THE OMB ARTIFICIAL INTELLIGENCE MEMORANDA

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ABSTRACT

Under the Biden and Trump Administrations, the Office of Management and Budget issued two memoranda on the use of artificial intelligence (AI) by the federal government. The memos set out minimum required risk management practices and associated governance structures that must be in place within federal government agencies before AI can be used. This Article traces the history of the OMB AI memos, explaining their shared origin in a decade of advocacy within civil society, industry, and academia that led to the creation of the Blueprint for an AI Bill of Rights by the Biden Administration's Office of Science and Technology Policy, which then fed directly into the Biden AI Memo, before it was replaced by the Trump Administration's version.

The Article then makes two arguments about the significance these memos. First, the lineage of the memos reveals the concern with practical implementation of minimum practices and safeguards in order to protect civil rights. Perhaps surprisingly, while the Trump Administration's replacement reflects the updated priorities of the new Administration, it keeps much of the structure and substance of the original memo, including some of the civil rights orientation and the requirement that an agency must meet the minimum practices or cease using the AI. Second, these memos serve an important but rarely recognized regulatory role within the government as what we call "intermediate instruments." By describing requirements at a level of specificity that makes them actionable while at a level of generality to make them applicable across many agencies and use cases, these memos become necessary governance tools that bridge the principles expressed in executive orders and the day-to-day practice of agencies. Such intermediate instruments are not often recognized as important in

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themselves, but the Article argues that they are worthy of independent recognition because they are likely widely used in oversight schemes of distributed bureaucratic structures.

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I. INTRODUCTION

On March 28, 2024, the Biden Administration's Office of Management and Budget (OMB) issued a memorandum on artificial intelligence (AI) ("Biden AI Memo").[1] On April 3, 2025, OMB, now under President Trump, replaced it with one that reflected the new Administration's priorities ("Trump AI Memo").[2] In this Article, we aim to explain the history and significance of these two documents. We trace a historical though-line beginning from civil society, academic, and government work on civil rights harms stemming from AI to the concrete protections enacted by the OMB Memos. In addition to their significance as civil rights protections, we argue that these memos are a

1. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-24-10, ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE (Mar. 28, 2024), https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf [https://perma.cc/F8JB-X7S2] [hereinafter Biden AI Memo].

2. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-25-21, ACCELERATING FEDERAL USE OF AI THROUGH INNOVATION, GOVERNANCE, AND PUBLIC TRUST (Apr. 3, 2025), https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf [https://perma.cc/CCT8-2GYQ] [hereinafter Trump AI Memo].

model of what we call "intermediate instruments"—governance tools that are necessary to convert high-level governance principles into actionable structures, procedures, and requirements within federal agencies.

OMB is the executive branch office responsible for carrying out the President's policies for internal operations of the federal government. Though the actual organizational chart is complicated—and surprisingly difficult to locate[3]—in practice, OMB is divided into budget, management, and legislative review arms. The management side is a set of five statutory offices that report to the Deputy Director for Management (DDM).[4] The DDM is responsible for "[c]oordinating and supervis[ing] the general management functions" of the OMB including, but not limited to, "managerial systems, including the systematic measurement of performance," "procurement policy," and "information and statistical policy."[5] The DDM is also charged with "[p]roviding leadership in management innovation through . . . the adoption of modern management concepts and technologies."[6] To accomplish these objectives, the OMB regularly issues management memoranda to implement internal policies for technology adoption and procurement. The Biden AI Memo and Trump AI Memo (collectively the "OMB AI Memos") are two such memos.

The OMB AI Memos created binding guidance for federal agencies on how to address the risks of harm posed by government use of AI. The three main sections of the memos describe (1) a governance structure for AI within federal agencies, including the introduction of Chief AI Officers (CAIOs), (2) the development of agency AI strategies and other mechanisms to encourage innovation, and (3) required minimum risk management practices for federal government use of AI. In this Article, we focus on (3), the structure and incorporation of these minimum risk management practices, which set the

3. The current White House website does not list an organizational chart. *See Office of Management and Budget*, WHITE HOUSE, https://www.whitehouse.gov/omb/ [https://perma.cc/H3RH-ETZE] (last visited Nov. 11, 2025). The only organizational chart we can find is from the Obama White House. *See Organizational Chart*, OBAMA WHITE HOUSE ARCHIVES, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/about_omb/omb_org_chart_0.pdf [https://perma.cc/P47Z-SCAD].

4. These offices are the Office of Information and Regulatory Affairs (OIRA), the Office of Federal Financial Management (OFFM), the Office of Federal Procurement Policy (OFPP), the Office of the Federal Chief Information Officer (OFCIO, serving the role of the E-Gov office), and the office of the Intellectual Property Enforcement Coordinator (IPEC). Each administration may create an organizational chart that additionally has other non-statutory offices report to the DDM, such as the U.S. Digital Service or the Made in America Office. *See* 31 U.S.C. § 503.

5. *Id.* § 503(b)(1), (b)(2)(A), (b)(2)(B), (b)(2)(D).

6. *Id.* § 503(b)(6).

memos up as key intermediate instruments for AI regulation. The minimum risk management practices are requirements that all agencies must follow in order to use AI; agencies not in compliance with the requirements are directed to cease use of those systems until they are brought into compliance. The memos also direct the CAIOs to oversee agency compliance, manage any necessary waivers or timeline extensions, and ensure reporting on agency use of AI to both OMB and the public by issuing AI Use Case Inventories.

These memos are most obviously important because they offer direct actionable guidance to federal agencies on civil rights protections for AI. But we argue here that they carry a separate conceptual importance; they are necessary intermediate instruments that convert principles into practice. In order to be effective, OMB guidance must be specific enough for agencies to follow and for OMB to certify compliance, while also being general enough to apply across widely varied uses of AI across agencies, from detecting invasive bullfrogs[7] to veteran suicide risk assessment[8] and government service chatbots.[9] The OMB AI Memos do just that, by creating sufficiently specific requirements for AI governance, but at a level of generality that will enable agencies to adapt the guidance to their individual needs.

When the Trump Administration took over from the Biden Administration, it replaced the memos governing AI. It did so in part because the Biden Administration's focus on equity was not in line with the new Administration's goals. But given the political context, what is most striking about the replacement memo is not the differences, but rather the continuity. The government needs documents like this simply to function, and while the policies did change between administrations, the governance structures and strategies largely did not. This demonstrates that the OMB AI Memos are an important anchoring step in the governance of AI, not only internally to the government, but also for broader AI policy. They forge a path from the high-level principles that had previously dominated the AI governance landscape to practical implementation in varied contexts.

This Article proceeds in five parts. Part II of the Article describes the content of the OMB AI Memos—the definitions of AI, the AI systems that are covered, and the substantive requirements.

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7. U.S. DEP'T OF THE INTERIOR, ARTIFICIAL INTELLIGENCE (AI) USE CASE INVENTORY, https://www.doi.gov/ai/use-case-inventory [https://perma.cc/W8W5-KKPB].

8. U.S. DEP'T OF VETERANS AFFS., AI USE CASE INVENTORY, https://department.va.gov/ai/ai-use-case-inventory/ [https://perma.cc/29PX-3MZP].

9. U.S. DEP'T OF HOMELAND SEC., ARTIFICIAL INTELLIGENCE USE CASE INVENTORY LIBRARY, https://www.dhs.gov/publication/ai-use-case-inventory-library [https://perma.cc/7777-XJSY].

Part III tells the story of the Biden AI Memo, beginning with its origins in a decade of work in civil society, academia, and government, which ultimately converged on high-level AI principles and led to the Blueprint for an AI Bill of Rights ("AI Bill of Rights"), a white paper produced by the White House Office of Science and Technology under the Biden Administration. Part III then explains the influence of the AI Bill of Rights on the resulting Biden AI Memo, drawing on language in both to demonstrate the direct relationship.

Part IV discusses the Trump AI Memo. While it is unsurprising that the new Administration replaced and updated the memo to reflect new priorities, this Part argues that what is perhaps more significant is the degree of continuity between the memos. We argue that the two biggest changes in the Trump AI Memo are (1) a more explicit move to a risk regulation framework and (2) the deprioritization of bias and equity issues. But the overall governance approach remains the same. The requirement of minimum risk management practices and the deference to agency expertise live on in the new memo, despite policy positions that were reversed or changed.

Part V argues that the importance of both OMB AI Memos collectively is to support the transition from principles to practice. Whenever a large organization, such as the federal government, endeavors to govern AI based on principles across many different units and domains, it must have some form of intermediate instrument to make this implementation possible. Despite the differences between administrations, the lesson of the OMB AI Memos is that the creation of implementation instructions has importance beyond the specific policies implemented.

Part VI concludes by discussing the lasting legacy of the Biden AI Memo.

II. THE OMB AI MEMOS

OMB was directed to produce the memos by three sources: the AI in Government Act of 2020,[10] the Advancing American AI Act,[11] and President Biden's (now rescinded) Executive Order (EO) 14110.[12] The AI in Government Act required that OMB create guidance for federal agencies through a process including public input to mitigate against bias or "any unintended consequences" resulting from government use of AI systems.[13]

10. AI in Government Act, Pub. L. No. 116–260, 134 Stat. 2286 (2020) (codified at 40 U.S.C. § 11301 note).

11. Advancing American AI Act, Pub. L. No. 117-263, 136 Stat. 3668 (2022) (codified at 40 U.S.C. § 11301 note).

12. Exec. Order No. 14110 on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75191 (2023) [hereinafter EO 14110].

13. AI in Government Act, *supra* note 10, at 2288, § 104(a)(3).

The Advancing American AI Act essentially reiterated the order, as there was not yet a memo by 2022, adding that the memo should draw on the principles in EO 13960,[14] President Trump's executive order on AI signed in the waning days of the first Trump Administration. Finally, President Biden's EO 14110, signed in late 2023, required that OMB develop minimum risk management practices and specifically scoped this requirement to focus on "government uses of AI that impact people's rights or safety."[15]

The resulting OMB AI Memos lay out governance practices and requirements for federal government use of AI,[16] including both internal government development of AI systems and agencies' use of privately developed systems via procurement.[17]

A. DEFINITIONS AND COVERAGE

The OMB AI Memos require a set of specific agency practices based on the type and use case of "covered AI."[18] They define AI according to the John S. McCain National Defense Authorization Act for Fiscal Year 2019[19] to include the following:

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14. Advancing American AI Act, *supra* note 11, at 3670, § 7224(a)(2).

15. EO 14110, *supra* note 12.

16. Trump AI Memo, *supra* note 2, *passim*. The equivalent language in the Biden AI Memo stated that it created "agency requirements and guidance for AI governance, innovation, and risk management." Biden AI Memo, *supra* note 1, at 1. The memos also contain directives to enhance innovation in government use of AI. *Id.* We are only interested in the oversight and risk management role of these memos, so we set aside the part of the memos designed to promote AI use in government.

