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## Special Reports

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### **Access to Government Information: The Presidential Transition, 2008–2009**

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Having served two terms as president, George W. Bush was constitutionally proscribed from seeking the same office again in 2008. Moreover, it was unlikely that he could have been returned to the White House. By the fall of the year, his approval rating among the electorate ranged from 19 percent to 34 percent, second only to the self-disgraced Richard Nixon. Late in Bush's administration, Pulitzer-prize winning journalist Charlie Savage of the *Boston Globe*, reviewing the president's record, observed that the "zone of secrecy surrounding the executive branch has been dramatically widened."<sup>1</sup>

By contrast, the opposition party candidate, Barack Obama, a charismatic and very articulate African American contender for the presidency, expressed strong support for transparency in government operations and seemingly regarded accountability within the federal government as an important value. There were many, not just those within the traditional open government community, who considered Obama's position in these regards a welcome return to a legacy of freedom of information and "sunshine."

As we now know, Obama won that contest, becoming the 44th President of the United States. This report reviews and assesses the information access record of George W. Bush in the final year of his administration, and the initial year of his successor in the same regard.

#### **Bush Departs**

During his final year in office, President George W. Bush continued to widen the zone of secrecy surrounding the executive branch. While his administration had

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waged some indirect opposition to the legislation, he had signed into law on December 31, 2007, amendments to the Freedom of Information Act (FOIA).<sup>2</sup> His approval was given without ceremony or a statement.

##### **Undermining the FOIA Amendments**

Shortly thereafter, it was learned that officials at the Office of Management and Budget (OMB) had indicated that all of the funding authorized by the amendments for a new Office of Government Information Services (OGIS) would be located in the fiscal year (FY) 2009 budget for the Department of Justice. Many regarded this arrangement as an attempt by the administration to give Justice control of OGIS, perhaps to the point of fatally crippling it, or allocating the OGIS funds to its own Office of Information and Privacy, which was the administration's overseer for agency compliance with FOIA policy.

Established within the National Archives and Records Administration (NARA), OGIS was mandated to review agency compliance with FOIA, recommend changes in the statute's administration to Congress and the president, offer mediation services between FOIA requesters and agencies as a nonexclusive alternative to litigation, and issue advisory opinions if mediation failed to resolve a dispute. Congress had deliberately located OGIS outside the Department of Justice, which represented agencies sued by FOIA requesters. In the face of questions about the matter, OMB officials declined to comment prior to the formal presentation of the president's budget to Congress on February 4. What that document revealed was a legislative proposal, to be enacted as a section of the general provisions of the Commerce, Justice, Science, and Related Agencies Appropriations legislation for FY 2009, specifying that the Department of Justice "shall carry out the responsibilities" of OGIS and repealing the new office's statutory mandate.<sup>3</sup> Congress ignored this proposal and subsequently funded OGIS in its status as a NARA component. Named to head OGIS on June 10, 2009, was Miriam Nisbet, who had been a special counsel with NARA, a legislative counsel with the American Library Association, and came to the position from the United Nations Educational, Scientific and Cultural Organization (UNESCO) where she had directed its Information Society Division. OGIS began operations in September 2009.

##### **Facilitating Classification**

Like Ronald Reagan before him, President Bush reversed the 30-year trend in security classification policy of narrowing the bases and discretion for making records officially secret by amending the prevailing executive order on classification with E.O. 13292 of March 25, 2003.<sup>4</sup> A few years later, the *New York Times* observed editorially that the "Bush Administration is classifying the documents to be kept from public scrutiny at the rate of 125 a minute. The move toward greater secrecy," it continued, "has nearly doubled the number of documents annually hidden from public view—to well more than 15 million last year [2006], nearly twice the number classified in 2001."<sup>5</sup>

E.O. 13292, among other reversals, eliminated the existing standard that information not be classified if there is "significant doubt" about the need to do so; treated information obtained in confidence from foreign governments as clas-

sified; and authorized the vice president, “in the performance of executive duties,” to classify information originally. It also added the broad areas of “infrastructures” and “protection services” to the categories of classifiable information; eased the reclassification of declassified records; postponed the automatic declassification of protected records 25 or more years old from the beginning of April 17, 2003, to the beginning of December 31, 2006; eliminated the requirement that agencies prepare plans for declassifying records; and permitted the director of central intelligence (DCI) to block declassification actions of the Interagency Security Classification Appeals Panel (ISCAP), unless overruled by the president. Composed of senior-level representatives of the secretary of state, secretary of defense, attorney general, DCI, archivist of the United States, and national security adviser to the president, ISCAP makes final determinations on classification challenges appealed to it; approves, denies, or amends exemptions from automatic declassification sought by agencies; makes final determinations on mandatory declassification review requests appealed to it; and generally advises and assists the president in the discharge of his discretionary authority to protect the national security of the United States.

### Ignoring Declassification

Proposals for fostering the declassification of records were offered by the Public Interest Declassification Board (PIDB) in January 2008. Statutorily established in 2000,<sup>6</sup> the board was a response to the work of the Commission on Protecting and Reducing Government Secrecy, chaired by Sen. Daniel P. Moynihan (D-N.Y.) during 1995–1997.<sup>7</sup> Preparation of *Improving Declassification*, the first PIDB report, began shortly after the panel’s initial February 2006 meeting. During that year and into the next, the board, on nearly a monthly basis, took testimony on declassification matters from representatives of the departments and agencies having the largest declassification programs, NARA, including the presidential libraries, and knowledgeable members of the public.<sup>8</sup> The report offered the following comments regarding the board’s overall finding.

Though the Government is committed, as a matter of policy, to making historically significant information available to the public as soon as it can safely do so, there is no common understanding among the agencies of what “historically significant” information is, nor any common understanding of how such information will be treated once identified as such. Rather, it becomes part of the “queue,” lost in the shuffle of automatic declassification reviews, FOIA requests, specifically mandated searches, and the like. What of historical significance is actually being declassified is unclear to both the public and to the Government.

