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# Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance

RONALD J. KROTOSZYNSKI, JR.\*

I'll tip my hat to the new constitution  
Take a bow for the new revolution  
Smile and grin at the change all around  
Pick up my guitar and play,  
Just like yesterday  
Then I'll get on my knees and pray  
We don't get fooled again  
Don't get fooled again,  
No, no!  
Yeah!  
Meet the new boss  
Same as the old boss<sup>1</sup>

## I. INTRODUCTION

As a presidential candidate, then-Senator Barack Obama promised, if elected, to oversee the most transparent administration in history.<sup>2</sup> An

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\* John S. Stone Chair, Director of Faculty Research and Professor of Law, University of Alabama School of Law. This Essay derives from my presentation at the *University of Miami Law Review's* symposium on "What Change Will Come?: The Obama Administration and the Administrative State," held on January 30, 2010, at the University of Miami in Coral Gables, Florida. I wish to thank the Editors for inviting me to participate in both the symposium and the symposium edition of the *University of Miami Law Review*. I also wish to acknowledge the generous support of the University of Alabama Law School Foundation, which facilitated this research project with a summer research grant. As always, any errors or omissions are my responsibility alone.

1. THE WHO, *Won't Get Fooled Again*, on WHO'S NEXT (MCA Records 1971).

2. See *Campaign 2008/Campaign Notebook*, HOUSTON CHRON., Dec. 21, 2007, at A14 ("Obama, touting his message of changing Washington, told a roundtable of independent voters he would not to [sic] let his administration's aides lobby him once they leave, would make government transparent and cut out lobbyists' influence."); Peter G. Gosselin & Peter Nicholas, *Clinton Lays Out New Healthcare Overhaul*, L.A. TIMES (Sept. 18, 2007), at A1 (quoting candidate Obama as stating that "[t]he real key to passing any healthcare reform is the ability to bring people together in an open, transparent process that builds a broad consensus for change."); Jim Rutenberg, *Spokesman in Waiting After Work in Campaign*, N.Y. TIMES, Nov. 8, 2008, at A18

Obama Administration, he promised, would ensure that evil lobbyists would not be permitted to advance the causes of certain unnamed, but certainly nefarious “special interests.” Consistent with this pledge, Senator Obama refused to accept political donations from lobbyists and also pledged to limit the influence of registered lobbyists in his administration.<sup>3</sup>

Certainly, in an era marked by the failure of the regulatory state to adequately regulate risk in the financial markets,<sup>4</sup> particularly in the markets for home mortgages,<sup>5</sup> a promise to run a transparent administration constituted a prudent electoral strategy. By running against “insiders” and Wall Street, and in favor of average American families and “Main Street,” candidate Obama was simply practicing smart politics. In particular, candidate Obama repeatedly suggested that the best way to thwart the undue influence of special interests would be to ensure that government operates in an open and transparent manner.<sup>6</sup> He pledged, if elected, to do just that.

Upon taking office in January 2009, President Obama quickly worked to realize these promises. For example, he immediately initiated a major review of government policies related to control of information

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(noting candidate Obama’s promise of transparency and quoting campaign spokesman Jim Gibbs after the election reiterating that “[t]he president-elect has pledged to be open, transparent and accessible”).

3. See, e.g., Patrick Healy, *Obama and Edwards Engage, Gently, on Special Interests*, N.Y. TIMES, Dec. 18, 2007, at A26 (“Speaking in northwest Iowa, Mr. Obama said, ‘Senator Edwards, who is a good guy, he’s been talking a lot about ‘I’m going to fight the lobbyists and the special interests in Washington.’” But, Mr. Obama reminded his audience, it was he who led a drive for an ethics overhaul in the Senate this year.”); Michael Luo & Christopher Drew, *Big Donors, Too, Have Seats At Obama Fund-Raising Table*, N.Y. TIMES, Aug. 5, 2008, at A1 (“Mr. Obama has pledged not to accept donations from lobbyists or political action committees registered with the federal government.”); Dan Morain & Thomas Hamburger *Obama Dogged by Ties to Donor*, L.A. TIMES, Jan. 23, 2008, at A1 (“Today, Obama campaigns for president as a new kind of politician, less beholden to special interests than his opponents. He and his staff regularly contrast his policy of refusing to accept donations from lobbyists with Clinton’s practices.”); Lynn Sweet, *Not ‘in my White House’: Obama Softens Stump Speech Pledge Not to Employ Lobbyists*, CHI. SUN TIMES, Dec. 16, 2007, at A24 (“On a blitz through northeastern Iowa since Thursday, people continually asked Obama about how he could curb the power of lobbyists and special interests. His simple, compelling, but, it turns out, incomplete answer—ban them from the White House—earns him applause.”).

