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Transparency and Accountability:
The Changing U.S. Perspective

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INTRODUCTION

The United States was one of the pioneers of government transparency. The U.S. Freedom of Information Act (FOIA) was among the first and, at the time it was enacted, the most far-reaching access laws in the world.¹ The U.S. FOIA covers only federal executive branch agencies, but other key aspects of governmental transparency are instilled in the nation's laws and traditions, including open legislative sessions and government meetings and ready access to court records. Moreover, every U.S. state has its own access law, many of which apply broadly to state government records. The U.S. transparency regime is comprehensive and the concept of public access to information is ingrained in the democratic system, supported by a network of checks and balances among the branches of government and externally from the media and the public.

Despite near-universal acceptance of open government as a foundational principle in the United States, the power of the FOIA and other transparency standards have been gradually chipped away over time, and openness has consistently found opponents in Congress and the executive branch. Today, excessive delays effectively bar journalists and other requesters who need a quick response to FOIA requests; no penalties exist for agencies that fail to comply with disclosure obligations; and there is no functioning oversight mechanism apart from the court system, which is beyond the reach of many ordinary citizens. When national security information is at issue, courts more often than not defer to government claims for secrecy without independent evaluation. Nonetheless, as secrecy and openness continue to ebb and flow with changing political leadership and circumstances, the underlying challenges have persisted.² These challenges were brought to the fore after the terrorist attacks on the United States on September 11, 2001, as the Bush administration moved to make secrecy the rule rather than the exception.

1. See Thomas Blanton, "The World's Right to Know," *Foreign Policy*, July-August 2002, at 50.

2. OMB Watch, *Moving Toward a 21st Century Right-to-Know Agenda: Recommendations to President-elect Obama and Congress*, at 10-11 (2008).

Today, with the U.S. as a model, countries around the world are advancing new innovations in government transparency. More than sixty new freedom of information laws have been passed in the post-Cold War era since 1992, most in Eastern Europe, Asia, and Latin America. And many of these laws reflect lessons learned from the experience in the United States and other countries that enacted early statutes. For example, India's Right to Information Law imposes monetary penalties on individual officials who do not comply with the time limits for information requests.³ Mexico's Federal Law on Transparency and Access to Public Government Information, enacted in 2002, features the most successful model for an independent adjudicatory body with authority to hear complaints from requesters and order agencies to release information.⁴ The concept of access to information is now a baseline standard for democracy, endorsed by the World Bank, supra-national organizations, and international human rights bodies.⁵ In dozens of countries, it has become a tool for fighting corruption, revealing waste and mismanagement, and empowering the poor.

In this context, the United States is at a transparency crossroads. With the election of President Barack Obama, many proclaimed the start of an era of renewed transparency and openness. The new administration has taken significant actions to prioritize transparency and has opened up unprecedented lines of communication with the public. But the scorecard from Obama's first months in office is mixed, as obstacles to transparency have impeded implementation of the president's early promises to make his administration the most open and accountable in history. The U.S. experience of developing an open government regime over more than four decades, and the challenges the Obama administration faces today in implementing its strong pronouncements on transparency and accountability, are instructive for understanding obstacles to government openness more broadly. This paper will briefly discuss the background

3. India, <http://freedominfo.org/countries/india.htm> (last visited Aug. 18, 2009).

4. Zachary Bookman & Juan-Pablo Guerrero Amparan, "Two Steps Forward, One Step Back: Assessing the Implementation of Mexico's Freedom of Information Act," *Mexican Law Review*, Vol. 1, No. 2 (2009), at 5-6.

5. See Analysis: How to Measure Openness?, <http://freedominfo.org/features/20051116.htm> (Nov. 16, 2005).

of the Bush and Obama approaches to transparency and then explore several of the major issues and challenges that impede transparency in the United States.

TRANSPARENCY AND ACCOUNTABILITY AFTER SEPTEMBER 11

In many ways, every presidential administration is secretive. In fact, “past presidents and Congresses, going back to the founding of the country, have been resistant to a fully transparent government.”⁶ Even the strongest supporters of transparency come into office and are confronted by the bureaucratic reality that keeping secrets can be necessary or politically expedient, and sometimes both. But after September 11, access to records documenting the government’s decisions and policies was largely shut down, and “[o]ur society, which prided itself for the transparency and accountability of our government, [was] transformed into a fortress of secrets.”⁷ The Bush administration unquestionably was more secretive than any other in modern history and acted broadly to foreclose transparency and avoid accountability for its actions.