Making matters worse, declassification does not necessarily mean that information will be available to the public any time soon. Once declassified, documents undergo archival processing, which includes determining whether they should be withheld for reasons other than security classification, conducting archival description (which may include indexing the documents), and conducting any necessary preservation activities. The National Archives lacks sufficient resources to keep pace with agency declassification reviews, resulting in enormous backlogs. It will likely take years for hundreds of millions of pages of materials declassified over the past 12 years to become available to the public. Moreover, many declassified documents will continue to be withheld from the public because they contain other types of controlled, unclassified information, such as investigative or personal information. Many more years are likely to pass before this protected information is allowed into the public domain.<sup>9</sup>

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While recognizing that “manpower is not the sole key to success” in declassification efforts, the PIDB report found that declassification “can and must be done in a smarter way,” “needs to be better focused with greater uniformity among departments and agencies,” and “needs to use technology to a greater extent to accomplish its mission and institute better strategic planning to address the needs of the future, especially the declassification of information stored in existing as well as emerging digital, optical, and other nontextual formats.”<sup>10</sup> With these considerations in mind, the panel identified 15 issues and made 49 recommendations for the declassification of classified national security information, including the following:

- Establishing by executive order or by statute a national declassification program under the supervision of the Archivist of the United States, with a new National Declassification Center (NDC), directed by a deputy archivist for declassification policy and programs, to administer the program
- Requiring departments and agencies to consolidate all of their declassification activities in one office or to bring them under the control of a single office
- Ensuring, by presidential directive, that historically significant classified records are given priority at the 25-year review point, both in terms of what records are taken first and in terms of the quality of the review they receive
- Establishing and appointing, through the Archivist of the United States, a board composed of prominent historians, academicians, and former government officials to determine which events or activities of the federal government should be considered historically significant from a national security and foreign policy standpoint, for a particular year, and so advise the archivist for purposes of setting priorities for declassification activities
- Establishing, through the archivist, a single center within the Washington, D.C., metropolitan area, to house all future classified presidential records from the end of a presidential administration until their eventual declassification and physical transfer to a presidential library for public examination
- Directing agencies, by NDC guidelines or other appropriate executive branch issuance, to dedicate some specific percentage of their declassification review personnel to conducting reviews of classified records less than 25 years old that they know to be historically significant
- Charging the new NDC, through an executive order or other appropriate issuance, with prescribing uniform guidelines to govern the declassification of all executive departments and agencies
- Authorizing NDC to conduct declassification reviews for other departments and agencies on a reimbursable basis
- Requiring that any withdrawal of records that were previously available to the public at the National Archives be approved by the archivist
- Requiring that records identified as being of historical significance undergo a concurrent review for personal privacy or “controlled but unclassi-

fied” information at the same time as the review for declassification is conducted

- Developing, through the archivist, a personnel plan, to be funded as part of NARA’s annual budget, that would address the current archival processing backlog and otherwise enable the archives in the future to fully process all declassified records within five years of their declassification so that they may be available to the public
- Requiring, by amendment of the operative executive order, that all departments and agencies with significant classification activity establish historical advisory boards, composed of experts within and outside the agency
- Requiring, by appropriate executive branch issuance, that all departments and agencies with responsibilities in the national security area hire an appropriate number of historians, either to select classified records of historical significance for declassification review and publication or to write historical accounts based upon the department’s or agency’s classified holdings
- Establishing new arrangements to assure the preservation of the President’s Daily Brief (PDB) as a presidential record under the Presidential Records Act, and allowing for the protection of the PDB under the terms of the Presidential Records Act
- Establishing formal procedures for the declassification review of classified congressional committee reports and hearing transcripts by NDC<sup>11</sup>

President Bush sent a January 29, 2008, memorandum to cabinet officials and senior presidential assistants having responsibility for national security and homeland security policy soliciting their views on the recommendations in the PIDB report. These were to be submitted in writing no later than April 15. While responses were made, it does not appear that the Bush administration took any further action.

### **Extending Control over the Records of Former Presidents**

During the closing years of the Bush regime, congressional efforts to overturn E.O. 13233 and return to the original intent of the Presidential Records Act were frustrated in the Senate.<sup>12</sup> The president had issued the directive on November 1, 2001, early in his initial term.<sup>13</sup> While the statute authorized a former president to seek a court order to stop the disclosure of particular records by the Archivist of the United States as a violation of the former president’s rights and privileges, E.O. 13233 reversed this arrangement and prohibited the archivist from releasing particular records unless and until both the incumbent and former presidents agreed to their disclosure, or until the archivist was directed to disclose the records by a final court order resulting from a lawsuit brought by a person requesting the documentary materials. For the first time, the order also vested a former vice president and a representative or group of representatives of a former president whose records are subject to the Presidential Records Act with authority to prohibit the archivist from releasing particular records.

The policy changes brought by the order met with opposition from, among others, historians, political scientists, journalists, lawyers, and members of Con-

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gress.<sup>14</sup> Remedial legislation was introduced, amended, and favorably reported in the House of Representatives in 2002, but did not receive a floor vote prior to the final adjournment of the 107th Congress. The champion of the legislation, Rep. Steve Horn (R-Calif.), did not stand for re-election, and no successor legislation was introduced until the first session of the 110th Congress when the Democrats were in the majority in the House. In March 2007 Rep. Henry Waxman (D-Calif.) introduced legislation revoking E.O. 13233 and allowing the archivist to reassume control of access to the records of recent former presidents. Moved quickly, the bill was approved by the House on March 14 under a suspension of the rules on a 333–93 vote.<sup>15</sup> Sen. Jeff Bingaman (D-N.M.) introduced a companion bill, which was favorably reported, but languished on the Senate legislative calendar without a final vote before the final adjournment of the 110th Congress and the departure of the Bush administration.

