Examining the Obama administration's open government promises

"My administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration."

- President Barack H. Obama (January 21, 2009)

Last year, President Obama entered into office with a pointed mandate for federal agencies. In a series of memoranda and executive orders issued during his administration's opening weeks, Obama set a high bar for government transparency on his watch. His initiatives ranged from increasing Freedom of Information Act (FOIA) compliance, to undertaking a government-wide review of document classification standards.

These changes were welcomed by open government advocates, who had been confronted by a culture of burgeoning secrecy during the previous eight years. In January of last year, the National Security Archive's Thomas Blanton called Obama's agenda "the earliest and most emphatic call for open government from any president in history."

The years of the Bush administration had been defined by a proliferation of secret programs, and by systemic backsliding on a wide range of federal records policies. For instance, the administration's guidance to executive agencies on FOIA requests was to default on the side of nondisclosure. President Bush also enacted rules that would have withheld substantial volumes of presidential materials from public release.

The Obama administration's early reversal of such policies created expectations that a sea change in governmental transparency was underway. As is the case in politics, the ensuing reality has been more muddled. The past months have featured several substantive reforms, but they have also demonstrated that the Obama White House has been hesitant to break with some of the secrecy policies favored by its predecessors.

Government record reforms
The Obama administration's earliest burst of open government activity centered on federal records reforms. Within hours of his inauguration, President Obama articulated his vision for a new era in government transparency. Subsequent White House memos expanded on this premise, setting out specific transparency initiatives for federal agencies.

In May of 2009, Obama ordered his staff to review Executive Order 12958 – a 1995 directive dealing with national security classification. The President's order called for the establishment of a National Declassification Center, and mandated the creation of guidelines to reduce the over-classification of government documents. It also explicitly sought to reverse the Bush-era practice of reclassifying information that had already been released to the public.

President Obama also immediately rolled back a Bush-era executive order that had governed the release of presidential records. The Bush guidelines allowed sitting Vice-Presidents, or designated representatives of former Presidents, to withhold presidential records from public disclosure. The guidelines contained no timeline for disclosure review.

Previously, only sitting or former Presidents were allowed to invoke executive privilege to withhold records. Such privilege determinations also had to be made within 30 days. Obama's records guidelines largely reinstated these standards.

Attempts to overhaul FOIA
In January of 2009, President Obama issued a directive to federal agencies on FOIA compliance, seeking to expedite the release of material through the Freedom of Information Act. Obama's order not only overturned the Bush-era presumption of nondisclosure, it also called for the creation of new FOIA guidelines for federal agencies. Since then, FOIA personnel from across the federal bureaucracy have been working to implement new FOIA procedures. For instance, FOIA staff for the Department of Justice met in June of this year to discuss methods for improving FOIA performance.

A Freedom of Information Act overhaul has been necessary for some time. Those who have used FOIA know that it has never been a terribly speedy or efficacious process. Federal agencies have long dealt with an immense

FOIA backlog, and many information releases come as the result of litigation, rather than through voluntary agency disclosures.

Earlier this year, the National Security Archive at George Washington University undertook an audit of FOIA compliance by federal agencies. The audit's purpose was to test the impact of President Obama's FOIA guidance on actual outcomes. The results indicate that systemic FOIA reform has yet to take hold – over 52 agencies were unable to demonstrate that they had undertaken FOIA reforms as urged by the White House.

Defending the state secrets privilege

In September of 2009, Attorney General Eric Holder issued guidelines that detailed when the administration would invoke the so-called "state secrets privilege." Since 1953, federal courts have allowed the government to withhold certain kinds of national security information, when that information might be revealed in a civil court case.

The Bush administration was widely criticized for its broad use of this doctrine to prevent the disclosure of legally controversial actions, such as its warrantless wiretapping program. The Obama administration eventually moved to address such concerns via new guidelines set out by the Department of Justice. The opening paragraph of Attorney General Holder's memo notes that:

"The Department is adopting these policies and procedures to strengthen public confidence that the U.S. Government will invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake …"

Holder's guidelines indicate a desire to break form the recent past, during which time the state secrets privilege was used quite expansively. In practice, however, Justice Department attorneys have largely followed the state secrets paradigm utilized by their predecessors in the Bush administration.