17. Biden AI Memo, *supra* note 1, at 3 ("This memorandum provides requirements and recommendations that, as described in more detail below, apply to new and existing AI that is developed, used, or procured by or on behalf of covered agencies."); Trump AI Memo, *supra* note 2, at 4 ("This memorandum provides requirements and recommendations that apply to new and existing AI that is developed, used, or acquired by or on behalf of covered agencies."). Separate memoranda describe the specific contract requirements that the government must follow to procure AI systems, but those memos in turn point back to the OMB AI Memos for the substantive minimum required practices. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-24-18, ADVANCING THE RESPONSIBLE ACQUISITION OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT (Sep. 24, 2024), at 4–5, 8 ("Agencies must ensure their AI acquisitions comply with the risk management requirements identified in OMB Memorandum M-24-10 if the AI is used in a way that impacts rights or safety, while also continuing to prioritize privacy, security, data ownership, and interoperability"); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-25-22, DRIVING EFFICIENT ACQUISITION OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT (Apr. 3, 2025), at 10 ("Contracts must ensure compliance with minimum risk management practices for high-impact use cases as required under M-25-21.").

18. Trump AI Memo, *supra* note 2, at 4; Biden AI Memo, *supra* note 1, at 3.

19. Biden AI Memo, *supra* note 1, at 26–27 (quoting Pub. L. No. 115-232, § 238(g)); Trump AI Memo, *supra* note 2, at 18. This definition was, in turn, the scoping definition used

> 1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
>
> 2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.
>
> 3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
>
> 4. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
>
> 5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.

The memos add "technical context" to guide the interpretation of what is covered by this definition of artificial intelligence. Two points are particularly notable: (1) the definition includes "machine learning (including deep learning as well as supervised, unsupervised, and semi-supervised approaches), reinforcement learning, transfer learning, and generative AI," and (2) "no system should be considered too simple to qualify as covered AI due to a lack of technical complexity (e.g., the smaller number of parameters in a model, the type of model, or the amount of data used for training purposes)."[20] These clarifications are important because they ensure that machine learning models like linear and logistic regression, sometimes used for high-impact systems, are considered within scope, along with more complex models frequently understood as the cause for concern.[21] "Covered AI," in turn, excludes use cases outside of an agency's core functions—for example, systems used solely for research or assessments of the AI itself in preparation for regulatory enforcement.[22]

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by the legislation directing OMB to write the memos (both the AI in Government Act of 2020 and the Advancing American AI Act of 2022).

20. Trump AI Memo, *supra* note 2, at 18; Biden AI Memo, *supra* note 1, at 27.

21. Such simple, yet high-impact, systems include a VA health care risk assessment logistic regression model described in the AI use case inventory. *See* supra note 8, U.S. DEP'T OF VETERANS AFFS., AI Use Case Inventory (describing the VA's "Care Assessment Needs (CAN) Score" system: "CAN is a set of risk-stratifying logistic regression models run on Veterans receiving health care through VHA.").

22. Trump AI Memo, *supra* note 2, at 4; Biden AI Memo, *supra* note 1, at 3.

For covered AI, the OMB AI Memos offer additional distinctions that dictate what requirements apply. Under the Biden AI Memo, systems are classified as "safety-impacting" or "rights-impacting." Safety-impacting systems are defined to include covered AI with significant impacts on human life, climate and the environment, critical infrastructure, or strategic assets or resources. Rights-impacting systems are defined as those covered AI systems which have a significant effect on an individual's or entity's civil rights, civil liberties, privacy, equal opportunities, or access to resources or services.[23] Under the Trump AI Memo, these categorizations are collapsed into a single definition of "high-impact" AI, that includes covered AI with a significant effect on: civil rights, civil liberties, or privacy; individual's or entity's access to education, housing, critical government resources or services, or other programs; human health and safety; critical infrastructure or public safety; or strategic assets or resources.[24] Though the structure of the categories differs between the memoranda, the set of covered AI remains largely consistent.

In addition to providing definitions for high-impact, safety-impacting, and rights-impacting AI, both memoranda provide agencies with a specific list of AI use cases that are presumed included within these definitions.[25] Beyond the substantive force of the presumption, the list also serves an important communicative purpose to agencies, creating a government-wide understanding of which systems are high-impact. Specific systems presumed by both memoranda to be high-impact include "emergency services," "the medically relevant functions of medical devices," law enforcement risk assessments, access controls for benefits systems, and many others.[26] The Trump AI Memo removed some systems that had been on the Biden lists including "[m]aintaining the integrity of elections and voting infrastructure" and a wide variety of education-related AI systems.[27]

23. Biden AI Memo, *supra* note 1, at 29.

24. Trump AI Memo, *supra* note 2, at 19.

25. Trump AI Memo, *supra* note 2, at 21–22; Biden AI Memo, *supra* note 1, at 31–33.

26. Trump AI Memo, *supra* note 2, at 21–22; Biden AI Memo, *supra* note 1, at 31–33.

27. Education-related systems included in the Biden AI Memo as systems that are presumed to be rights-impacting, and excluded entirely from the Trump AI Memo's list, are: "In education contexts, detecting student cheating or plagiarism; influencing admissions processes; monitoring students online or in virtual-reality; projecting student progress or outcomes; recommending disciplinary interventions; determining access to educational resources or programs; determining eligibility for student aid or Federal education; or facilitating surveillance (whether online or in-person)." *Compare* Biden AI Memo, *supra* note 1, at 32, *with* Trump AI Memo, *supra* note 2, at 19.

B. SUBSTANTIVE PROVISIONS

The OMB AI Memos set out three high-level, substantive risk management components for agencies to accomplish: (1) building a governance structure for AI use, (2) reporting about AI uses via the AI Use Case Inventory, and most importantly, (3) implementing certain minimum risk mitigation requirements, without which the AI system cannot be used.

The governance structure centers on the creation of a Chief AI Officer (CAIO) position.[28] Bigger agencies—specifically those that are statutorily required to have a Chief Financial Officer—must additionally have an AI governance board.[29] CAIOs are responsible for oversight of the memoranda requirements, including any waivers granted from OMB's required practices[30] and for communication within the government about agency AI procedures and with the public via the AI Use Case Inventory.[31]

The AI Use Case Inventory was mandated by EO 13960[32] and the Advancing American AI Act,[33] and integrated into the Office of the Federal Chief Information Officer's Integrated Data Collection process under the Biden AI Memo.[34] It serves as a key component of the public's transparency into AI use by the federal government by requiring public visibility via a website into current and planned agency AI uses.[35] Under the instructions

28. Trump AI Memo, *supra* note 2, at 10–11; Biden AI Memo, *supra* note 1, at 4–8.

29. Trump AI Memo, *supra* note 2, at 11; Biden AI Memo, *supra* note 1, at 8–9.

30. Trump AI Memo, *supra* note 2, at 15; Biden AI Memo, *supra* note 1, at 17.

31. Trump AI Memo, *supra* note 2, at 10–11; Biden AI Memo, *supra* note 1, at 6.

32. Exec. Order No. 13960 on Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, 85 Fed. Reg. 78939 (2020) [hereinafter EO 13960].

33. Advancing American AI Act, *supra* note 11, at 3670, § 7224(a)(2).

34. The Office of the Federal Chief Information Officer (OFCIO) is housed under the DDM and manages governmentwide IT policy including the Integrated Data Collection (IDC) process which is a quarterly data reporting mechanism from agency CIOs to OMB. *See Office of the Federal Chief Information Officer*, WHITE HOUSE, https://bidenwhitehouse.archives.gov/omb/management/ofcio/ [https://perma.cc/P5LB-ZP5A] (describing OFCIO); *Integrated Data Collection*, CIO.GOV, https://www.cio.gov/handbook/reporting/idc/ [https://perma.cc/FWG3-S585] (describing the IDC); and Biden AI Memo, *supra* note 1, at 5 (requiring that AI Use Case Inventories be collected via the IDC).

35. Biden AI Memo, *supra* note 1, at 5. The Biden Administration made the consolidated AI use case inventory available at https://web.archive.org/web/20250116141511/https://ai.gov/ai-use-cases/. Individual agency inventories are available at agency-maintained sites, see, e.g., https://www.dhs.gov/publication/ai-use-case-inventory-library [https://perma.cc/7777-XJSY]; https://www.hhs.gov/programs/topic-sites/ai/use-cases/index.html [https://perma.cc/FUE9-X8AY]; https://department.va.gov/ai/ai-use-case-inventory/ [https://perma.cc/29PX-3MZP].

stemming from the Biden AI Memo,[36] such reporting further included information about the assessed risks of the system and steps taken at the direction of the memorandum to mitigate those risks. It is not yet clear whether reporting from the Trump AI Memo will maintain these instructions, or revert to the structure of earlier inventories that did not include information about risks.[37]

Substantively, for those covered AI use cases determined to be high-impact and not waived from some or all requirements via a process with the CAIO, the memoranda lay out "minimum risk management practices." The requirements include both provisions that must be in place before use, such as pre-deployment testing and risk mitigation, and those that continue throughout the life of the system, such as ongoing performance monitoring. In addition to technical practices like performance assessments, the minimum risk management practices also include sociotechnical practices that take into account the humans operating and impacted by the system. These include "training, assessment, and oversight for operators of AI"[38] and incorporating feedback from the public. In some cases, these minimum practices are strict requirements, such as the requirement for pre-deployment testing,[39] while others, such as the practice of incorporating feedback from the public, are guidance to be applied by agencies "where appropriate."[40] The memos direct that they are to be implemented for any high-impact covered AI or agencies must cease using the system.[41]

The next Part discusses these requirements in greater depth after a discussion of their genesis.

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36. OFF. OF THE FED. CIO, GUIDANCE FOR 2024 AGENCY ARTIFICIAL INTELLIGENCE REPORTING PER EO 14110 (Aug. 14, 2024), https://www.cio.gov/assets/resources/2024-Guidance-for-AI-Use-Case-Inventories.pdf [https://perma.cc/5G6A-4EPE].

37. *See, e.g.*, the results of the 2023 AI Use Case Inventory: https://github.com/ombegov/2024-Federal-AI-Use-Case-Inventory/blob/main/data/2023_consolidated_ai_inventory_raw.csv [https://perma.cc/BR9R-EV6E].