### Struggling with Information Control Markings

Among the deficiencies that contributed to the surprise terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, were the failure of intelligence and law enforcement agencies to share relevant information and the secrecy practices attending such information. A national study commission investigating the attacks recommended, in these regards, that “[i]nformation procedures should provide incentives for sharing, to restore a better balance between security and shared knowledge,” and called upon the president to “coordinate the resolution of the legal, policy, and technical issues across agencies to create a ‘trusted information network’” to facilitate such sharing.<sup>16</sup>

While security classification policy and procedures—such as the unwillingness of agencies to honor the security clearances of personnel from outside their own domains and to otherwise adhere to strict need-to-know practices—contributed to information sharing deficiencies, the use of numerous other information-control markings in addition to the authorized national security protection labels also had a negative effect. Their legal basis was often not clear; their application and authority was not well understood; and their general effect was restrictive. The variety and widespread use of these markings first came to public attention in 1972 when congressional overseers examining the administration and operation of the Freedom of Information Act disclosed their existence.<sup>17</sup> The Nixon administration, at that time and during the remainder of its tenure, made no apparent effort to curb the generation and use of such labels, and the continued practice was inherited by the administration of President George W. Bush.

When legislating the Homeland Security Act of 2002, Congress directed the president to “prescribe and implement procedures under which relevant Federal agencies—”

- (A) share relevant and appropriate homeland security information with other Federal agencies, including the Department [of Homeland Security], and appropriate State and local personnel;
- (B) identify and safeguard homeland security information that is sensitive but unclassified;
- and
- (C) to the extent such information is in classified form, determine whether, how, and to what extent to remove classified information, as appropriate, and with which such personnel it may be shared after such information is removed.<sup>18</sup>

The president's response came in the issuance of E.O. 13311 of July 29, 2003, in which he largely assigned his responsibilities for the development and implementation of information-sharing arrangements to the secretary of homeland security.<sup>19</sup> By the early autumn of 2004, as Congress turned its attention to legislating intelligence reforms to strengthen the ability of agencies to detect and deter terrorist attacks, there had not been any response from the secretary regarding the development of the anticipated information sharing arrangements. Consequently, Congress revisited the matter in the Intelligence Reform and Terrorism Prevention Act of 2004, which mandated a so-called Information Sharing Environment (ISE)—an arrangement to facilitate, among federal, state, local, and tribal governments, as well as segments of the private sector, the “sharing of terrorism information in a manner consistent with the national security and with applicable legal standards relating to privacy and civil liberties.”<sup>20</sup>

A December 16, 2005, presidential memorandum for the heads of executive departments and agencies, in support of ISE, explicitly noted, in one of its guidelines, the need to standardize procedures for sensitive but unclassified information, saying: “To promote and enhance the effective and efficient acquisition, access, retention, production, use, management, and sharing of Sensitive But Unclassified (SBU) information, including homeland security information, law enforcement information, and terrorism information, procedures and standards for designating, marking, and handling SBU information (collectively ‘SBU procedures’) must be standardized across the Federal Government.”<sup>21</sup>

As part of the markings standardization effort, an interagency working group, led by the Department of Homeland Security and the Department of Justice, was formed and, according to testimony by ISE Program Manager Thomas E. McNamara at a May 10, 2006, House hearing, completed an initial inventory of information control markings in March 2006. In his statement, McNamara said:

Preliminary assessments indicate that there are no government-wide definitions, procedures, or training for designating information that may be SBU. Additionally, more than 60 different marking types are used across the Federal Government to identify SBU, including various designations within a single department. (It is important to note, seventeen of these markings are statutory.) Also, while different agencies may use the same marking to denote information that is to be handled as SBU, a chosen category of information is often defined differently from agency to agency, and agencies may impose different handling requirements. Some of these markings and handling procedures are not only inconsistent, but are contradictory.<sup>22</sup>

During the course of his testimony, McNamara indicated that some legislative action might be needed, possibly to adjust statutorily authorized markings or control regimes, or perhaps to prohibit the use of protection designations not otherwise statutorily mandated.<sup>23</sup>

A few months later, it was reported that the Department of Homeland Security and the Department of Justice were deadlocked over the information control markings to be commonly used to facilitate information sharing, as well as a supporting management structure, and control over who gets information. As a consequence, a mid-June deadline set by the president to propose a new labeling system was missed.<sup>24</sup>

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The ISE Implementation Plan, prepared by the ISE Program Manager and issued in November 2006, pointed out that “the growing and non-standardized inventory of SBU designations and markings is a serious impediment to information sharing among agencies, between levels of government, and, as appropriate, with the private sector. Elimination of this impediment,” it continued, “is essential to ensure that the future ISE promotes and enhances the effective and efficient acquisition, access, retention, production, use, management, and sharing of unclassified information while also ensuring its appropriate and consistent safeguarding.”<sup>25</sup> In accordance with the SBU procedures standardization guideline in the president’s December 2005 memorandum, the secretary of homeland security and the attorney general, in coordination with the secretaries of state, defense, and energy, and the director of national intelligence, were to submit for presidential approval recommendations (1) “for government-wide policies and procedures to standardize SBU procedures” and (2) “for legislative, policy, regulatory, and administrative changes,” as well as (3) an “assessment—by each department and agency participating in the SBU procedures review process—of the costs and budgetary considerations for all proposed changes to marking conventions, handling caveats, and other procedures pertaining to SBU information.”<sup>26</sup>

In early February 2008 it was reported that the new SBU regime was ready for presidential approval and was being shared with some congressional staff in briefings. Information would be rated in three categories concerning “safeguards” as to how it should be stored, handled, and transmitted, and “dissemination” as to who is allowed to see it. The three categories, ranging from the lowest to the highest degree of protection, would be (1) “standard safeguards, standard dissemination,” (2) “standard safeguards, specific dissemination,” and (3) “enhanced safeguards, specific dissemination.” At least four existing categories of SBU information were to be grandfathered into the new system. These included the *Safeguards Information* of the Nuclear Regulatory Commission, *Sensitive Security Information* of the Transportation Security Administration, and *Protected Critical Infrastructure Information* as well as *Chemical-Terrorism Vulnerability Information* of the Department of Homeland Security.<sup>27</sup>

It was not clear how or by whom the implementation and use of these new arrangements would be monitored, or how infractions would be detected and punished. Similarly, the relationship between the three new information protection categories and the exemptions of the Freedom of Information Act was also uncertain due to the lack of more specific details concerning the new regime. Furthermore, the introduction of these new arrangements did not require the departments and agencies, for other administrative purposes, to abandon existing, or cease creating new, information control markings or to better manage their use.