State secrets privilege in the *Al-Haramain* case

This trend is illustrated by the government's arguments in the *Al-Haramain Islamic Foundation v. Obama* case. This litigation began during the Bush administration, and has continued until the present day. A glance through

the briefs reveals that officials in both administrations used similar legal arguments to try to dismiss the case.

In 2004, the Bush administration designated the Al-Haramain Islamic Foundation as a global terrorist organization, and froze its assets. Al-Haramain is a Saudi charity that has been censured by the United Nations Security Council, and has been implicated in international financial fraud by U.S. officials.

Al-Haramain challenged its terrorist designation, and its attorneys sought a variety of government documents as part of their discovery process. Among these papers was an inadvertently released, classified document indicating that the organization had been surveilled outside of the confines of the Foreign Intelligence Surveillaence Act (FISA). Since 1978, FISA has been the sole avenue available for national security wiretapping under American law.

Al-Haramin's attorneys subsequently sued the government for damages related to the warrantless wiretapping of their clients. They presented the classified document in question to the court, hoping to have it admitted it as evidence. The government contended that the document was protected by the states secrets privilege, and it urged the court to terminate the litigation.

The state secrets doctrine can be narrowly applied, in order to protect specific pieces of information from disclosure during civil trials. However, the briefs in the *Al-Haramain* case suggest a more expansive approach – they seek the dismissal of an entire lawsuit in which a classified program may be touched upon in general. Even after a federal judge ruled that Al-Haramain could only continue its court fight without access to the classified document, the DOJ continued to argue for dismissal.

This sort of approach was used extensively by the Bush administration to prevent scrutiny of some of its covert – and legally questionable – programs. It was also explicitly criticized by candidate Barack Obama while on the campaign trail. Months after President Obama took office, however, lawyers in his Justice Department were making essentially the same arguments.

The stakes in the state secrets debate
The problem with an expansive application of the state secrets doctrine is that it can provide cover for illegal and improper actions. In fact, *Unites States v. Reynolds* - the Supreme Court case that first established the states secrets privilege – was subsequently found to have been based upon government misrepresentations.

Reynolds involved the crash of a B-29 bomber with an electronic surveillance crew aboard. Families of the crew members sued the federal government for damages, and sought Air Force accident reports as part of their litigation. The government refused to release the reports, citing a privilege to protect sensitive intelligence information. In its *Reynolds* decision, the Supreme Court ultimately agreed.

Years later, it was revealed that the government had deliberately misled the Court. Documents released in 2000 indicated that the B-29 aircraft had been in poor condition, and that no sensitive information formed the basis for the government's state secrets claim. *Reynolds* - the case that gave birth to the state secrets privilege itself - was based upon fraudulent government assertions.

In the long term, the skepticism generated by the over-use or abuse of secrecy powers can blow back on legitimate security operations. It is interesting to note that defense briefs filed in Al-Haramain's separate, financial fraud case are replete with allegations that the government used information from the warrantless wiretapping program as the basis for its criminal search warrant. The judge in the case has rejected these claims, stating that, "There is no reason to believe the activity on the part of the government regarding possible warrantless surveillance … resulted in any information being used in the affidavit in support of the search warrant."

The role of the press in government transparency
Any review of the Obama administration's open government agenda needs to encompass the entire picture. Certainly, progress is being made in the reform of federal records policies. At the same time, deficiencies persist. Beyond the state secrets issue, it is notable that President Obama has not yet convened the Civil Liberties Oversight Board created by the 9/11 Commission implementation legislation. Questions have also arisen about media access to the site of the BP oil spill, and the role of federal agencies in blocking that access.

Any political entity – from city councils to the Presidency - has a tendency to drift from its publicly stated goals without outside pressure. In matters of government transparency, this is doubly true. Organized political constituencies for these issues are comparatively small when stacked up against competing interests. Here, the American press has a fundamental role to play, by keeping open government issues part of the public dialog. By doing so, it can help ensure that the public's right to know will continue to be seen as an animating force in the creation of federal policy.

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