During the first decade of the twenty-first century, more new classified secrets were created than ever before, and the pace of declassification of old secrets slowed substantially.⁸ Millions of unclassified government records were marked with pseudo-secrecy labels like “sensitive but unclassified” and “sensitive homeland security information,” which although not intended to prevent release under FOIA, likely resulted in less disclosure.⁹ The Bush administration’s policy on FOIA, outlined in a 2001 memo from Attorney General John Ashcroft, told agencies to withhold information whenever they could find a reason to do so,¹⁰ and in fact denials of FOIA

6. OMB Watch, *21st Century Right-to-Know Agenda*, at 9.

7. Statement of Meredith Fuchs (General Counsel, National Security Archive), *Hearing on Restoring the Rule of Law before the Constitution Subcomm. of the Senate Judiciary Comm.* (Sept. 16, 2008).

8. Classification surged dramatically, from 8 million classification actions in 2001 to an all-time high of more than 23 million in 2008. Information Security Oversight Office (ISOO), 2008 Report to the President, <http://www.archives.gov/isoo/reports/2008-annual-report.pdf>. The cost to protect classified information has skyrocketed from \$4.7 billion in 2001 to \$8.64 billion in 2008. ISOO, 2008 Report on Cost Estimates for Security Classification Activities, <http://www.archives.gov/isoo/reports/2008-cost-report.pdf>.

9. National Security Archive, *Pseudo-Secrets: a Freedom of Information Audit of the U.S. Government's Policies on Sensitive But Unclassified Information* (2006), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB183/press.htm>.

10. Attorney General John Ashcroft, Memorandum on the Freedom of Information Act (Oct. 12, 2001), *available at* <http://www.usdoj.gov/archive/oip/foiapost/2001foiapost19.htm>.

requests increased dramatically government-wide.¹¹ President Bush also revised the Presidential Records Act (PRA), a law intended to provide a structured means for balancing the executive's interests in his or her records with the public interest in disclosure, by inserting new mechanisms for current and former presidents, vice presidents, and their heirs to assert executive privileges to block release of records.¹² In effect, secrecy became the default.

Secrecy has many costs, including economic and political costs and costs to public safety and security. But it is arguably most dangerous when it not only keeps the public in the dark about key government policies but also impedes effective decision-making within the government. Policies and interpretations of law that impact the public should be debated openly, to the extent national security permits. According to Senator Russ Feingold, a vocal supporter of transparency during the Bush administration, "when it comes to the law that governs the executive branch's actions, Congress, the courts, and the public have the right and the need to know what law is in effect."¹³

During the Bush administration, however, policies regarding homeland security, domestic surveillance, detention, enhanced interrogation, and extraordinary rendition were developed in secret, out of view of the public but also shielded from Congress and even other high-level officials in the administration.¹⁴ In addition, government officials used overclassification, selective and limited declassification, and improper reclassification of previously released information to avoid oversight and accountability. There were few checks from within the government and even fewer from outside to challenge illegality and overreaching by government officials, and the result was poor policies that threatened our security, infringed the rights of U.S. citizens and those in U.S. custody, and damaged the reputation of the United States in the world.

11. OMB Watch, *21st Century Right-to-Know Agenda*, at 15.

12. Exec. Order 13,233, 3 C.F.R. 815-819 (2001).

13. Statement of U.S. Senator Russ Feingold, *Hearing on Secret Law and the Threat to Democratic and Accountable Government before the Subcomm. on the Constitution of the Senate Judiciary Comm.* (Apr. 30, 2008).

14. See Unclassified Report on the President's Surveillance Program (July 10, 2009), available at <http://www.usdoj.gov/oig/special/s0907.pdf>.