### Obama Arrives

Barack Obama came to the presidency after slightly more than three years in the United States Senate. He had previously served three terms in the Illinois State Senate (1997–2004), and earlier had been a community activist in Chicago prior to his entry to Harvard Law School, from which he graduated in 1991. As a legislator, he was not an obvious champion of open government policy, although he

supported accountability arrangements in government and, as a U.S. senator, offered legislation to establish greater transparency in federal spending, with one such proposal, which he cosponsored, becoming the Federal Funding Accountability and Transparency Act of 2006.<sup>28</sup> This statute provides a mandate for *USAspending.gov*. During his 2008 presidential campaign, references to accountability and transparency in government became frequent and were well received by an electorate that was suspicious of, if not rather displeased with, the secrecy practices of the Bush administration.

Upon arriving at the White House, President Obama had to contend immediately with a rapidly deepening worldwide recession that was particularly acute for the U.S. economy. Other initial demands included the reduction of American troop levels in Iraq and changing the war strategy in Afghanistan. Nominations to executive and judicial positions, economic recovery, and healthcare reform soon complicated and intensified his interactions with Congress. The Obama administration's close attention to this agenda resulted in both less immediate efforts at open government reform and less actual elimination of Bush administration secrecy policies and practices than some expected or would have liked.

### Initial Steps

The day after his January 20, 2009, inauguration, Obama issued a memorandum to all heads of executive branch departments and agencies regarding FOIA. There, he thrilled proponents of open government, who had been stifled and frustrated by eight years of the Bush administration, with a commitment to the basic philosophy and procedures of the statute, saying:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.<sup>29</sup>

The president's memorandum also directed executive branch entities to "take affirmative steps to make information public." Expanding on this premise, he wrote:

They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.<sup>30</sup>

Later, on March 19, a supporting memorandum from Attorney General Eric H. Holder, Jr., reinforced the president's "openness prevails" policy, identifying two important implications.

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption. Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not

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be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.<sup>31</sup>

Recognizing that “the disclosure obligation under the FOIA is not absolute,” the memorandum rescinded predecessor 2001 Attorney General guidance “which stated that the Department of Justice would defend decisions to withhold records ‘unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records’.” Under the policy of the Obama administration, it said, “the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”<sup>32</sup>

Some months later, at a late September Senate oversight hearing on freedom of information, Meredith Fuchs, general counsel of the National Security Archive, observed: “There is no doubt that the Obama Administration has changed the course that the prior administration had set in this area.” Noting that, during the past several months, there had been “many decisions to release information that had been withheld by the Bush Administration,” she commented that there were, as well, “several high profile refusals to release records, including the continued refusal to release [Office of Legal Counsel] memoranda concerning the warrantless surveillance program and the continued effort to block release of images of detainees at Abu Ghraib that two courts have ruled must be released.” Indeed, she said, “many concerns remain among frequent FOIA requesters about the implementation of the Obama policies,” and she called for stronger and more supportive leadership in the future from the attorney general regarding FOIA administration and litigation.<sup>33</sup> A few months thereafter, it was reported that more than 300 individuals and groups had filed FOIA lawsuits during the first year of the Obama administration, the plaintiffs contending that little had changed since the years of the Bush administration.<sup>34</sup>

On the same day that the government-wide FOIA memorandum was issued, Obama promulgated E.O. 13489, revoking E.O. 13233 and the Bush administration’s expansive policy regarding public disclosure arrangements concerning the records of former presidents.<sup>35</sup> The Archivist of the United States was returned to being the principal decision-maker concerning the public release of such materials; the privilege of the incumbent or affected former president to protect records was narrowed and procedurally clarified; and no role was prescribed for a representative or a group of representatives or an incumbent or former vice president in such matters. Remedial legislation had been approved by the House on January 7 under a suspension of the rules on a 359–58 vote.<sup>36</sup> Sent to the Senate, the bill was cleared with a substituted text and placed on the legislative calendar on May 19, where it remained, however, without further action.

### Disappointments

These early actions of the Obama administration—new FOIA policy of presumptive information availability, limiting restrictions on the disclosure of the records of former presidents, and the notable decision to release four memos written by the Office of Legal Counsel at the Department of Justice in 2002 and 2005 pro-

viding a legal rationale for harsh interrogation of terrorism subjects—were initial down payments on an anticipated open government effort by the new regime. That prospect, however, soon came into question as a consequence of subsequent developments. In early February, to the surprise of many, the Obama administration pressed ahead with a claim of the state secrets privilege in a lawsuit before the United States Court of Appeals for the Ninth Circuit seeking reinstatement of a claim for damages against an air carrier involved in the transportation of the plaintiffs to a foreign locale where they were allegedly tortured. The government attorney in the case, when specifically asked if the “change of administration has no bearing” in the litigation, responded in the negative. The attorney for the plaintiffs condemned the action of the Obama administration, calling it a ratification of the previous regime’s “extreme policies,” which he said prevented torture victims from seeking redress.<sup>37</sup> “It would have been hard to distinguish the Obama administration from its predecessor during a San Francisco court hearing this week,” the *Washington Post* editorialized shortly thereafter. Observing that “howls of condemnation from some civil liberties advocates were predictable and understandable,” it was noted that the entire matter of invoking the states secrets privilege was under review by the attorney general, and the hope was expressed that “he will not be as reflexive in invoking the shield as were his predecessors.” The writer concluded, however, that “trust in matters as sensitive as these is not enough, no matter who is president.”<sup>38</sup>