38. Trump AI Memo, *supra* note 2, at 17; Biden AI Memo, *supra* note 1, at 20 ("operators of *the* AI").

39. Trump AI Memo, *supra* note 2, at 15; Biden AI Memo, *supra* note 1, at 18.

40. Trump AI Memo, *supra* note 2, at 17; Biden AI Memo, *supra* note 1, at 22.

41. Trump AI Memo, *supra* note 2, at 15 ("If a particular high-impact use case is not compliant with the minimum practices then the agency must safely discontinue use of the AI functionality."); Biden AI Memo, *supra* note 1, at 15 ("Except as prevented by applicable law and governmentwide guidance, agencies must apply the minimum risk management practices in this section to safety-impacting and rights-impacting AI by December 1, 2024, or else stop using the AI until they achieve compliance").

III. THE BIDEN AI MEMO

The Biden AI Memo owes its origins to a decade of advocacy, research, and prior government work, ultimately leading to the Blueprint for an AI Bill of Rights ("AI Bill of Rights"), a white paper released by the Biden Administration's White House Office of Science and Technology Policy (OSTP) in October of 2022.[42] The AI Bill of Rights contains principles and practices designed to protect the public from the potential harms of AI, and the Biden AI Memo drew not only inspiration, but actual substantive provisions directly from it. This Part will detail the origins of the AI Bill of Rights and describe how it influenced the Biden AI Memo.

A. HISTORY OF AI-RELATED PRINCIPLES AND RESEARCH ON AI HARMS

In 2008, Chris Anderson, editor-in-chief of Wired magazine, famously described the advent of "Big Data" as "the end of theory."[43] The declining price of computer technology and the availability of cheap data had remade the economy. The "Big Data" era of big business was in full swing. Government had also gotten on board the data train, with the Obama Administration pushing data as an important asset, but with a focus on open data—data "for the people."[44]

The year 2014 marked a turning point on our collective journey towards understanding data-driven technologies. That year, members of civil society, government practitioners, journalists, and researchers from law, computer science, and other related fields began to seriously examine the societal impacts of Big Data. All these different groups were realizing that Big Data—the then-popular term that has since been overtaken by AI—can do harm as well as good. A coalition of civil rights groups released the "Civil Rights Principles for the Era of Big Data"[45] which advocates for fairness, personal control of information, protection from inaccurate data, and other safeguards from big data related inference. The Obama Administration's OSTP released a

42. WHITE HOUSE OFF. OF SCI. & TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE (Oct. 4, 2022) [hereinafter AI Bill of Rights].

43. Chris Anderson, *The End of Theory: The Data Deluge Makes the Scientific Method Obsolete*, WIRED (June 3, 2008), https://www.wired.com/2008/06/pb-theory/ [https://perma.cc/E6PE-795Y].

44. *FACT SHEET: Data by the People, for the People*, OBAMA WHITE HOUSE ARCHIVES (Sep. 28, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/09/28/fact-sheet-data-people-people-eight-years-progress-opening-government [https://perma.cc/85A3-5UP3].

45. THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, CIVIL RIGHTS PRINCIPLES FOR THE ERA OF BIG DATA (2014), https://civilrights.org/2014/02/27/civil-rights-principles-era-big-data/ [https://perma.cc/PKF8-HMBA].

landmark report observing that "big data analytics have the potential to eclipse longstanding civil rights protections in how personal information is used in housing, credit, employment, health, education, and the marketplace."[46] Later that year, the first convening of academic researchers focused on the principles of fairness, accountability, and transparency in machine learning (FAT/ML) was held at a computer science conference with interdisciplinary attendees across computer science, law, and policy, including some of the individuals involved in developing the big data civil rights principles.[47]

In the years following, these groups continued working and meeting, and FAT/ML convenings occurred yearly. In 2016, OSTP released a second report on big data, this time focused more squarely on its impact on civil rights related to credit, employment, higher education, and criminal justice.[48] Journalists also released key investigations, including a landmark ProPublica article from 2016 showing racial bias in the incorrect predictions of a pretrial risk assessment.[49] Further work by journalists and researchers identified concerns with the use of AI in domains including predictive policing,[50] online advertising,[51] and many others.[52] Academic interest in the field grew, with over 450 attendees at the

46. EXEC. OFF. OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES 3 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf [https://perma.cc/AW6H-3Y2N].

47. The speakers page from the 2014 FAT/ML website lists both David Robinson and Harlan Yu, who were at the time the principals of Upturn, a DC-based tech policy nonprofit that was involved in the development of the civil rights principles. *See 2014 Speakers*, FAIRNESS, ACCOUNTABILITY, & TRANSPARENCY IN MACH. LEARNING, https://www.fatml.org/schedule/2014/speakers [https://perma.cc/HN63-G4XQ]; AARON RIEKE, DAVID ROBINSON & HARLAN YU, CIVIL RIGHTS, BIG DATA, AND OUR ALGORITHMIC FUTURE (2014), https://www.upturn.org/work/civil-rights-big-data-and-our-algorithmic-future/ [https://perma.cc/53JM-XGXQ] (indicating that David Robinson and Harlan Yu served as technical advisors for the Big Data and Civil Rights Principles).

48. EXEC. OFF. OF THE PRESIDENT, BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS (2014), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf [https://perma.cc/T753-2VN3].

49. Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks.*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/24EQ-RNQA].

50. William Isaac & Kristian Lum, *To Predict and Serve?*, 13 SIGNIFICANCE 14 (Oct. 7, 2016), https://rss.onlinelibrary.wiley.com/doi/full/10.1111/j.1740-9713.2016.00960.x.

51. Julia Angwin & Terry Parris Jr., *Machine Bias: Facebook Lets Advertisers Exclude Users by Race*, PROPUBLICA (Oct. 28, 2016), https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race [https://perma.cc/N8EE-FZ2K].

52. *Machine Bias: Investigating Algorithmic Injustice*, PROPUBLICA, https://www.propublica.org/series/machine-bias [https://perma.cc/P2AR-YYL4].

first full-size conference offering of the Conference on Fairness, Accountability, and Transparency in 2018.[53]

With this growing public and researcher interest came a movement to develop principles and practices for governing AI. In 2016, researchers from the FAT/ML community developed principles and an associated transparency reporting mechanism they called a "social impact statement,"[54] with others' calls for algorithmic impact assessments as a legal intervention following close behind.[55] Companies also began releasing AI ethics principles, including IBM in 2017,[56] Google in 2018,[57] and Microsoft in 2018 (specific to facial recognition).[58] Following these releases, governmental bodies also released AI ethics principles: more than forty countries signed on to the OECD AI Ethics Principles in 2019[59] and the Pentagon and U.S. Intelligence Community

53. Press Release, Conference on Fairness, Accountability, and Transparency (Jan. 30, 2018), https://facctconference.org/2018/press_release.html [https://perma.cc/4HYP-CW26].

54. Nicholas Diakopoulos, Sorelle Friedler, Marcelo Arenas, Solon Barocas, Michael Hay, Bill Howe, HV Jagadish, Kris Unsworth, Arnaud Sahuguet, Suresh Venkatasubramanian, Christo Wilson, Cong Yu, & Bendert Zevenbergen, *Principles for Accountable Algorithms and a Social Impact Statement for Algorithms*, FAIRNESS, ACCOUNTABILITY, & TRANSPARENCY IN MACH. LEARNING, https://www.fatml.org/resources/principles-for-accountable-algorithms [https://perma.cc/8BWZ-YA42] (referencing the Dagstuhl working group write-up from the 2016 Dagstuhl Seminar, *Data, Responsibly*: https://www.dagstuhl.de/16291 [https://perma.cc/UX7M-9847]).

55. Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109, 169–82 (2017); DILLON REISMAN, JASON M. SCHULTZ, KATE CRAWFORD & MEREDITH WHITTAKER, ALGORITHMIC IMPACT ASSESSMENTS REPORT: A PRACTICAL FRAMEWORK FOR PUBLIC AGENCY ACCOUNTABILITY (2018), https://ainowinstitute.org/publication/algorithmic-impact-assessments-report-2 [https://perma.cc/7X9G-3V5A].

56. Contemporary discussion of the principles dates them to 2017. *See* Alison DeNisco Rayome, *3 Guiding Principles for Ethical AI, from IBM CEO Ginni Rometty*, TECHREPUBLIC (Jan. 17, 2017), https://www.techrepublic.com/article/3-guiding-principles-for-ethical-ai-from-ibm-ceo-ginni-rometty/ (IBM principles available at: https://web.archive.org/web/20210416170025/https://www.ibm.com/policy/wp-content/uploads/2018/06/IBM_Principles_SHORT.V4.3.pdf [https://perma.cc/KY4L-X5V3]).

57. Sundar Pichai, *AI at Google: Our Principles*, GOOGLE (June 7, 2018), https://blog.google/technology/ai/ai-principles/ [https://perma.cc/8T5U-ERBD].

58. *Six Principles for Developing and Deploying Facial Recognition Technology*, MICROSOFT, https://msblogs.thesourcemediaassets.com/sites/5/2018/12/MSFT-Principles-on-Facial-Recognition.pdf [https://perma.cc/PGA4-PZX4].

59. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL ON ARTIFICIAL INTELLIGENCE (May 2019), https://one.oecd.org/document/C/MIN(2019)3/FINAL/en/pdf [https://perma.cc/Y6FM-WBEQ] (discussing the AI Ethics Principles); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL ON ARTIFICIAL INTELLIGENCE: ADHERENTS, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449#

released principles in 2020.[60] During President Trump's first term, EO 13960 included AI principles as well. The principles from all of these groups were largely overlapping. More than half of the eighty-four such documents analyzed in 2019 included the principles of transparency, fairness, non-maleficence, responsibility, and privacy.[61]

B. THE AI BILL OF RIGHTS

The next important step on the way to the Biden AI Memo was a white paper titled "Blueprint for an AI Bill of Rights."[62] Under President Biden, OSTP was tasked with developing equity-oriented technology policy, both related to AI and more generally.[63] The AI Bill of Rights was one outcome of OSTP's work on equity and AI policy. It puts forth five AI principles designed to protect the public from the potential harms of AI when used to impact people's rights, opportunities, or access to critical resources. These principles are: (1) safe and effective systems; (2) algorithmic discrimination protections; (3) data privacy; (4) notice and explanation; and (5) human alternatives, consideration, and fallback.[64]

The developed principles built on the other principles of the era,[65] originating from civil society, academia, and the private sector, and the AI Bill

adherents [https://perma.cc/TR94-54QV] (listing the countries that signed on to the AI Ethics Principles).

60. C. Todd Lopez, *DOD Adopts 5 Principles of Artificial Intelligence Ethics*, U.S. DEP'T OF WAR (Feb. 25, 2020), https://www.defense.gov/News/News-Stories/article/article/2094085/dod-adopts-5-principles-of-artificial-intelligence-ethics/ [https://perma.cc/8ASX-XEPG]; *Principles of Artificial Intelligence Ethics for the Intelligence Community*, DIR. OF NAT'L INTEL., https://www.dni.gov/files/ODNI/documents/Principles_of_AI_Ethics_for_the_Intelligence_Community.pdf (For the historical press release, see: https://web.archive.org/web/20250213213506/https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2020/3468-intelligence-community-releases-artificial-intelligence-principles-and-framework).

