framework come to fruition, leaders could look to tack this onto “must pass” legislation prior to the end of the year. The NDAA or other FY 2024 appropriations bills stand out as potential vehicles that could carry AI policies.

- **Standalone.** Using the House suspension calendar and “unanimous consent” in the Senate could allow lawmakers to clinch smaller bills on consensus AI-related issues. These types of bills could find a quick path to the president’s desk if the White House deems them beneficial to the administration’s AI policy goals.
KEY TAKEAWAYS

As Congress seeks to get its collective head around how best to approach AI, there remains a lack of congruity, with lawmakers contending that they are still in “learning mode” and pitching a patchwork of preliminary proposals and ideas on how best to proceed.

Lawmakers and AI industry stakeholders are eager to have a regulatory framework for AI established sooner rather than later to ensure the U.S. can lead in this area, especially as both competitor and allied nations pursue their own regulatory strategies.

However, others have signaled a desire to first spend more time studying how, and even whether, the government should regulate AI, and there are concerns that moving too quickly could produce unintended consequences.

Absent sufficient agreement within and between political parties, it will likely prove difficult to ensure that there are enough votes to get any substantial AI bill through both chambers of the divided 118th Congress.

While lawmakers continue their fact-finding processes in hopes of clinching a broader AI framework, Congress could look to pass more narrowly-focused bills on consensus AI-related issues that could clear unanimously or get added to a “must pass” vehicle later this year.
Thank you!

*Stay tuned for additional updates from the TRP team as AI policy takes shape.*