Some months later, the plans of Attorney General Holder in this regard were revealed. The new policy would make it more difficult to invoke the state secrets privilege by requiring that the attorney general and a team of Department of Justice lawyers be convinced that the release of sensitive information would present significant harm to national defense or foreign relations, which collectively constitute national security. Nonetheless, the standards involved appeared to be vague, if not nebulous. One sympathetic analyst, Gary Bass, executive director of OMB Watch, reportedly said it was “‘enormously consistent with open-government recommendations’ from himself and other advocates.”<sup>39</sup> The *New York Times* was not so sure. Calling the new arrangement “An Incomplete State Secrets Fix,” it editorially warned that the “Obama administration has essentially embraced the Bush approach in existing cases, trying to toss out important lawsuits alleging kidnapping, torture and unlawful wiretapping without any evidence being presented.” While the attorney general’s new guidelines were viewed as “a positive step forward,” they purportedly “did not go nearly far enough,” and offered no “shift in the Obama administration’s demand for blanket secrecy in pending cases” or “support for pending legislation that would mandate thorough court review of state secrets claims made by the executive branch.” In a cautionary conclusion, the editorial said:

Since assuming office, Mr. Holder has reviewed the administration’s position in ongoing cases and has continued broad secrecy claims of the sort President Obama criticized when he was running for president. To the extent that legitimate cases get dismissed as a result, Mr. Holder should make sure allegations of government wrongdoing get referred to an agency inspector general, as his new plan requires.

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Assessing the total policy, the editorial concluded that the “need for such safeguards is not theoretical.”<sup>40</sup>

In another situation, after initially deciding that it would not ask for court prohibition of the release of photographs showing the abuse of prisoners in Iraq and Afghanistan, the Obama administration changed its position.<sup>41</sup> “The Obama administration,” said the *New York Times* editorially shortly thereafter, “has clung for so long to the Bush administration’s expansive claims of national security and executive power that it is in danger of turning President George W. Bush’s cover-up of abuses committed in the name of fighting terrorism into President Barack Obama’s cover-up.” Calling the action one of the “reminders of this dismaying retreat of Mr. Obama’s passionate campaign promises to make a break with Mr. Bush’s abuses of power,” the editorial noted that, apart from a court challenge, the secretary of defense had been legislatively given authority to withhold the photos.<sup>42</sup> The editorial concluded with the comment that such photographs should be disclosed “to demonstrate that this nation has turned the page on Mr. Bush’s shameful policies,” and offering that: “Withholding the painful truth shows the opposite.”<sup>43</sup>

In mid-November, Secretary of Defense Robert Gates blocked the public release of the photos in question,<sup>44</sup> and a few weeks later, the Supreme Court vacated a lower court ruling that would have required disclosure of the pictures.<sup>45</sup> Noting that the vacated appellate court ruling “was based on sound precedent and principles of government openness and accountability,” the *New York Times* observed that “President Obama managed to void those principles and poke a large retroactive hole in the Freedom of Information Act.” Continuing, the observation was offered that:

disclosure is the best way to demonstrate that this nation has truly broken from the Bush administration’s shameful policies. Letting officials decide not to release evidence of those policies is a dangerous step. Under the new law’s perverse logic, the more outrageous the government’s conduct, the greater the protection from disclosure. Allowing the executive branch to hide an important category of information without any real review also ignores the core purpose of the Freedom of Information Act. For a president who rose to the White House on promises of transparency and reasonable limits on executive power, this is not a legal victory to be proud of.<sup>46</sup>

Later in the year, after extensive obstruction by both the Bush and Obama administrations, a federal judge dismissed government objections to releasing Federal Bureau of Investigation records concerning statements made by Vice President Richard B. Cheney to the special prosecutor during his investigation of matters concerning the unauthorized disclosure of the Central Intelligence Agency (CIA) status of Valerie Plame. Disclosure of the records, it had been asserted, might chill cooperation by White House officials in such investigations in the future.<sup>47</sup> The records indicated that Cheney did not have clear memories about details surrounding the Plame leak, was ignorant of some pertinent interactions with the press by his chief of staff, and was displeased with the CIA’s handling of alleged attempts by Iraq to buy uranium.<sup>48</sup>

Shortly thereafter, the Obama administration better acquitted itself when, in late October, the White House voluntarily posted on its Web site portions of its

long-sought visitors log for the first six months of the year. A second installment was provided in November, and monthly releases were planned for the future. Press accounts noted the frequency of visits by some individuals, as well as the variety of personalities listed—entertainers, business executives, labor leaders, lobbyists, fund-raisers, and some celebrities.<sup>49</sup>

### Open Government Directive

In compliance with the instructions of President Obama's January 21, 2009, memorandum on "Transparency and Open Government," OMB, on December 8, 2009, issued the long-anticipated Open Government Directive (OGD).<sup>50</sup> Eleven pages long, and accompanied by a report,<sup>51</sup> the directive "was informed by recommendations from the Federal Chief Technology Officer, who solicited public comment through the White House Open Government Initiative," and rooted in three principles: transparency, participation, and collaboration. Collectively, the three principles are described as the "cornerstone of an open government."<sup>52</sup> Transparency is intended to promote accountability. Participation represents the citizens' contribution to policy decision making. Collaboration focuses on cooperation both across federal agencies as well as between federal agencies and other public and private entities. In addition to its attempt to institutionalize a wholesale rebirth of the information practices of the federal government, the OGD is notable for its relatively short deadlines and presumption that agencies have the resources not only to implement the directive, but also to capitalize on, and respond to, the cacophony of information and demands that are implicitly envisioned as a measure of the success of open government.