61. Anna Jobin, Marcello Ienca & Effy Vayena, *The Global Landscape of AI Ethics Guidelines*, 1 NATURE MACHINE INTELLIGENCE 389, 391–396 (2019), https://www.nature.com/articles/s42256-019-0088-2 [https://perma.cc/Q8J7-DWBL] (*see* especially Table 3, at 395).

62. AI Bill of Rights, *supra* note 42.

63. Letter from Joseph Biden, President-Elect, to Dr. Eric S. Lander, President's Sci. Advisor and Dir. of the Off. of Sci. & Tech. Pol'y (Jan. 15, 2021), https://bidenwhitehouse.archives.gov/ostp/news-updates/2021/01/15/a-letter-to-dr-eric-s-lander-the-presidents-science-advisor-and-director-of-the-office-of-science-and-technology-policy/ [https://perma.cc/RWP7-T5TX].

64. AI Bill of Rights, *supra* note 62, at 5–7.

65. While these five principles are not exactly the same as the five consensus principles identified above (*see supra* note 62 and accompanying text), they do map roughly onto these ones: non-maleficence maps to safe and effective systems, fairness to algorithmic

of Rights was described by its writers as focused on "protecting [our] civil rights in the algorithmic age."[66] The AI Bill of Rights aimed to beyond principles, toward implementation as well. Accordingly, in a section titled "From Principles to Practice: A Technical Companion to the Blueprint for an AI Bill of Rights," it described practices needed to achieve these principles in detail.[67]

In the month following the release of the AI Bill of Rights, OpenAI's ChatGPT launched.[68] The dramatically increased public attention on AI resulted in a flurry of White House actions.[69] In October 2023, President Biden

discrimination protections, privacy to privacy, transparency to notice and explanation, and responsibility to human alternatives, consideration, and fallback.

66. Alondra Nelson, Sorelle Friedler & Ami Fields-Meyer, *Blueprint for an AI Bill of Rights: A Vision for Protecting Our Civil Rights in the Algorithmic Age*, OSTP BLOG (Oct. 4, 2022), https://bidenwhitehouse.archives.gov/ostp/news-updates/2022/10/04/blueprint-for-an-ai-bill-of-rightsa-vision-for-protecting-our-civil-rights-in-the-algorithmic-age/ [https://perma.cc/MYN6-ZNWF].

67. AI Bill of Rights, *supra* note 62, at 18–20, 26–28, 33–38, 43–44, 49–51 (discussing five subsections (one per principle) titled, "What should be expected of automated systems").

68. *Introducing ChatGPT*, OPENAI (Nov. 30, 2022) (OpenAI Product Release).

69. These actions included: an executive order from February 2023 that, in part, worked to prevent algorithmic discrimination; in May 2023, the announcement of investment in research, a public red-teaming challenge, and the future release of the Biden AI Memo later that year for public comment; a National R&D Strategy released in May 2023; a White House announcement of voluntary commitments from companies to manage AI risks in July 2023; an AI Cyber Challenge launched in August 2023; and further voluntary commitments from companies secured in September 2023. *See* Exec. Order No. 14091 on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. 88 Fed. Reg. 10825 (Feb. 16, 2023); *FACT SHEET: Biden-Harris Administration Announces New Actions to Promote Responsible AI Innovation that Protects Americans' Rights and Safety* (May 4, 2023), https://bidenwhitehouse.archives.gov/ostp/news-updates/2023/05/04/fact-sheet-biden-harris-administration-announces-new-actions-to-promote-responsible-ai-innovation-that-protects-americans-rights-and-safety/ [https://perma.cc/BGD3-QYXZ]; SELECT COMM. ON A.I. OF THE NAT'L SCI. & TECH. COUNCIL, NATIONAL ARTIFICIAL INTELLIGENCE RESEARCH AND DEVELOPMENT STRATEGIC PLAN 2023 UPDATE (May 2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/05/National-Artificial-Intelligence-Research-and-Development-Strategic-Plan-2023-Update.pdf [https://perma.cc/45D8-QNNB]; *FACT SHEET: Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI*, BIDEN WHITE HOUSE ARCHIVES (July 21, 2023), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/ [https://perma.cc/5Q4E-46PN]; *Biden-Harris Administration Launches Artificial Intelligence Cyber Challenge to Protect America's Critical Software*, BIDEN WHITE HOUSE ARCHIVES (Aug. 9, 2023), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/08/09/biden-harris-administration-launches-artificial-intelligence-cyber-challenge-to-protect-americas-critical-software/ [https://perma.cc/P7FZ-EZLB]; *FACT SHEET: Biden-Harris*

signed EO 14110 on "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence." EO 14110 was a broad statement of policy regarding both the desire to promote AI innovation and address the risks associated with it.[70] As part of its overall push to address risks to safety and rights, the EO required that OMB issue guidance specifying, among other things:

> required minimum risk-management practices for Government uses of AI that impact people's rights or safety, *including, where appropriate, the following practices derived from OSTP's Blueprint for an AI Bill of Rights* and the NIST AI Risk Management Framework: conducting public consultation; assessing data quality; assessing and mitigating disparate impacts and algorithmic discrimination; providing notice of the use of AI; continuously monitoring and evaluating deployed AI; and granting human consideration and remedies for adverse decisions made using AI.[71]

Thus, OMB was directed to make many of the provisions of the AI Bill of Rights binding.

C. THE AI BILL OF RIGHTS' INFLUENCE ON THE BIDEN AI MEMO

Given the commands to OMB to draw on a variety of sources (EO 13960, the AI Bill of Rights, and the National Institute of Standards and Technology (NIST) AI Risk Management Framework),[72] it was not obvious that the resulting memo would draw so heavily on the AI Bill of Rights in particular. But there is a key perspective that the AI Bill of Rights and the Biden AI Memo share: there are specific identified impacts of AI that are worth protecting against. This perspective stems from the AI Bill of Rights's focus on practical implementation to protect civil rights. In both documents, the specific impacts

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Administration Secures Voluntary Commitments from Eight Additional Artificial Intelligence Companies to Manage the Risks Posed by AI, BIDEN WHITE HOUSE ARCHIVES (Sep. 12, 2023), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/09/12/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-eight-additional-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/ [https://perma.cc/E3WP-YPLM].

70. EO 14110, *supra* note 12, §§ 1–2.

71. *Id.* § 10(1)(iv) (emphasis added).

72. While EO 14110 played a large role, it was not the sole legal basis for the Biden AI Memo. As discussed above, both the AI in Government Act, *supra* note 10, and the Advancing American AI Act, *supra* note 11, at 3670, § 7224(a)(2) (directing OMB to draw on "the principles articulated in EO 13960") played important roles as well. In fact, the Biden AI Memo was clearly in progress prior to the issuance of EO 14110, since only two days after that executive order Vice President Harris announced the release of the 26-page draft memo for public comment. *See OMB Releases Implementation Guidance Following President Biden's Executive Order on Artificial Intelligence*, BIDEN WHITE HOUSE ARCHIVES (Nov. 1, 2023), https://bidenwhitehouse.archives.gov/omb/briefing-room/2023/11/01/omb-releases-implementation-guidance-following-president-bidens-executive-order-on-artificial-intelligence/ [https://perma.cc/WYP7-4CMW].

of concern are identified by the language scoping what AI use cases require instituted protections. In contrast, the NIST AI Risk Management Framework explicitly rules out taking a stance on what specific impacts are worth focusing on, stating that the framework "does not prescribe risk tolerance," or in other words, that organizations with a high risk tolerance can successfully implement the framework by taking few or no steps to manage risk.[73] Organizations are encouraged by NIST to identify the risks they care about and take steps based on those identified risks. OMB instead identifies for agencies a specific set of impacts with risks that must be managed. This contrast demonstrates that the Biden AI Memo looks the way it does at least in part because it follows the civil rights framing of the AI Bill of Rights.

The specific scoping language identifying AI impacts that require protections also makes clear the influence of the AI Bill of Rights on the Biden AI Memo. For example, both the Biden AI Memo and AI Bill of Rights list specific minimum risk management practices when the government uses AI systems that affect people's rights.[74] In both cases, the definitions apply protections to systems grouped into three buckets based on (1) impact to civil rights, (2) equal opportunities, or (3) access to government services, with only slight differences in language between the two. The Biden AI Memo's category of "rights-impacting AI" applies to AI that affect:

> 1) Civil rights, civil liberties, or privacy, including but not limited to freedom of speech, voting, human autonomy, and protections from discrimination, excessive punishment, and unlawful surveillance;
>
> 2) Equal opportunities, including equitable access to education, housing, insurance, credit, employment, and other programs where civil rights and equal opportunity protections apply; or
>
> 3) Access to or the ability to apply for critical government resources or services, including healthcare, financial services, public housing, social services, transportation, and essential goods and services.[75]

The AI Bill of Rights, in turn, applies to automated systems that affect:

> Civil rights, civil liberties, and privacy, including freedom of speech, voting, and protections from discrimination, excessive punishment,

73. U.S. DEP'T OF COM. NAT'L INST. OF STANDARDS & TECH., NIST AI 100-1: ARTIFICIAL INTELLIGENCE RISK MANAGEMENT FRAMEWORK (AI RMF 1.0) 7 (Jan. 2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf [https://perma.cc/5NV8-8Q5T].

74. The Biden AI Memo focuses on the category of "rights-impacting AI," while the AI Bill of Rights defines its scope as automated systems that affect "rights, opportunities, or access." *Compare* Biden AI Memo, *supra* note 1, at 15, *with* AI Bill of Rights, *supra* note 62, at 8.

75. Biden AI Memo, *supra* note 1, at 29 (emphasized for comparison).

> unlawful surveillance, and violations of privacy and other freedoms in both public and private sector contexts;
>
> Equal opportunities, including equitable access to education, housing, credit, employment, and other programs; or,
>
> Access to critical resources or services, such as healthcare, financial services, safety, social services, non-deceptive information about goods and services, and government benefits.[76]

The extent of coverage is somewhat different between the two documents: the Biden AI Memo requires that the "output serves as a principal basis for a decision"[77] while the AI Bill of Rights applies to systems which "have the potential to meaningfully impact" individuals or communities.[78] But the influence of the coverage categories from the AI Bill of Rights on the Biden AI Memo is clear.