OBAMA AND THE NEW ERA OF OPENNESS

After candidate Obama's strong emphasis on transparency and open government during the campaign and a clear promise that his administration would be the most open and accountable in history, President Obama took all the right first steps. On January 21, 2009, his first full day in office, President Obama issued several important directives heralding what he called a "new era of transparent and open government,"¹⁵ including:

- A FOIA memorandum that reverses the Bush administration policy and reestablishes a presumption of disclosure, stating that "every agency and department should know that this administration stands on the side not of those who seek to withhold information, but those who seek to make it known."¹⁶
- A new executive order on presidential records, which restores the PRA to the disclosure standards prior to the Bush administration.¹⁷
- A landmark memorandum on Transparency and Open Government that directs the heads of the Office of Management and Budget and the General Services Administration, along with the White House Chief Technology Officer, to develop an Open Government Directive aimed at using technology to "establish a system of transparency, public participation, and collaboration" as a means to "strengthen our democracy and promote efficiency and effectiveness in Government."¹⁸

The Obama administration has also taken several notable actions to increase transparency and accountability on national security issues, including:

- Releasing key Bush-era memos from the Department of Justice's Office of Legal

15. Press Release, The White House, Statement from the Press Secretary on the President's signing of two Executive Orders and three Memoranda (Jan. 21, 2009), http://www.whitehouse.gov/the_press_office/StatementfromthePressSecretaryonthePresidentssigningoftwoExecutiveOrdersandthreeMe/.

16. Memorandum on Freedom of Information Act, 74 Fed. Reg. 4681 (Jan. 26, 2009).

17. Exec. Order 13489, 74 Fed. Reg. 4667 (Jan. 26, 2009).

18. Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009).

Counsel (OLC), which provided justification and guidance regarding detention and harsh interrogation techniques used on prisoners in U.S. custody.¹⁹

- Reversing a policy enforced by the Bush administration to prevent media coverage of ceremonies honoring U.S. military personnel killed in Iraq and Afghanistan.²⁰
- Instituting a review of key national security cases, including those lawsuits in which the Bush Justice Department invoked the state secrets privilege to prevent the cases from proceeding in court.²¹
- Ordering a review of policies on classification and declassification and controlled unclassified information, with a goal of “provid[ing] for greater openness and transparency in the Government’s security classification and declassification program while also affording necessary protection to the Government’s legitimate interests.”²²
- Creating a task force to study interrogation and rendition policies and another task force on disposition of detainees in U.S. custody.²³

In addition, the new administration has devoted significant attention to improving interaction with the public through technology and has used social media technologies broadly to reach out to the public and to gather input from outside government.²⁴ Several examples of these new initiatives include:

- A major effort to gather public input on the Open Government Directive, including an online comment forum and a wiki-driven collaborative drafting exercise.²⁵

19. See Office of Legal Counsel Memoranda, <http://www.usdoj.gov/opa/documents/olc-memos.htm> (last visited Aug. 18, 2009).

20. See Obama Administration Lifts Blanket Ban on Media Coverage of the Return of Fallen Soldiers (Feb. 26, 2009), <http://www.gwu.edu/~nsarchiv/news/20090226/index.htm>.

21. President Barack Obama, Remarks on Protecting Our Security and Our Values (May 21, 2009).

22. Memorandum of May 27, 2009 on Classified Information and Controlled Unclassified Information, 74 Fed. Reg. 26275 (June 1, 2009).

23. Exec. Order 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009); Exec. Order 13493, 74 Fed. Reg. 4901 (Jan. 27, 2009).

24. See Evan Ratliff, “The Wired Presidency: Can Obama Really Reboot the White House?” *Wired Magazine*, Jan. 19, 2009.

25. See Transparency and Open Government (May 21, 2009), <http://www.whitehouse.gov/blog/09/05/21/Opening/>.

- A blog-based public forum for public comment regarding improving classification and declassification policy as part of an administration review.²⁶
- Online town hall forums to answer questions from the public about economic issues.²⁷

CHALLENGES TO GOVERNMENT TRANSPARENCY

President Obama came into office as a hero of transparency advocates, the leader who could revitalize our democratic principles by shining a light into the darkest corners of the Bush administration, putting his own activities on display, and reversing the secrecy trend embedded in the government culture. As discussed above, President Obama took a number of significant steps to increase transparency in the early days of his administration, including many that had been specifically advocated by proponents of open government.²⁸ He engaged with the public on new levels and made transparency a clear priority for this administration.