The actions fall under four major objectives. The first objective is Publish Government Information Online, which directs agencies to make information available online in open formats (platform independent, machine readable, and able to be reused) and with the presumption in favor of openness ("to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions," but with an emphasis on being responsive even in the face of high demand, and using technology to improve the dissemination of information). The objective is operationalized by two deadline-driven mandates. One of these mandates is to "publish online in an open format at least three high-value data sets" within 45 days.<sup>53</sup> The OGD later defines high-value information as "information that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to [the] need and demand as identified through public consultation."<sup>54</sup> These data sets were to have not previously been available online and are to be registered via the *Data.gov* Web site. The second mandate is, within 60 days, to "create an Open Government Webpage located at [http://www.\[agency\].gov/open](http://www.[agency].gov/open) to serve as a gateway for agency activities related to the Open Government Directive."<sup>55</sup> On these Web sites, agencies are expected to include a means for the public to provide feedback on the agency's OGD activities; respond to such feedback; and publish their annual FOIA reports in an open format. Separately, agencies are directed to take steps to reduce significant backlogs of FOIA requests by 10 percent, and to "comply with

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guidance on implementing specific presidential open government initiatives such as Data.gov, eRulemaking, IT Dashboard, Recovery.gov, and USAspending.gov.”<sup>56</sup>

The second objective is to Improve the Quality of Government Information. The objective is operationalized by three specific deadlines for action. Within 45 days, agencies, in consultation with OMB, are to “designate a high-level senior official to be accountable for the quality and objectivity of, and internal controls over, the Federal spending information publicly disseminated through such public venues as USAspending.gov or other similar websites.”<sup>57</sup> Within 60 days, the OMB deputy director for management is directed to issue a “framework for the quality of Federal spending information publicly disseminated.” The framework would require agencies to submit plans regarding their internal controls and processes to ensure information quality. There is also reference to a future assessment to consider whether additional OMB guidance should be issued regarding other types of government information that are publicly disseminated. Within 120 days, the OMB deputy director for management is directed to issue a “a longer-term strategy for Federal spending transparency, including the Federal Funding Accountability Transparency Act and the American Reinvestment and Recovery Act.”<sup>58</sup>

The third objective is to Create and Institutionalize a Culture of Open Government. This objective contemplates the need to foster opportunities for the three principles of the OGD to become integrated into the everyday business practices of the federal government. Central to this objective is the requirement that each agency develop its own Open Government Plan (OGP). Within 120 days, each agency is to “develop and publish on its Open Government Webpage an Open Government Plan that will describe how it will improve transparency and integrate public participation and collaboration into its activities.”<sup>59</sup> The OGD includes considerable guidance to agencies on how to go about developing their OGPs, which are to be updated every two years, describing five major components each plan should contain. The component that appears to be most heavily emphasized is transparency. With eight subparts, the transparency component focuses on a variety of activities agencies are to undertake to publish information online. In summary, they include developing a strategic action plan for transparency that inventories and outlines timelines for making high-value information available; publication of data “as granular as possible”; detailing compliance with other transparency initiatives; details for proposed measures to inform the public of agency actions, such as public meetings, Internet press conferences, and periodic national town hall meetings; providing information to the public about agency compliance with records management requirements; providing information to the public about the agency’s staffing and capacity to respond to FOIA requests; providing information to the public about staffing and processes used for responding to congressional requests for information; and providing information to the public about the agency’s declassification programs.

The second component of the OGPs focuses on participation. As part of this component, agencies are expected to “explain in detail” how they will improve participation in the decision making process. This includes discussing plans for revising “current practices to increase opportunities for public-participation in and feedback on the agency’s core mission activities;” providing descriptions and links to Web sites for public engagement; and “proposals for new feedback

mechanisms, including innovative tools and practices that create new and easier methods for public engagement.”<sup>60</sup>

The third component of the OGP focuses on collaboration. For this component, agencies are expected to discuss how they will improve collaboration with “Federal and non-Federal governmental agencies, the public, and non-profit and private entities in fulfilling the agency’s core mission activities.”<sup>61</sup> The plans are to contain details about technology platforms, Web sites, and “innovative methods, such as prizes and competitions,” for facilitating collaboration with various audiences.

The fourth component is the inclusion of “at least one specific, new transparency, participation, or collaboration” flagship initiative that agencies will implement.

The fifth component is a focus on public and agency involvement, and encourages agencies to look beyond the requirements of the OGD for further ideas and opportunities to invite and sustain public engagement.

Three other activities round out the objective to institutionalize a culture of open government. Within 60 days, the federal chief information officer (CIO) and the federal chief technology officer (CTO) are directed to create an Open Government Dashboard, which is to serve as an aggregator of the agencies’ Open Government Plans and measure of their progress in meeting the objectives of the OGD. Within 45 days, the OMB deputy director for management, the federal CIO, and the federal CTO are directed to “establish a working group that focuses on transparency, accountability, participation, and collaboration within the Federal Government.”<sup>62</sup> The working group, “with senior level representation from program and management offices throughout the Government,” is intended to serve as a forum for sharing best practices and coordinating efforts to promote transparency, collaboration, and participation. Within 90 days, the OMB deputy director for management is directed to issue “a framework for how agencies can use challenges, prizes, and other incentive-backed strategies to find innovative or cost-effective solutions to improving open government.”<sup>63</sup>

The fourth objective is to Create an Enabling Policy Framework for Open Government. This objective recognizes that the communications technology environment is very dynamic. In recent years, the emergence and popular embrace of social media applications such as blogs, YouTube, Facebook, and Twitter have left both the executive and legislative branches struggling to find ways to engage citizens in their favorite communications mediums while remaining in compliance with a range of privacy, security, and records management laws that long predate Web 2.0. To that end, within 120 days, the administrator of the OMB Office of Information and Regulatory Affairs (OIRA), in consultation with the Federal CIO and Federal CTO, is directed to review OMB implementation guidelines on laws such as the Paperwork Reduction Act and privacy regulations “to identify impediments to open government and to the use of new technologies and, where necessary, issue clarifying guidance and/or propose revisions to such policies, to promote greater openness in government.”<sup>64</sup>