There is also a direct relationship between the specific practices detailed in each document. For example, both documents discuss the important practice of testing an AI system to make sure it will work in its real-world context. The specific descriptions of that practice are different in the two documents, yet some sentences are the same and the paragraph structure is similar. (See Appendix A for a detailed comparison.) For example, both documents say that such testing should ensure that the system "will work in its [intended] real-world context," that the "testing should follow domain-specific best practices, when available," and that it "should take into account both the specific technology used and" the humans who make up part of the overall system (e.g., "human operators" or reviewers).[79]

Organizationally, the documents have different structures. The Biden AI Memo organizes the minimum risk management practices into two main categories: those required for safety-impacting and rights-impacting AI systems, and those required solely for rights-impacting AI systems. The AI Bill of Rights instead organizes the associated practices based on the principle they support, with practices appearing under the subheading "What should be expected of automated systems."[80] Broadly, the practices associated with the Safe and Effective Systems principle of the AI Bill of Rights are reorganized in the Biden AI Memo to be required by both safety and rights-impacting AI systems; the practices associated with Algorithmic Discrimination Protections are required solely by rights-impacting AI systems; and some practices

76. AI Bill of Rights, *supra* note 62, at 8.
77. Biden AI Memo, *supra* note 1, at 15.
78. AI Bill of Rights, *supra* note 62, at 8.
79. Biden AI Memo, *supra* note 1, at 18; AI Bill of Rights, *supra* note 62, at 18.
80. AI Bill of Rights, *supra* note 62, at 18.

supporting Notice and Explanation and Human Alternatives, Consideration, and Fallback are required for both rights-impacting and safety-impacting systems, while others are required solely for rights-impacting systems.[81]

For example, the practice of testing in a real-world context appears under Safe and Effective Systems in the AI Bill of Rights, while it is part of the minimum practices for both safety-impacting and rights-impacting AI in the Biden AI Memo. Similarly, the AI Bill of Rights practice to "[p]rovide timely human consideration and remedy by a fallback and escalation system in the event that an automated system fails, produces error, or you would like to appeal or contest its impacts on you" is listed under the Human Alternatives, Consideration, and Fallback principle,[82] while the same practice becomes a requirement to "[m]aintain human consideration and remedy processes" in the Biden AI Memo, listed as a minimum risk-management practice for rights-impacting AI.[83] The memo further states: "[w]here practicable and consistent with applicable law and governmentwide guidance, agencies must provide *timely human consideration and* potential *remedy*, if appropriate, to the use of the AI via *a fallback and escalation system in the event that* an impacted individual would like to *appeal or contest* the AI's negative impacts on them," with emphasis added to phrases that match those from the AI Bill of Rights.[84]

Overall, while the organizational structure of the AI Bill of Rights and Biden AI Memo are markedly different, the definitions, coverage, and protective practices have a clear throughline.

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81. The Biden AI Memo does not focus on privacy protections corresponding to the AI Bill of Rights Data Privacy principle. Biden AI Memo, *supra* note 1, at 3 ("This memorandum does not address issues that are present regardless of whether AI is used versus any other software, such as issues with respect to . . . privacy . . . . "). It does discuss privacy alongside other issues with some frequency; it is just not a focus. Anecdotally, this is because some people within the government see the Privacy Act of 1974 as doing all the work necessary to secure privacy, making it difficult to internally justify new privacy rules. Structurally, it may also be because of the organizational structure of OMB, with the OIRA privacy office governing privacy-related concerns, while the Office of the Federal CIO led the OMB AI Memo development. *See Office of Information and Regulatory Affairs*, OBAMA WHITE HOUSE ARCHIVES, https://obamawhitehouse.archives.gov/omb/oira [https://perma.cc/RN6U-5RWR] (discussing inclusion of privacy in OIRA); *see also* AI, CIO COUNCIL, https://www.cio.gov/tags/ai/ (documents from OFCIO describing and analyzing the Biden AI Memo) (on file with the Berkeley Technology Law Journal); *White House Releases New Policies on Federal Agency AI Use and Procurement*, WHITE HOUSE (Apr. 7, 2025), https://www.whitehouse.gov/articles/2025/04/white-house-releases-new-policies-on-federal-agency-ai-use-and-procurement/ [https://perma.cc/3D23-BVPR] (quoting an OFCIO Officer on the release of the Trump AI Memo).

82. AI Bill of Rights, *supra* note 62, at 49.

83. Biden AI Memo, *supra* note 1, at 23.

84. *Id.*

IV. THE TRUMP AI MEMO

Given the shift in priorities from the Biden Administration to the Trump Administration, one would reasonably expect key policy changes relating to government use of AI. Indeed, one of the first executive orders of the second Trump Administration revoked President Biden's executive order on AI (EO 14110) which had (in part) directed OMB to create the Biden AI Memo.[85] An additional executive order directed OMB to revise the Biden AI Memo within sixty days of the order's January 23, 2025 signing date.[86] OMB was directed to draft a new memo consistent with the new Administration's policy on AI: "It is the policy of the United States to sustain and enhance America's global AI dominance in order to promote human flourishing, economic competitiveness, and national security."[87] But while the Trump AI Memo introduced some important changes, what is perhaps more notable is a surprising degree of continuity between the two OMB AI Memos.

Some of the continuity can be traced to specific policy and associated implementation that survived administration changes. The first executive branch efforts to govern internal use of AI stemmed from the first Trump Administration's EO 13960, as discussed above.[88] It instructs the government to adhere to nine principles for government use of AI and directs OMB to create policy to facilitate them.[89] Neither President Biden nor President Trump ever rescinded it. The principles were subsequently incorporated into the legal requirements of the OMB AI Memos under the Advancing American AI Act.[90] To be sure, an important component of the Biden Administration policy on

85. Exec. Order No. 14148 on Initial Rescissions of Harmful Executive Orders and Actions, 90 Fed. Reg. 8237 (2025) (revoking EO 14110 in Section 2(ggg)) [hereinafter EO 14148].

86. Exec. Order No. 14179 on Removing Barriers to American Leadership in Artificial Intelligence, 90 Fed. Reg. 8741 (2025), at Section 5(b). It also directed OMB to revise the associated Biden memo on AI procurement (M-24-18).

87. Exec. Order 14179 on Removing Barriers to American Leadership in Artificial Intelligence, 90 Fed. Reg. 8741 (2025), at Section 2.

88. *See supra* notes 14, 32, and 61, and the accompanying text.

89. The nine principles are: "Lawful and respectful of our Nation's values"; "Purposeful and performance-driven"; "Accurate, reliable, and effective"; "Safe, secure, and resilient"; "Understandable"; "Responsible and traceable"; "Regularly monitored"; "Transparent"; and "Accountable." EO 13960, *supra* note 32. These nine principles do not match the five consensus principles mentioned earlier, see *supra* note 61, yet there are many similarities. Non-maleficence is core to many of these (purposeful and performance-driven; accurate, reliable and effective; safe, secure, and resilient; and regularly monitored), transparency appears directly, and responsibility appears as both responsible and traceable and accountable.

90. *See* Advancing American AI Act, *supra* note 11, at 3669, § 722(4)(a) (describing documents the Director shall consider in issuing the required guidance on government use of AI.).

AI was its focus on equity, and these principles do not mention it (though the principle "Lawful and respectful of our Nation's values" explicitly includes civil rights in the explanatory paragraph).[91] Accordingly, and unsurprisingly, the Trump AI Memo removes any explicit discussion of equity from its replacement memo.[92] EO 13960, by contrast, was hardened by the statute adopting it as well as by the Biden Administration's efforts to implement the executive order by creating the required AI use case inventory, designating officials at each agency responsible for coordinating work on AI, and generally creating plans for compliance with the EO.[93] This continued implementation-work and its legal basis serve as an important, consistent, and principle-based through-line between the first Trump, Biden, and second Trump Administrations.

The core features of the OMB AI Memos have not changed much. The Trump AI Memo retains much of the same structure and requirements as the Biden AI Memo. The definition of AI—and thus the systems that are covered—has not changed.[94] The general structure of the substantive requirements—identifying some AI systems as requiring specific minimum practices based on use case[95] and prohibiting their use if the minimum practices are not met[96]—has not changed. The governance structure—including the

91. EO 13960, *supra* note 32.

92. In addition to these executive orders focused on AI, the Trump Administration also revoked Biden's equity-related executive orders, including EO 14091, which contained the algorithmic discrimination definition used in the Biden AI Memo. *See* EO 14148, *supra* note 85 (revoking EOs 13985 and 14091).

93. As examples of such agency compliance plans, see U.S. DEP'T OF THE TREASURY, OFF. OF THE CHIEF INFO. OFF., U.S. DEPARTMENT OF THE TREASURY EXECUTIVE ORDER 13960 CONSISTENCY PLAN (Dec. 2022), https://home.treasury.gov/system/files/136/Treasury-EO13960-Consistency-Plan.pdf [https://perma.cc/JK7N-XK4G]; *see also* Bhavya Lal & Kate Calvin, *NASA's Responsible AI Plan*, NAT'L AERONAUTICS & SPACE ADMIN. (2022), https://ntrs.nasa.gov/api/citations/20220013471/downloads/RAI%20Plan%20Sept%201%202022.pdf [https://perma.cc/V87P-QWKE]. AI use case inventory guidance was also issued by OFCIO before the Biden AI Memo as part of EO 13960 implementation. *See EO 13960: Artificial Intelligence (AI) Use Case Inventories*, OFCIO (2023), https://www.cio.gov/assets/resources/2023-Guidance-for-AI-Use-Case-Inventories.pdf [https://perma.cc/QT7W-NLJY].

94. *Compare* Trump AI Memo, *supra* note 2, at 18, *with* Biden AI Memo, *supra* note 1, at 26–27.

95. *Compare* Trump AI Memo, *supra* note 2, at 19 (defining "high-impact AI"), *with* Biden AI Memo, *supra* note 1, at 29–30 (defining "rights-impacting AI" and "safety-impacting AI").

96. *Compare* Trump AI Memo, *supra* note 2, at 15 ("If a particular high-impact use case is not compliant with the minimum practices then the agency must safely discontinue use of the AI functionality."), *with* Biden AI Memo, *supra* note 1, at 14 ("[A]gencies must implement the minimum practices in Section 5(c) of this memorandum for safety-impacting and rights-impacting AI, or else stop using any AI in their operations that is not compliant with the minimum practices, consistent with the details and caveats in that section.").

designation of agency CAIOs—has not changed, nor has the requirement for agencies to publicly report their AI use cases.[97]

When comparing the memos' actual texts, we see that the Trump Administration introduced some cuts, but much of the text itself was retained, with some text being moved around. It seems fairly clear that the authors involved aimed to make the new memo have fewer words overall, in addition to substantive policy changes to the memo.[98] As a result, some of the cut language is ambiguous—was the specificity of the Biden memo language cut because it was deemed extraneous, or because of a policy rationale? It can be hard to say.