But six months into President Obama's tenure, many supporters of open government are disappointed with the lack of progress. The Obama administration has perpetuated some widely criticized Bush administration secrecy policies, blocked disclosure of key records related to the war on terrorism, and failed to implement its own promises on Freedom of Information reform. These early shortcomings on transparency provide insight into the challenges and obstacles to greater openness that every administration faces. This section will examine several of the most significant challenges and discuss how they might be overcome going forward, both in the current administration and in future administrations.

REAL THREATS TO NATIONAL SECURITY

Some secrecy is necessary to avoid releasing information that would assist enemies of the nation and to permit effective intelligence gathering and negotiations with foreign governments, and

26. See Introduction to the Declassification Policy Forum (June 28, 2009), http://blog.ostp.gov/2009/06/28/introduction_to_the_declassification_policy_forum/.

27. See Open for Questions: President Obama to Answer Your Questions on Thursday (Mar. 24, 2009), <http://www.whitehouse.gov/blog/09/03/24/Open-for-Questions-President-Obama-to-Answer-Your-Questions-on-Thursday/>.

28. See Press Release, OMB Watch, Obama at 100 Days—21st Century Right-to-Know Agenda (April 2009), www.ombwatch.org/files/obamaat100daysrtk.pdf.

this need becomes more pronounced during times of war or national crisis. Although some increases in secrecy were inevitable after the September 11 terrorist attacks, current and former officials have acknowledged that the system is also plagued by massive overclassification, estimating that a significant portion of information protected as classified should not be.²⁹ Excessive secrecy has significant costs, including burdening the system and making it harder to keep real secrets safe, impeding information sharing within the government, and stifling vital public input in government policy-making.

President Obama inherited two wars and a major global counterterrorism effort. The United States continues to hold hundreds of prisoners at Guantanamo Bay, and thousands of American troops are stationed in combat zones in Iraq and Afghanistan. There are real secrets that need to be kept to protect the lives of Americans at home and the U.S. military abroad, and this reality likely has played into decisions by the new administration to withhold information and take positions similar to those of the Bush administration with regard to transparency. But the new president has fallen into some of the same traps as his predecessor. He has listened to the overzealous arguments of those within the administration who have responsibilities for overseeing military and intelligence operations, without due consideration of the costs and the interests of the public on the other side of the equation. Several examples include:

- The Obama administration has refused to release dozens of photos showing mistreatment of prisoners in U.S. custody, claiming that “releasing these photos would inflame anti-American opinion and allow our enemies to paint U.S. troops with a broad, damning, and inaccurate brush, thereby endangering them in theaters of war.”³⁰
- President Obama also declined to release a number of key OLC memos, particularly those providing justification for the National Security Agency’s warrantless surveillance program.

29. See, e.g., Donald Rumsfeld, “War of the Worlds,” *Wall St. J.*, July 18, 2005, at A12 (“I have long believed that too much material is classified across the federal government as a general rule[.]”); *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on National Security, Emerging Threats and International Relations of the H. Comm. on Gov’t Reform*, 108th Cong. 82 (2004) (testimony of Carol A. Haave) (conceding that approximately 50 percent of classification decisions are over-classifications); see also *id.* at 23 (testimony of J. William Leonard) (“It is no secret that the government classifies too much information.”).

30. President Barack Obama, Remarks on Protecting Our Security and Our Values (May 21, 2009).

- The Obama Justice Department has invoked or supported the state secrets privilege to foreclose judicial consideration of Bush-era cases challenging government wrongdoing related to torture, rendition, and wiretapping.³¹
- The administration has also delayed release of a major report from the Inspector General of the Central Intelligence Agency regarding the agency's interrogation and detention program because of objections from agency employees.³²

President Obama has also taken several important actions to reverse the overly secretive national security policies of the Bush administration, as noted above. But with regard to national security, the most important decisions are yet to come. It remains to be seen whether the new president will meaningfully change the standards for national security classification to ensure that information is not classified for the wrong reasons and that information properly subject to classification is released if the public interest in disclosure outweighs any identifiable threat to national security. The Obama administration is currently conducting a review of classification and declassification policy, and the outcome, in the form of a new executive order on classification, will make a strong statement about whether this administration is truly committed to transparency, even in the realm of national security. The new administration also has room to move towards greater transparency in other national security policies, including as it reviews and reforms its policy on invoking the state secrets privilege in cases challenging Bush-era torture, rendition, and other unlawful conduct and takes positions in critical ongoing lawsuits.