At the time of this writing, some of the first deadlines of the OGD have just started to pass and the public’s perception of what has been accomplished so far is decidedly mixed. In some cases, data sets posted to Data.gov as part of each agency’s requirement to post three high-value data sets were reportedly removed

days later with few clues as to why. Although privacy, confidentiality, security, and other restrictions are contemplated as justifications in the OGD, the apparent lack of a clear and open notice from OMB raised eyebrows and made headlines.<sup>65</sup> In other cases, agency choices of what to post revealed that “high-value” is clearly in the eye of the beholder. Some critics—hoping for information on travel logs, spending reports, and oil and gas lease decisions—instead found information such as population counts of wild horses and burros from the Department of the Interior, tire quality ratings from the Department of Transportation, and an accounting of villages damaged or destroyed in the Darfur region of Sudan during 2003–2009 from the Department of State.<sup>66</sup>

Some of this disappointment may be the result of impossibly high expectations, driven in part by the soaring rhetoric of the Obama administration (such as promises of “an unprecedented and sustained level of openness and transparency in every agency”<sup>67</sup>), which was in stark contrast to its predecessor. Some of this may also be the result of an overly optimistic belief that the power of technology would automatically overcome the realities of governing, delivering results at the speed of a Google search. It will likely take considerable time, effort, and persistence to bridge the yawning gap between expectations and reality, and deliver on the fullest potential of open government. However, the OGD is notable for three contributions it makes to the government information landscape. First, it establishes an explicit expectation (although not wholly irreversible under extraordinary circumstances) by which the White House will be held accountable for the duration of its term, and which future administrations will have to address. Second, the emphasis on technology and open standards will likely spur innovation in the area of information sharing and analysis in ways yet unforeseen. Third, it highlights the long-overdue need for a thoughtful re-examination of federal information policy laws in a way that does not throw out the privacy and records baby with the analog era bathwater.

### **Security Classified and Controlled Unclassified Information**

The OMB memorandum of December 8, 2009, setting out the terms of the open government directive, proffers that such prescribed action should occur “to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions.” This qualification was understood by most interpreters to exclude security classified information properly designated and many types of SBU records. Reforms regarding both of these types of protected information were addressed separately by the new administration.

On May 27 the White House released a presidential memorandum to the heads of executive departments and agencies reminding the recipients that, “[w]hile the Government must be able to prevent the public disclosure of information where such disclosure would compromise the privacy of American citizens, national security, or other legitimate interests, a democratic government accountable to the people must be as transparent as possible and must not withhold information for self-serving reasons or simply to avoid embarrassment.”<sup>68</sup> To this end, the president directed a review of the policy and procedures for the security classification of information and the creation of an interagency task

force to review similarly the conditions and arrangements pertaining to SBU or what is called controlled unclassified information (CUI).

Regarding the CUI task force, the memorandum designated Attorney General Holder and Secretary of Homeland Security Janet Napolitano as co-chairs and named other officials as members. Its August 25 report to the president was publicly released by the White House on December 15. The report indicated that SBU information “is identified by over 100 unique markings and at least 130 different labeling or handling regimes,” which “collectively . . . reflect a disjointed, inconsistent, and unpredictable system for protecting, sharing, and disclosing sensitive information.” It offered the following assessment of current SBU information procedures.

Regardless of any individual regime’s performance, it is clear that as a whole, Executive Branch performance under these measures suffers immensely from interagency inconsistency in SBU policies, frequent uncertainty in interagency settings as to exactly what policies apply, and inconsistent application of similar policies across agencies. Additionally, the absence of effective training, oversight, and accountability at many agencies results in a tendency to over-protect information as SBU, thus greatly diminishing government transparency.<sup>69</sup>

“Current SBU policies are generally ill-suited” to “sharing terrorism-related and other intelligence and law enforcement information with local law enforcement,” it was noted, and “the markings are sometimes misunderstood as providing an independent basis for withholding documents from the public, Congress, or the courts, which in turn can undermine transparency, as well as public trust in government.”<sup>70</sup>

The report offered 40 remedial recommendations for consideration by the president. Among these were:

- Simplifying the definition of controlled unclassified information (CUI) to “All unclassified information for which, pursuant to statute, regulation, or departmental or agency policy, there is a compelling requirement for safeguarding and/or dissemination controls”<sup>71</sup>
- Expanding the scope of the CUI framework “to include all information falling within the definition of CUI in the possession or under the control of the Executive Branch of the Federal Government”<sup>72</sup>
- Making the expanded CUI framework “the single categorical designation used to identify, safeguard, and disseminate unclassified information”<sup>73</sup>
- Setting a presidentially imposed “moratorium on efforts within the Executive Branch to define or develop new SBU categories outside of the CUI Framework”<sup>74</sup>
- Following a prescribed four-step process for designating CUI
- Establishing “standards for personnel possessing the authority and/or necessary qualifications for identifying information as CUI”<sup>75</sup>
- Requiring each agency to establish a program to manage its CUI, including, at a minimum, “Senior Officials responsible on behalf of the agency head for recommending CUI Designations, providing training, CUI management, and oversight of agency CUI activities”<sup>76</sup>

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- Simplifying CUI categories and markings
- Establishing standard markings and guidance
- Clarifying that “the CUI Framework and FOIA are entirely separate and that CUI markings have no bearing on whether records are exempt from release under FOIA”<sup>77</sup>
- Clarifying “that a CUI marking is not a basis for withholding information from Congress or the Judiciary”<sup>78</sup>
- Establishing a life cycle for all CUI information to be, with some specified exceptions, decontrolled after ten years
- Authorizing agencies “to impose administrative sanctions for repeated non-compliance with CUI policies or with CUI safeguard or dissemination control requirements”

The president’s May 27 memorandum mandating the CUI task force also directed Assistant to the President for National Security Affairs James L. Jones to review security classification policy and procedures prescribed by E.O. 12958, as amended, and to submit recommendations and proposed revisions to the order, particularly regarding the establishment of a National Declassification Center, addressing overclassification, facilitating greater sharing of classified information, appropriate prohibition of reclassification, and relevant considerations regarding the electronic information environment.<sup>79</sup>

Shortly thereafter, the White House set up an Internet blog—the Declassification Policy Forum—to receive solicited suggestions about the reform of E.O. 12958 and the classification process. These suggestions were to be considered for the final recommendations sent to the president.<sup>80</sup> After the blog was terminated in mid-July, a number of participating public advocacy organizations and individuals became concerned that the resulting recommendations and proposed revisions to E.O. 12958 requested by the president would be delivered by the national security adviser without an opportunity for further comment. Their August 1 request for such a comment opportunity, however, was denied by the national security adviser a month later. Expressing appreciation for the comments received, Jones indicated that “it is essential to preserve the confidentiality of the President’s deliberative process regarding these complex issues that stem from the President’s constitutional authority to protect the national security” and, for that reason, “we cannot agree to make public a highly deliberative draft containing recommended changes in the order.” Shortly thereafter, an August 4 draft of an executive order amending E.O. 12958 was disclosed by *Secrecy News*.<sup>81</sup> Prepared by an interagency task force, the draft, it was noted, remained subject to revision and had not yet been formally transmitted to the White House.