As we see it, while the continuity is probably most notable, there are also two high-level changes to the Trump AI Memo worth drawing out: (1) a move toward risk regulation and away from a recognition and focus on individualized harms or rights—notably in line with what Professor Margot Kaminski identifies as the convergence of global AI laws around risk regulation[99]—and (2) a deprioritization of equity, bias, or discrimination harm in line with the Trump Administration's general hostility to such ideas.[100]

The move toward risk regulation can be seen in a couple differences. The most notable is the category changes. As discussed in Part I, the core use-based definition was changed from a split "safety-impacting AI" and "rights-impacting AI" to a single "high-impact AI" category that largely combines the previous two categories, with a single set of minimum risk management practices now being required. This approach mirrors other risk regulation regimes, such as the EU's AI Act, which, while concerned with both safety

97. This was a requirement instituted by EO 13960 issued under the first Trump Administration and by the Advancing American AI Act, *supra* note 11, at 3672, § 7225(a)(3).

98. The Biden AI Memo is 34 pages and approximately 14,700 words while the Trump AI Memo is 25 pages and approximately 9,700 words. Reducing the number of words as a goal in and of itself has been a focus of the Trump Administration in other settings. *See* David Gilbert & Vittoria Elliott, *DOGE Put a College Student in Charge of Using AI to Rewrite Regulations*, WIRED (Apr. 30, 2025), https://www.wired.com/story/doge-college-student-ai-rewrite-regulations-deregulation/ [https://perma.cc/DLA5-CKZF].

99. Margot E. Kaminski, *Regulating the Risks of AI*, 103 B.U. L. REV. 1347, 1351 (2023).

100. *See, e.g.*, Adam Serwer, *The Great Resegregation*, ATLANTIC (Feb. 22, 2025), https://www.theatlantic.com/politics/archive/2025/02/trump-attacks-dei/681772/ [https://perma.cc/U3YD-Z2HE] (observing that The Trump Administration aims to "reverse the civil-rights movement").

and fundamental rights,[101] packs both concepts into a regulation of "high risk" AI.[102]

Other aspects of this move towards a risk regulation approach include the removal of two requirements: that government agencies "[n]otify negatively affected individuals"[103] and that the agencies "[m]aintain options to opt-out for AI-enabled decisions."[104] Both memos contain minimum risk management practices, including pre-deployment testing, AI impact assessments (including independent review), ongoing monitoring, human training, remedy and appeals processes, and public consultation. But the targeted removal of notice and opt-out rights for individuals seems to indicate a shift away from any individualized right or redress component of the governance regime.

The second change is a move away from equity and discrimination concerns. Without the background understanding of the Trump Administration's general hostility to such concerns, these changes in the memo might be more difficult to interpret. With the collapse of the safety-impacting and rights-impacting categories, there was a fair amount of text that could be considered redundant and could have been deleted for that reason. For example, in the Biden AI Memo, there were two instances of commands to "conduct ongoing monitoring." One appears under the heading "Minimum Practices for Either Safety-Impacting or Rights-Impacting AI."[105] The other is more specific; it commands agencies to "[c]onduct ongoing monitoring and mitigation for AI-enabled discrimination," specifically stating that "[a]s part of the ongoing monitoring requirement [referenced above], agencies must also monitor rights-impacting AI to specifically assess and mitigate AI-enabled discrimination."[106] As this command already appears under the heading "Additional Minimum Practices for Rights-Impacting AI," one could see it as redundant where the categories have been collapsed. Indeed the corresponding language in the Trump AI Memo is a command to "conduct testing and periodic human review of AI use cases, where feasible, to identify any adverse impacts to the performance and security of AI functionality, including those that may violate laws governing privacy, civil rights, or civil

101. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024, art. 1, 2024 O.J. (L 1689) 1 [hereinafter AI Act] ("The purpose of this Regulation is to . . . ensur[e] a high level of protection of health, safety, fundamental rights enshrined in the Charter . . . . ").

102. AI Act, *supra* note 101, art. 6; *see also* Margot Kaminski & Andrew Selbst, *An American's Guide to the EU's AI Act*, 40 BERKELEY TECH. L.J. 1081 (2025).

103. Biden AI Memo, *supra* note 1, at 23.

104. *Id.* at 24.

105. *Id.* at 19.

106. *Id.* at 23.

liberties."[107] If one were to read the concern with discrimination as limited to that which is already illegal, then it is possible to read this change as a non-substantive language cleanup, given the category shift. In a similar vein, though the Biden AI Memo specifically barred the use of noncompliant AI generally, it reiterated that prohibition within the section on discriminatory AI.[108] The Trump AI Memo removes this language, but it is not clear whether this truncation is due to perceived redundancy or meant to be substantive.

There are, however, other clues indicating that the truncations are meant as a substantive change, narrowing the scope of discrimination protections. One clue is the complete removal of the words equity and bias from the text of the memo. Another is the decision to treat the problem of AI bias as limited to already-illegal discrimination. Language around discrimination in the Biden AI Memo directed agencies to "[m]itigate disparities that lead to, or perpetuate, unlawful discrimination *or harmful bias, or that decrease equity* as a result of the government's use of the AI."[109] Thus, the Biden AI Memo did not merely limit the AI bias concerns to that which was already illegal; rather, it focused on mitigating real harms, whether otherwise proscribed or not. The corresponding Trump language on mitigation is combined with the above quoted language on conducting testing, stating simply that "[a]gencies must implement appropriate mitigations" later in the paragraph.[110] Again, this rephrasing is arguably a more efficient use of language, but it is more likely an intentional weakening of the Biden AI Memo's discrimination protections. The Trump Administration could not entirely ignore or remove any discussion of civil rights or civil liberties because these concerns were written into the AI in Government Act[111] and EO 13960,[112] but such a vague command allows individual agency personnel to argue that they have mitigated appropriately while soft-pedaling or stonewalling substantive mitigation.

Notably, the move to narrow bias concerns to only those already proscribed by law is made worse by the Trump Administration's public position on what counts as illegal discrimination. President Trump stated in EO 14281 that not only will the Administration no longer recognize disparate

107. Trump AI Memo, *supra* note 2, at 17.

108. Biden AI Memo, *supra* note 1, at 21 ("Mitigate disparities that lead to, or perpetuate, unlawful discrimination or harmful bias, or that decrease equity as a result of the government's use of the AI; and 4. Consistent with applicable law, cease use of the AI for agency decisionmaking if the agency is unable to adequately mitigate any associated risk of unlawful discrimination against protected classes."); *Id.* at 23 ("Where sufficient mitigation is not possible, agencies must safely discontinue use of the AI functionality.").

109. Biden AI Memo, *supra* note 1, at 17 (emphasis added).

110. Trump AI Memo, *supra* note 2, at 17.

111. AI in Government Act, *supra* note 10, at 2288, § 104(a)(2).

112. EO 13960, *supra* note 32.

impact as a viable theory of discrimination, but that the doctrine "violates our Constitution."[113] This position is obviously not a correct statement of the law as it stands today, but its adoption as the official government position is certainly concerning, especially as disparate impact is a much more important theory for algorithmic discrimination than disparate treatment.[114]

Beyond these two shifts, the intent behind some other changes are more ambiguous. For example, on impact assessments, the Biden AI Memo directs agencies conducting required AI impact assessments to include documentation of:

> 1. *The intended purpose for the AI and its expected benefit*, supported by specific metrics or qualitative analysis. Metrics should be quantifiable measures of positive outcomes for the agency's mission—for example to reduce costs, wait time for customers, or risk to human life—that can be measured using performance measurement or program evaluation methods after the AI is deployed to demonstrate the value of using AI. Where quantification is not feasible, qualitative analysis should demonstrate an expected positive outcome, such as for improvements to customer experience, and it should demonstrate that AI is better suited to accomplish the relevant task as compared to alternative strategies.[115]

The Trump AI Memo also requires AI impact assessments to document the intended purpose and expected benefit of the AI system, described as:

> A. *the intended purpose for the AI and its expected benefit*, supported by specific metrics or qualitative analysis, assessing impact inclusive of but not limited to costs, customer experience, or expected positive outcomes of AI use, as compared to existing agency processes;[116]

Some detail has clearly been eliminated in the Trump AI Memo, yet it is hard to determine the degree to which the elimination of such detail was intended to effect substantive changes to agency practices or whether substantive changes will result. One rationale for interpreting the Trump AI Memo's more parsimonious language as a non-substantive change is that, as the first such management memorandum detailing how agencies should assess their uses of AI, the Biden AI Memo also served an educational and communicative purpose to the agencies, which was no longer necessary in the Trump version. A contrary interpretation is also reasonable. If the Trump Administration

113. Exec. Order No. 14281 on Restoring Equality of Opportunity and Meritocracy, 90 Fed. Reg. 17537 (2025).

114. *See, e.g.*, Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016).

115. Biden AI Memo, *supra* note 1, at 17.

116. Trump AI Memo, *supra* note 2, at 16.

disagreed with the importance of only using AI where it is clearly superior to alternative processes, removing phrasing and details such as "it should demonstrate that AI is better suited to accomplish the relevant task as compared to alternative strategies" could serve to de-emphasize the requirement.[117] Other changes throughout the Trump AI Memo lead to similar questions.

In the Trump AI Memo, we see remarkable structural continuity from the Biden AI Memo, key substantive changes, and some changes with unclear purposes.

V. FROM PRINCIPLES TO PRACTICE: UNDERSTANDING THE AI MEMOS AS INTERMEDIATE INSTRUMENTS

Overall, while we might have expected a complete overhaul of the governance framework laid out in the Biden AI Memo given the different policy priorities across administrations, the Trump AI Memo contained a surprising amount of continuity, despite the substantive changes we identified above. In this Part, we argue that there are structural reasons for this continuity,[118] and these reasons can help us understand the ultimate function

117. We note that the importance of comparing AI to alternative (likely non-technical) strategies, and not just to other AI systems, has long been argued to be a key aspect of the protections provided by algorithmic impact assessments. *See, e.g.*, Selbst, *supra* note 55, at 176.