THE POWER OF EXECUTIVE PRIVILEGE

Public officials generally are reluctant to limit their own power once they have obtained it. In many ways, the president is both an elected public servant and the guardian of the office that he or she holds. White House counsel Gregory Craig acknowledged this reality after President

31. Brennan Center for Justice, *Transparency in the First 100 Days: A Report Card*, at 18-20 (Apr. 27, 2009), http://www.brennancenter.org/content/resource/report_card_table/#card.

32. "Obama pushes to delay release of CIA report," *Associated Press*, July 2, 2009, http://www.msnbc.msn.com/id/31715303/ns/us_news-security/.

Obama took office, referring to the public calls for greater accountability for alleged wrongdoing during the Bush administration: “The president is very sympathetic to those who want to find out what happened. But he is also mindful as president of the United States not to do anything that would undermine or weaken the institution of the presidency.”³³ This is not a new approach, however, and expansive claims of presidential power did not begin in the Bush administration. In fact, presidents of both parties, from Nixon to Clinton, have faced strong criticism for shielding their own activities, whether legitimate or illegitimate, from public view based on claims of constitutional privilege.

President Obama has already shown that he is willing to assert some of the same executive authority that Bush claimed to withhold key information from the public or circumvent oversight mechanisms. For example:

- The Obama administration has refused to disclose White House visitor logs showing details about visits by coal and health care lobbyists, taking the same position in litigation as the previous administration to withhold these records under FOIA.³⁴
- President Obama has also used constitutionally questionable signing statements—a favorite tool of President Bush that Obama strongly criticized while running for office—to claim authority for not complying with laws enacted by Congress.³⁵
- The Obama Justice Department has argued in court against the release of interviews with former Vice President Dick Cheney about the leak of CIA agent Valerie Plame Wilson’s identity, on the basis that disclosing the interviews would make White House officials unwilling to cooperate in future investigations.³⁶

33. Charlie Savage, “Obama’s War on Terror May Resemble Bush’s in Some Areas,” *New York Times*, Feb. 17, 2009.

34. Peter Nicholas, “White House declines to disclose visits by health industry executives,” *LA Times*, July 22, 2009.

35. Charlie Savage, “Obama’s Embrace of a Bush Tactic Riles Congress,” *New York Times*, Aug. 9, 2009.

36. Press Release, Citizens for Responsibility and Ethics in Washington, In Cheney Interview Case, DOJ Argues White House Officials Won’t Cooperate with Law Enforcement Investigations (July 2, 2009), <http://www.citizensforethics.org/node/41268>.

According to many transparency advocates, the test will be whether the Obama administration makes a full accounting for the actions taken by its predecessors, including by releasing key records and legal opinions related to the warrantless surveillance program and other Bush-era policies. There must be a distinction between protecting the institution of the presidency and protecting individuals who served in the previous administration and may have engaged in wrongdoing or overreaching. President Obama's early executive order on presidential records showed a willingness to relinquish some privileges and control over his own records after he leaves office. It will also be important, however, for the Obama administration to demonstrate that it understands the appropriate limits of presidential power and to be transparent about its own activities while in office, particularly regarding detention and the conduct of counterterrorism operations, as national security considerations allow.

BUREAUCRATIC INFLUENCES

The Freedom of Information Act is carried out largely by career civil servants in the executive branch, not by the political appointees who set policies regarding implementation of the law. That means that despite strong statements in favor of transparency from above, to some extent transparency still rises and falls with the whims of individual officials who process FOIA and declassification requests and decide what information can be released to the public. After the Ashcroft memo was issued in the early years of the Bush administration, the National Security Archive surveyed major federal agencies to determine the impact of the new guidance on day-to-day FOIA operations, and a majority of agencies reported little change in internal policies or procedures.³⁷ Despite the high-level embrace of secrecy during the Bush years, millions of pages of information, including sensitive or previously classified records, were released. Nonetheless, the Ashcroft policy represented a significant shift in the executive branch approach to transparency and ultimately led to more information being withheld across the board.

37. National Security Archive, *The Ashcroft Memo: "Drastic" Change or "More Thunder Than Lightning"?* (2003), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/index.html>.