The final version of the new directive was issued on December 29 as E.O. 13526, together with a presidential implementation memorandum and a designation of officials having original classification authority.<sup>82</sup> Among the significant features of the new classified information order are

- Restoring the standards that, where “there is significant doubt about the need to classify information, it shall not be classified,” and where “there

is significant doubt about the appropriate level of classification, it shall be classified at the lower level”<sup>83</sup>

- Emphasizing the requirement that the “unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security”<sup>84</sup>
- Prescribing a new fundamental principle that “No information may remain classified indefinitely”<sup>85</sup>
- Prohibiting the reclassification of information after its declassification and release to the public under proper authority except when agencies can comply with specified restrictions<sup>86</sup>
- Requiring agency heads to “complete on a periodic basis a comprehensive review of the agency’s classification guidance, particularly classification guidelines, to ensure the guidance reflects current circumstances and to identify classified information that no longer requires protection and can be declassified”<sup>87</sup>
- Establishing “within the National Archives a National Declassification Center to streamline declassification processes, facilitate quality-assurance measures, and implement standardized training regarding the declassification of records determined to have permanent historical value”<sup>88</sup>
- Facilitating approved information sharing by promoting maximum possible access to classified information by persons who meet standard criteria for access<sup>89</sup>
- Eliminating an intelligence community veto of declassification decisions made by the Interagency Security Classification Appeals Panel, which had been granted by the prior administration<sup>90</sup>

Asked about the impact of the new arrangements, one close observer, Steven Aftergood, the director of the Project on Government Secrecy at the Federation of American Scientists, reportedly said: “Everything depends on the faithful implementation by the agencies, but there are some real innovations here.”<sup>91</sup> In an editorial commending the recent reforms, the *Washington Post* noted that additional recommendations “to design a more fundamental transformation of the security classification system” were expected from the president’s national security adviser. Hope was expressed that those recommendations would result “in a balance that significantly increases the openness that the president seeks.”<sup>92</sup>

## Conclusion

With the election of Barack Obama to the presidency in 2008, there was an expectation in various quarters that he would eliminate or reverse, to some degree, the secrecy policies and practices of the prior administration. The fulfillment of that expectation, however, has been neither as thorough nor as rapid as anticipated by some. Why?

In a campaign for high political office, many issues and policy areas are equal in status for candidates, although some have tactical or strategic importance for winning votes and support in key geographical locales or among particular

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groups. It is likely that, for candidate Obama, transparency and openness in government was one of those matters, among many, that were sincerely important to him. Arriving at the Oval Office, however, real conditions were in play, and the many considerations of the campaign portfolio suddenly became prioritized. The need for responses to a worldwide recession, a collapsing domestic financial structure, and a failing American economy, along with foreign policy necessities concerning Iraq and Afghanistan, as well as other compelling demands, overrode, at least for the moment, openness commitments of the campaign. To top things off, a marathon effort to reform health care grew into a heated sprint in an unsuccessful effort to deliver legislation to the president's desk late in the year, consuming most of the remaining oxygen in the policy environment.

Handling all of these matters, the new president had little time to deal with a legacy of policy momentum. Sure, there was a pioneering directive on FOIA administration, but, as old sailors well know, it takes planning and time to turn a huge ship (of state). Presciently, Meredith Fuchs, general counsel of the National Security Archive, commenting on the sustained, if not somewhat increased volume of FOIA lawsuits in 2009, said she suspected that the Obama administration reflexively defended decisions made years earlier during the Bush administration to withhold requested records.<sup>93</sup>

It is also possible, in a similar way, that government lawyers were serving the new regime all too well, defending the federal government, the executive branch, or the president, when consideration might well have been given to the American citizenry as their client.

The new president, upon arrival at the institution, found a presidency greatly strengthened by the prior occupant of the position. Although he did not seek such authority, he may well have thought that he could exercise this power in a better way than did his predecessor, and he apparently was not willing to concede any of it to Congress or the courts. This power was to be retained.

Finally, there may be something of a tendency on the part of the Obama administration, seeking, as it does, to better apply information technology (IT) to achieve its objectives, to over-emphasize the use of IT for the proactive output of government information. At worst, this approach was realized in the propagandistic and censorial Committee on Public Information of the World War I era. In a more balanced view, the FOIA was legislated to provide the public with a procedure to gain access to "unpublished" government information. The open government initiative prescribed by the OMB directive of December 8, 2009, provides an offset to such proactive output—allowing the public to contribute ideas to government policymaking. There is, of course, no guarantee that such public input will be of desirable quality or usefulness. Regarding this aspect of the policy statement, Steven Aftergood at the Federation of American Scientists recently commented that "The quality of public comments on the development of the open government directive last summer, which sometimes suffered from digressions into extraneous matters, was not consistently encouraging on that note."<sup>94</sup> Members of Congress have similar experience with constituent communiqués, which sometimes reflect misunderstanding or insufficient knowledge about public policy issues. They have the resources of congressional support agencies to draw upon to provide remedial educational information.

It has been said that fashion is something that goes in one year and out the other. Certainly open government is not a matter of fashion, and certainly the Obama administration has more than one year to accomplish its goals and fulfill its promises.

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