118. Some of this continuity can surely also be explained by continuity in personnel and the fact that writing and providing for public comment on the original memo (as required by the AI in Government Act) was a lot of work that they would not want to be required to repeat. Two specific members of the second Trump Administration were also key players in earlier administrations: Lynne Parker, Principal Deputy Director of OSTP under the Second Trump Administration also served for a time in the Biden Administration as the Director of the National Artificial Intelligence Initiative Office in OSTP and in the first Trump Administration as the Assistant Director for Artificial Intelligence in OSTP, and Michael Krastios serves as Director of OSTP in the second Trump and CTO of the first Trump Administration. *See* Press Release, White House, White House Releases New Policies on Federal Agency AI Use and Procurement, https://www.whitehouse.gov/articles/2025/04/white-house-releases-new-policies-on-federal-agency-ai-use-and-procurement/ [https://perma.cc/3D23-BVPR] (quoting Parker describing the Trump AI Memo); Lynne Parker, *OSTP's Continuing Work on AI Technology and Uses That Can Benefit Us All*, BIDEN WHITE HOUSE ARCHIVES, https://bidenwhitehouse.archives.gov/ostp/news-updates/2022/02/03/ostps-continuing-work-on-ai-technology-and-uses-that-can-benefit-us-all/ [https://perma.cc/GB6J-5GWV] (coauthoring a blog post describing the AI work of the Biden Administration, including the AI Bill of Rights); 2016–2019 PROGRESS REPORT: ADVANCING ARTIFICIAL INTELLIGENCE R&D (2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/11/AI-Research-and-Development-Progress-Report-2016-2019.pdf [https://perma.cc/M4XT-2K9K] (mentioning Parker as Co-chair of the Subcommittee on Machine Learning and Artificial Intelligence in the first Trump Administration); Letter from Donald J. Trump, President, to Michael Kratsios, Dir. of the White House Off. of Sci. & Tech. Pol'y (Mar. 26,

of the OMB AI Memos to AI governance, both within the government itself and within the broader AI governance landscape. The OMB AI Memos are therefore best understood as intermediate policy documents, necessary to convert high-level principles into agency action.

As we have argued, the OMB AI Memos are derived from principles aiming to explicate key policy desires in AI governance. The memos are trying to accomplish two different goals. The first is to achieve consistency in implementation of AI principles across the government. The second is to enable practical action across many agencies with highly varied missions and associated AI use cases, but without writing out a separate policy for each individual mission and associated use case—an ill-advised and practically impossible task.

The first goal is accomplished via two different methods: spelling out concrete actions that agencies must take and requiring communication across agencies. The concrete actions are all the substantive requirements discussed above: the creation of a governance framework and especially the CAIO position, reporting of AI use cases, government-wide understanding of which use cases are high-impact, and minimum standards for AI risk mitigation. We call attention to them again here to point out that the very concreteness of the tasks is largely what necessitates such an instrument in the first place. Without such guidance, each agency head would be left to wonder how exactly to cash out high-level principles into organizational changes, policy changes, and reporting policies.

Communication across agencies is accomplished via an interagency council.[119] The interagency council is charged with "coordinat[ing] the development and use of AI across agencies' programs and operations, including enabling compliance with implementation of this memorandum and all other applicable authorities" and on a more practical note, "develop[ing]

2025), https://www.whitehouse.gov/briefings-statements/2025/03/a-letter-to-michael-kratsios-director-of-the-white-house-office-of-science-and-technology-policy/ [https://perma.cc/JY32-EJ4F] (open letter from President Trump charging Kratsios with AI policy in the second Trump Administration); *Michael Kratsios, Chief Technology Officer of the United States*, TRUMP WHITE HOUSE ARCHIVES, https://trumpwhitehouse.archives.gov/people/michael-kratsios/ [https://perma.cc/ZBT4-TZS3] (Kratsios's bio page from the first Trump Administration identifying him as CTO). Nonetheless, we believe the structural reasons we identify are important drivers of the continuity as well.

119. Biden AI Memo, *supra* note 1, at 13–14; Trump AI Memo, *supra* note 2, at 13. The Trump AI Memo specifies that the interagency council is established to "advance the implementation of the AI Principles." Trump AI Memo, *supra* note 2, at 13. The Biden AI Memo does not explicitly include this language.

and promot[ing] shared templates, formats, technical resources, and exemplary uses of agency AI adoption and implementation."[120]

The second goal is enabling the agencies to take practical action on AI risk management without specifying individualized guidance for each AI use case. The agencies have a wide variety of missions and associated AI use cases. For example, the Department of the Interior uses AI to detect invasive bullfrogs,[121] the Department of Veterans Affairs uses AI to create veteran suicide risk assessments,[122] and the Federal Emergency Management Agency uses chatbots to streamline information access internally.[123] As of the 2024 consolidated AI use case inventory, more than two thousand such AI use cases were reported across the federal government.[124] Creating individualized guidance for each such use case would not be feasible or advisable.

This problem is inherent to the need for what we are calling an "intermediate instrument"; it must enable differing implementations of high-level principles. But there are different possible approaches to solving this problem. The approach that the OMB AI Memos took was to create specific requirements and a reporting structure that leave a large amount of room for agency discretion and give deference to agency expertise. There are a number of reasons why this deference may be preferred. It would be logistically infeasible for OMB's single technical office (OFCIO) to oversee the thousands of government AI use cases. Deferring to agencies also ensures that domain experts with relevant knowledge regarding the context of deployment of an AI system are directly involved in its governance[125] (for example ensuring that healthcare professionals in U.S. Department of Health and Human Services oversee medical AI that may require medical expertise to understand and assess). Thus, OMB's guidance is written at an intermediate and cross-sector level that will make sense and be actionable across a wide variety of agencies

120. Trump AI Memo, *supra* note 2, at 13; *accord* Biden AI Memo, *supra* note 1, at 13–14.

121. U.S. DEP'T OF THE INTERIOR, ARTIFICIAL INTELLIGENCE (AI) USE CASE INVENTORY, *supra* note 7.

122. *AI Use Case Inventory*, U.S. DEP'T OF VETERANS AFFS., https://department.va.gov/ai/ai-use-case-inventory/ [https://perma.cc/29PX-3MZP].

123. U.S. DEP'T OF HOMELAND SEC., ARTIFICIAL INTELLIGENCE USE CASE INVENTORY LIBRARY, https://www.dhs.gov/publication/ai-use-case-inventory-library [https://perma.cc/7777-XJSY].

124. *The Government Is Using AI to Better Serve the Public*, AI.GOV, https://web.archive.org/web/20250116141511/https://ai.gov/ai-use-cases/; *see also* Off. of the Fed. Chief Info. Officer, *2024 Federal Agency AI Use Case Inventory*, GITHUB, https://github.com/ombegov/2024-Federal-AI-Use-Case-Inventory/tree/main/data [https://perma.cc/8KR6-MHMK].

125. *See generally* Ryan Calo & Danielle K. Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797 (2021), https://scholarlycommons.law.emory.edu/elj/vol70/iss4/1 [https://perma.cc/EL8S-KWUG].

while satisfying the need for concrete implementation guidance. Such guidance must also include steps that can be straightforwardly checked for compliance by OMB, an office that is unlikely to include domain expertise in the wide variety of AI applications used by agencies and may also not have staff with deep AI expertise. These various limiting factors necessarily lead to concrete requirements that are primarily about the implementation of risk management techniques, rather than focused on substantive outcomes.

Another possible version of an intermediate instrument would have been something akin to Canada's Algorithmic Impact Assessment (AIA),[126] which instructs agencies seeking to use AI to fill out a questionnaire that is turned into an overall risk score.[127] Some of the questions focus on use case (e.g., whether the stakes are "very high"), some on the context (e.g., whether the system is related to health, economic interests, social assistance, access and mobility, licensing and issuance of permits, employment, or other), some on the system capabilities (e.g., image and object recognition or text and speech analysis), and some on risks (e.g., drop-down menus to choose the degree of reversibility of a decision or the degree of risk to rights and freedoms).[128] Many of the questions are accompanied by text boxes for explanations, but they do not factor into the risk score.[129] Finally, there are two pages of mitigation questions that can lower the overall risk score.[130] The risk score then classifies the AI into one of several risk tiers, leading to an escalating set of procedural requirements related to peer review, inequality, notice, human oversight, explainability, training and documentation, IT and business community management, and the internal approval required for the system.[131]

Canada's AIA is a similar intermediate instrument, in that the requirements are written generically in order to avoid writing many more granular assessment instruments across all agencies. But instead of focusing on developing governance and risk mitigation within the agency, the governance mandates exist in this central instrument, with the only solid barrier to

126. *Algorithmic Impact Assessment Tool*, GOV'T OF CANADA, https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/algorithmic-impact-assessment.html [https://perma.cc/UWL9-DW83].

127. *Directive on Automated Decision-Making*, TREASURY BD. OF CANADA SECRETARIAT (2019), https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32592 [https://perma.cc/725H-VCWG].

128. *Algorithmic Impact Assessment Tool*, GOV'T OF CANADA, *supra* note 126.

129. *Id.*

130. *Id.*

131. *Directive on Automated Decision-Making*, TREASURY BD. OF CANADA SECRETARIAT, *supra* note 127, App. C-Impact Level Requirements.

deployment being who must sign off.[132] Unlike a suite of mandatory requirements, the risk scores invite a tradeoff between different types of risk or mitigation to achieve a lower overall tier of risk. This likely trades off simplicity of completing the risk assessment—perhaps thereby increasing willing buy-in—against consistency in requirements. Also, rather than set up lines of communication in which agencies are communicating directly, coupled by a use case inventory, it requires publication of the AIAs directly, such that anyone, including other agencies, can see for themselves what their counterparts are doing.

Our interest here is not in the relative merit of one approach or the other. Rather, it is to point out that what is essential about the OMB AI Memos is precisely their role as intermediate instruments. Wherever there are high-level principles that apply to many different actors in different situations (here, government agencies, but not always), then intermediate instruments like this must exist. Intermediate instruments that, like the OMB AI memos, take the approach of instituting and governing risk management procedures include those from Microsoft,[133] the Government Accountability Office (GAO),[134] and the Data and Trusted AI Alliance,[135] with other companies developing such instruments as products themselves.[136]

Once we understand the role of these intermediate instruments generally, it is easy to see that strategic discussion about the approaches occur at a different level from discussions of the specific policies implemented. Rather, it is about how to reconcile the two goals of consistency in implementation and enabling integration into entities with vastly different missions. A debate over the OMB approach versus the Canadian approach is a different debate than whether, say, equity is a driving value, as important as the second debate

132. *Id.* For Level I and II risk, the assistant deputy minister responsible for the program must provide approval, for Level III it's the head of the department using the AI and for level IV risk, it is the Treasury Board—the Canadian counterpart to OMB. *Id.*

133. *Microsoft Responsible AI Standard, v2 General Requirements*, MICROSOFT (June 2022), https://cdn-dynmedia-1.microsoft.com/is/content/microsoftcorp/microsoft/final/en-us/microsoft-brand/documents/Microsoft-Responsible-AI-Standard-General-Requirements.pdf?culture=en-us&country=us [https://perma.cc/26T6-3JQQ].

134. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-21-519SP: ARTIFICIAL INTELLIGENCE: AN ACCOUNTABILITY FRAMEWORK FOR FEDERAL AGENCIES AND OTHER ENTITIES (June 2021), https://www.gao.gov/assets/gao-21-519sp.pdf [https://perma.cc/RV3R-HUZ7].