This trend works both ways. In March 2009, Attorney General Eric Holder issued new guidance implementing President Obama's FOIA memorandum and formally rescinding the Ashcroft memo that established the Bush administration FOIA policy. Although the response from agencies has been largely positive about the new guidance, it is not yet clear whether requesters and the public will feel a difference in terms of transparency. In one recent case, the FBI reconsidered a Bush-era decision to withhold millions of records in a database of investigative records in light of the new Holder guidance, which strongly encourages agencies to exercise discretion to release records that might be subject to FOIA exemptions. However, the FBI told a federal judge after the review that its position was the same with regard to withholding the records, in effect that "the Holder guidelines don't change a thing."³⁸ Other agencies have also been reluctant to revisit previous decisions based on the new guidance, evidencing a disconnect between high-level policy and ground-level practice.

In addition, the new Holder guidance does little to reduce backlogs and delay, one of the most intractable problems in FOIA administration. Although reintroducing the presumption of disclosure is an essential step towards greater transparency, agencies lack resources, well-trained staff, and cultural support for fulfilling their disclosure obligations. Government employees continue to have incentives for withholding information, including fear of embarrassing the agency or releasing information that could cause harm, but have relatively few if any incentives to be more transparent. Going forward, the Obama administration should take steps to improve professionalism and efficiency in agency FOIA programs and to create a more open environment within the government, where disclosure is a priority and transparency is a common value.

LACK OF EFFECTIVE CHECKS ON SECRECY

Ensuring effective independent checks on government decisions to withhold information from the public has been an ongoing challenge in the United States. The FOIA provides for

38. Electronic Frontier Foundation, *Obama's Transparency Promise: We're Still Waiting* (April 2009) <http://www.eff.org/deeplinks/2009/04/obamas-transparency->.

independent review by a federal court of agency determinations to withhold information pursuant to the statute. Particularly as secrecy has grown since the September 11th attacks, however, courts have become increasingly deferential to agency claims of national security secrecy, and most judges are reluctant to review classified information or question agency assertions.³⁹

In addition, FOIA requesters who cannot afford to take their cases to court generally have been without recourse beyond an administrative appeal to the same agency that handled the initial request. There are now, however, several mechanisms available for requesters to challenge agency decisions. The Interagency Security Classification Appeals Panel (ISCAP) is a body housed at the National Archives and Records Administration (NARA), which has authority to review agency decisions on requests for declassification of classified records. In recent years, the ISCAP has been very active, successfully ordering agencies to declassify and release important historical records.⁴⁰

Significantly, major amendments to the FOIA enacted in 2007 created a new Office of Government Information Services (OGIS), also based at NARA, to mediate disputes between agencies and requesters and review agency FOIA performance. Although OGIS does not have the binding authority of commissions and ombuds offices in other countries like Mexico, it can be effective if it establishes legitimacy among government agencies and publishes strong, well-reasoned advisory opinions. The new office will become operational in the fall of 2009, but with limited budget and staff, it is not clear whether it will have a meaningful impact initially. President Obama can make a strong move towards improving a FOIA system long-plagued by delays and obstruction by requesting sufficient funding for OGIS and encouraging executive branch agencies to cooperate with requests for mediation and abide by the office's decisions.

39. See Meredith Fuchs, "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy," *Administrative Law Review* Vol. 58, No. 1, at 131.

40. See The Secrecy Court of Last Resort (June 5, 2009), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB276/index.htm>.

TECHNOLOGY AND ELECTRONIC RECORDS

Technology holds great promise for increasing transparency and accountability by connecting the public more directly with the internal workings of government. Over the last decade and a half, the U.S. Congress has required federal agencies to connect with the public using the Internet and provide information electronically, including through the Electronic Freedom of Information Act of 1996 (E-FOIA), the E-Government Act, and the Paperwork Reduction Act. Many federal agencies established Web sites in the 1990s and most now provide services and information over the Internet. But the promise of these statutes—an interactive government where most non-sensitive information and data is provided automatically to the public without FOIA requests or other inquiries—has not yet become a reality.⁴¹

The primary challenge for transparency is the sheer volume of electronic information. Federal agencies now produce millions of electronic records and, by some estimates, billions of email communications every year. As the volume of information grows, it becomes increasingly difficult to make it available to the public in an efficient and accessible way, and it also becomes more and more challenging for federal agencies to organize, maintain, and eventually archive their data so that records can be searched and provided to the public when requested. Moreover, electronic records are more easily lost, destroyed, or manipulated—whether inadvertently or intentionally—resulting in new threats to transparency. Outdated laws and regulations are not sufficient to address the challenges posed by electronic records and new communications technologies.