135. *Algorithmic Bias Safeguards*, DATA & TRUST ALL. (July 9, 2024), https://dataandtrustalliance.org/work/algorithmic-safety-mitigating-bias-in-workforce-decisions [https://perma.cc/8MDD-JPWX].

136. *See Scale Trusted AI with Watsonx.Governance*, IBM, https://www.ibm.com/products/watsonx-governance [https://perma.cc/SL8C-YTNM]; *see also AI Governance*, DATAROBOT, https://www.datarobot.com/product/ai-governance/ [https://perma.cc/Q3MJ-A5V4].

separately is. Thus, the central choice that the Biden AI Memo made was to answer the question of how to get from principles to practice, and the degree of continuity between the memos suggests that at least this strategic choice has avoided becoming a partisan battle so far.

VI. CONCLUSION: THE LASTING LEGACY OF THE BIDEN AI MEMO

The OMB AI Memos were designed to give government agencies guidance on how to implement high level AI principles in practice. Both the Biden AI Memo and Trump AI Memo required agencies to implement minimum risk management practices or cease the use of any AI system that could not meet the requirements. As might be expected, when President Trump took over from President Biden, the Administration's priorities shifted drastically, and he immediately moved to counteract much of the work of the Biden Administration. Yet the Biden AI Memo leaves an important and lasting legacy. It lives on both within the government through the structure and strategic choices of the Trump AI Memo and outside the government as a model instrument for implementing AI principles.

Intermediate instruments for AI governance are necessary for two key goals: consistency in implementation of AI principles and practical adoption of AI across a wide variety of use cases. In order to meet these goals, the OMB AI Memos describe practices that agencies must take at a high level of specificity and with deference to agency implementation. This strategic choice, coupled with oversight from OMB, allows a wide variety of agency missions to be accommodated.

Deference to agencies is not necessarily a panacea; agencies' degree of substantive compliance will vary. We have seen such variation already in the outcomes of the Biden AI Memo. For example, the agencies were required to create their AI Use Case Inventories with a deadline that occurred after the 2024 presidential election. Compliance was mixed. The VA's reporting instances included 229 AI use cases, 145 of which were safety or rights-impacting, and almost all had approved extensions. At the same time, the implemented AI systems without extensions had extensive and thoughtful evaluations completed, assessing risks of the use case and connecting those risks explicitly to the concerns about potential violations of AI principles.[137] In

137. As one illustrative example, consider the description of key risks for the REACH VET model that predicts veteran suicide risks:

> Our main concerns regarding risks are as follows: (1) Providers might over-rely on statistical risk estimate. To reduce this risk, we provide information regarding which risk factors were identified by the predictive model to

contrast, the DOJ, which reported 240 AI use cases, 140 of which were safety- or rights-impacting, took no extensions, but reported "None" as the key risks for every implemented use case they were required to assess.[138] This included

> encourage transparent understanding of the basis for the model estimate. Moreover, the clinical prevention program provides only general guidelines to clinicians indicating that identified patients should be reviewed. This forces clinicians to rely on their clinical skills to plan intervention responses. (2) The program could be clinically inefficient and use provider time that might be more effectively focused elsewhere. This is a real risk which may evolve over time as other components of the overall VA suicide prevention program improve, and potentially reduce the need for this targeted prevention program. VHA conducts ongoing evaluations to assess for potential inefficiencies in the model and test methods to improve clinical efficiency. For example, VA is currently piloting a process to expand focus of the REACH VET program to patients not currently engaged in mental health care. (3) The program could lead to unfair allocation of clinical resources if the model is biased and other clinical programming does not compensate for areas of model underperformance. This is also a risk and thus VHA evaluates model bias across key demographic populations and actively develops methods to reduce model bias or address bias by adjusting other components of the treatment system to compensate. After review of the common risks template, the following additional risks were identified: Fair & Equitable (FE)-Algorithm target not reflective of real-world outcome of interest Response: There is a minor risk that the county coroners who assign cause of death might have miscategorized some Veteran deaths, reducing the validity of the outcome variable used. Transparent & Explainable (TE)-Degradation of End-User Trust and Ineffective Challenge or Remedy Processes Response: This is a risk. There has been public misunderstanding of how the model performs and is used. VA has responded and clarified misconceptions in the public forums in which misunderstanding has arisen. Accountable & Monitored (AM)-Performance Efficacy and Fairness (e.g., Model/Data Drift, Model Degradation, or inappropriate application) Response: This is a risk, model performance is degrading over time and an update is in process. However all identified patients are clinically complex and appropriate for clinical attention. Accountable & Monitored (AM)-User-Introduced Errors Response: There is a low risk, there is a community of practice to support proper implementation of the REACH VET Program, which is supervised and trained by national program leads. Accountable & Monitored (AM)-System Performance Not as Intended Response: There is a low risk, the internal VA team that manages the model and risk estimates based on it has validation processes in place to review all steps of the process.

Office of the Federal Chief Information Officer, *2024 Federal Agency AI Use Case Inventory*, GITHUB, https://github.com/ombegov/2024-Federal-AI-Use-Case-Inventory/ (select "data" on the landing page; then select "2024_consolidated_ai_inventory_raw_v2.xls" from the listed files; then click on the "download" button to download and open the file; then scroll to cell number AV1632).

138. *See id.*

ShotSpotter—an AI-based gunshot detection system that includes well-known risks such as over-alerting and inaccuracy[139]—and biometric systems, which are known to have bias risks.[140] Understanding that varied compliance is an inherent feature of deference to the agencies, then, the effectiveness of the OMB AI Memos will depend on the willingness of each administration to enforce its own rules, as well as civil society pressure and public attention in helping to focus the administration on these issues. Thus, while the choices made in the Biden AI Memo make sense in an administration focused on appropriate AI use, they may have kicked the can to future administrations on oversight more than intended. Most importantly for our purposes though, the Biden AI Memo's choice to implement the principles this way is what lives on in the Trump AI Memo.

Outside the government, the OMB AI Memos can also be a useful model of substantive technical guidance where such intermediate instruments are needed. State and local governments share this governance problem. Some have already taken steps to create such governance structures for AI. For example, the Maryland state government has codified a requirement to create such a governance document for state use of AI.[141] Similarly, large companies that operate across different domains and have an interest in implementing of their own AI ethics principles with broad brand consistency across those domains, will also require an intermediate instrument for the same reasons as the government.[142]

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139. This includes risks raised in a DOJ-funded report. ERIC L. PIZA, GEORGE O. MOHLER, JEREMY G. CARTER, DAVID N. HATTEN, NATHAN T. CONNEALY, RACHAEL ARIETTI, JISOO CHO & EMILY CASTILLO, NAT'L CRIM. JUST. REFERENCE SERV., THE IMPACT OF GUNSHOT DETECTION TECHNOLOGY ON GUN VIOLENCE IN KANSAS CITY AND CHICAGO: A MULTI-PRONGED EVALUATION (2024), https://www.ojp.gov/pdffiles1/nij/grants/308357.pdf [https://perma.cc/3FLU-RDZX]; *see also* a report from the Chicago Police Department OIG. CITY OF CHI., OFF. OF INSPECTOR GEN., THE CHICAGO POLICE DEPARTMENT'S USE OF SHOTSPOTTER TECHNOLOGY (2021), https://igchicago.org/wp-content/uploads/2021/08/Chicago-Police-Departments-Use-of-ShotSpotter-Technology.pdf [https://perma.cc/JAV3-JXJH].

140. Such bias risks, especially with regards to inaccurate facial recognition matches, have been well-documented, including via a governmental report from NIST. *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software*, NAT'L INST. OF STANDARDS & TECH. (Dec. 19, 2019), https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software [https://perma.cc/4KLN-XTV5].

141. MD. CODE, STATE FIN. & PROC. § 3.5-804.

142. For example, Microsoft has both AI Ethics Principles and an accompanying implementation document. *See Microsoft Responsible AI: Principles and Approach*, MICROSOFT, https://www.microsoft.com/en-us/ai/principles-and-approach#ai-principles [https://perma.cc/9QU7-78PR]; *Microsoft Responsible AI Standard, v2 General Requirements*, MICROSOFT, *supra* note 133.

While other models exist, the OMB AI Memos are a particularly useful model of intermediate instruments for AI governance. Some companies create such instruments for internal use and others sell them as governance products.[143] Each likely has their own benefits and drawbacks depending on the use case. Notably, however, the OMB AI Memos are unique in that the government created them in the public interest, without a profit motive. The instruments thus also have greater democratic legitimacy; they are instruments created with a public input process, largely kept in place across both parties' administrations.

After more than a decade of work across civil society, government, and academia to understand AI-driven harms and how to address them, the focus of policy has progressed from analysis to implementation. The OMB AI Memos and similar intermediate instruments are crucial components of this new phase of AI governance, and they should be broadly understood as such.

143. *See, e.g.*, *Scale Trusted AI with Watsonx.Governance*, IBM, *supra* note 136; *see also AI Governance*, DATAROBOT, https://www.datarobot.com/product/ai-governance/ [https://perma.cc/Q3MJ-A5V4].

VII. APPENDIX A

Table 1: Descriptions of Testing Practices as Found in the Biden AI Memo (left) and AI Bill of Rights (right), with Matching Text Highlighted

Biden AI Memo	AI Bill of Rights
Test the AI for performance in a real-world context. Agencies must conduct adequate testing to ensure the AI, as well as components that rely on it, will work in its intended real-world context. Such testing should follow domain-specific best practices, when available, and should take into account both the specific technology used and feedback from human operators, reviewers, employees, and customers who use the service or are impacted by the system's outcomes. Testing conditions should mirror as closely as possible the conditions in which the AI will be deployed. Through test results, agencies should demonstrate that the AI will achieve its expected benefits and that associated risks will be sufficiently mitigated, or else the agency should not use the AI. In conducting such testing, if an agency does not have access to the underlying source code, models, or data, the agency must use alternative test methodologies, such as querying the AI service and observing the outputs or providing evaluation data to the vendor and obtaining results. Agencies are also encouraged to leverage pilots and limited releases, with strong monitoring, evaluation, and safeguards in place, to carry out the final stages of testing before a wider release.	**Testing.** Systems should undergo extensive testing before deployment. This testing should follow domain-specific best practices, when available, for ensuring the technology will work in its real-world context. Such testing should take into account both the specific technology used and the roles of any human operators or reviewers who impact system outcomes or effectiveness; testing should include both automated systems testing and human-led (manual) testing. Testing conditions should mirror as closely as possible the conditions in which the system will be deployed, and new testing may be required for each deployment to account for material differences in conditions from one deployment to another. Following testing, system performance should be compared with the in-place, potentially human-driven, status quo procedures, with existing human performance considered as a performance baseline for the algorithm to meet pre-deployment, and as a lifecycle minimum performance standard. Decision possibilities resulting from performance testing should include the possibility of not deploying the system.