President Obama has set in motion major changes in how the federal government uses information technology to connect with the public. For example, the White House established an online process using blog and wiki technologies to allow the public to submit ideas for improving transparency, discuss the ideas, and collaborate on drafting language as part of the Open Government Initiative. This first experiment in electronic governance was in some ways

41. See National Security Archive, *File Not Found: Agencies Violate Law on Freedom of Information* (2007), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm>.

successful, drawing significant participation and generating good ideas, but it also revealed a major obstacle to public participation when opponents of the administration joined together to post hundreds of comments unrelated to the discussion topic.⁴²

The forthcoming Open Government Directive will chart a course for reform, which should include updating existing regulations, providing agencies with new resources to improve technology, and training government employees to put the Internet and new social media tools to use to improve transparency and public participation in government. Likewise, the administration should work together with NARA and the newly-appointed Archivist of the United States to move towards new, innovative models for electronic records management that are binding and enforceable at federal agencies.⁴³ In addition, technology-based transparency efforts, including new Web sites like Data.gov and Recovery.gov, hold promise for making more government information accessible and usable on the Internet.

CONCLUSION: THE TRANSPARENCY BALANCING ACT

Transparency is not an all-or-nothing proposition. Rather, government leaders must engage in a delicate balancing act between the interests of the public in understanding what their government is doing and why, and the interests of the government in keeping certain information and decisions from public scrutiny, for example to preserve effective decision-making or to protect national security. Just as there are costs to excessive secrecy, there can be costs from unrestrained transparency.⁴⁴

42. See Saul Hansell, "Ideas Online, Yes, but Some Not So Presidential," *New York Times*, June 23, 2009.

43. See Statement of Meredith Fuchs (General Counsel, National Security Archive), *Hearing on the National Archives and Records Administration before the Information Policy, Census, and National Archives Subcomm. of the House Oversight and Gov't Reform Comm.* (May 21, 2009).

44. According to Professor Cary Coglianese of the University of Pennsylvania Law School, "Too much transparency—or transparency in the wrong places—might actually detract from officials' ability to make good decisions. One worry is that under an extreme transparency achievable today with the aid of advanced technology, officials will not engage in as probing or self-critical forms of deliberation because they know that outsiders could be monitoring everything they say and do." Cary Coglianese, "The Transparency President? The Obama Administration and Open Government" (forthcoming), available at <http://ssrn.com/abstract=1433815>, at 13.

Transparency is also not a goal in and of itself but rather a means to the end of accountability. Transparency for transparency's sake can result in political theater that throws open the windows of government but fails to reveal what is actually going on inside—the underlying rationales for decision-making.⁴⁵ The suggestion that televising all cabinet meetings or making all of the president's speeches and press conferences available on YouTube will increase accountability clouds our conception of transparency as a means to understand how government policy is made. The type of information that sheds meaningful light on government decision-making processes generally is the type of information that government officials are unlikely to voluntarily disclose on the Internet—the internal memoranda that show what went into a given decision, who knew what when, which officials endorsed which positions and why. These are the Bush administration's OLC memos, Secretary of Defense Donald Rumsfeld's "snowflakes," the records of the Clinton health care task force and the Cheney energy task force, and the details about which coal and health care lobbyists visited the Obama White House and when.

The United States is at a crossroads, with secretive Bush administration policies and acknowledged government wrongdoing in the past and new and innovative options for advancing transparency in the future. Without a meaningful accounting for misconduct and overreaching—including public understanding of decision-making in the national security arena and across the government—it will be difficult to move and reestablish the public trust. The Obama administration has a significant opportunity to effect change in the culture of government, shifting the paradigm to make transparency the default and using technology to make public participation in government a reality. President Obama must continue to confront challenges head-on and bring the underlying principles of openness and accountability to the forefront in all areas of governance.

45. Professor Coglianese refers to a distinction between "fishbowl transparency"—disclosure information that shows how government officials actually behave—and "reasoned transparency"—revealing explanations for government decision-making. Coglianese, at 15.

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