4. See, e.g., Olufunmilayo B. Arewa, *Risky Business: The Credit Crisis and Failure (Part I)*, 104 NW. U. L. REV. COLLOQUY 398 (2010), <http://www.law.northwestern.edu/lawreview/colloquy/2010/14/LRColl2010n14Arewa.pdf>; Charles K. Whitehead, *Reframing Financial Regulation*, 90 B.U. L. REV. 1 (2010).

5. See Olufunmilayo B. Arewa, *Risky Business: The Credit Crisis and Failure (Part III)*, 104 NW. U. L. REV. COLLOQUY 441, 447–51 (2010), available at <http://www.law.northwestern.edu/lawreview/colloquy/2010/16/LRColl2010n16Arewa.pdf>; Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035, 1036–45, 1070–75 (2010).

6. See *infra* note 10 and accompanying text.

possessed by the government.<sup>7</sup> Promising “a clean break from business as usual,” President Obama also established new guidelines limiting future lobbying by members of his administration.<sup>8</sup>

Politics and governance, however, are different endeavors. Indeed, politics, which in the modern-era largely consists of building up a brand image through a carefully orchestrated mass media campaign,<sup>9</sup> is much easier to do well than actually governing. Governing, under the best of circumstances, is difficult because so many questions inevitably produce win-lose outcomes. Those who will benefit from new government policies will certainly advocate for them, but just as surely those who will suffer from them will work against them with equal vigor. Moving from the baseline can be very difficult, and sometimes proves to be impossible.

Health care reform provides a useful illustration of these principles, and these inevitable conflicts, in action. As a candidate for president, Senator Obama repeatedly pledged to oversee the enactment and implementation of comprehensive national health care reform legislation. Consistent with his populist, outsider appeal to voters, he also promised, over a half dozen times, that all negotiations related to the comprehensive health care legislation would be, quite literally, carried live on cable television: “We’ll have the negotiations televised on C-SPAN . . . .”<sup>10</sup> Of course, transparency in theory can often prove to be an easier proposition than transparency in practice, as President Obama learned during the long legislative slog toward a bill capable of securing passage in both houses of Congress.<sup>11</sup> And, when the final negotiations over the

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7. See *infra* Section III and accompanying text.

8. Sheryl Gay Stolberg, *On First Day, Obama Quickly Sets a New Tone*, N.Y. TIMES, Jan. 22, 2009, at A1 (“Mr. Obama called the moves, which overturned two policies of his predecessor, ‘a clean break from business as usual.’ Coupled with Tuesday’s Inaugural Address, which repudiated the Bush administration’s decisions on everything from science policy to fighting terrorism, the actions were another sign of the new president’s effort to emphasize an across-the-board shift in priorities, values and tone.”).

9. See T.E. PATTERSON & R.D. MCCLURE, *POLITICAL ADVERTISING: VOTER REACTION TO TELEVISED POLITICAL COMMERCIALS* 7 (1974) (“Critics contend that televised ads fail to provide the voters meaningful information, that they degrade the electoral process by selling candidates as if they were soap, that they emphasize image-making while ignoring political issues, and that they are designed to influence the least interested—and most easily misled—voters.”); Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L.J. 663, 664–73 (1992) (noting the shortcomings of political campaigns based on 30-second television and radio advertisements that mimic the techniques used to sell mass-produced commercial products).

10. See Meredith Oakley, Editorial, *Then and Now in Game of Politics*, ARK. DEMOCRAT-GAZETTE, Apr. 2, 2010, at 19 (quoting then-candidate Obama on this point and noting that “[w]ell, as we all know, it didn’t happen.”).

11. See Erica Warner, *C-SPAN Remark Bedevils President*, TIMES-PICAYUNE (New Orleans), Jan. 7, 2010, at A4.

precise content of the 2010 Patient Protection and Affordable Care Act<sup>12</sup> took place between the White House and the Democratic congressional leadership, the negotiations were not carried live on C-SPAN, contrary to the President's earlier promise.<sup>13</sup>

It would be easy to take pot shots at the Obama Administration for this about-face, but doing so would not advance our understanding of the relationship between transparency and governance very much, if at all. As a preliminary matter, however, it seems to me that one cannot, *ex ante*, know in a given circumstance whether transparency will advance or impede the goal of effective, competent governance. I suspect that in some cases transparency might enhance the probability of a positive outcome, but that in other cases it might have an opposite effect. In any given case, then, it is impossible to know whether transparency, by itself, will enhance or impede the project of good governance.<sup>14</sup>

Nevertheless, since taking office, the Obama Administration has worked assiduously to advance three general principles in the operation of executive departments and administrative agencies: "transparency, public participation, and collaboration."<sup>15</sup> Although it is certainly true that the ends do not inevitably justify the means used to achieve them, results matter. For myself, a focus on substance, rather than process, recommends itself as the primary metric for judging the performance of federal agencies.<sup>16</sup> To date, however, the Obama Administration seems more interested in and concerned with matters of process, including initiatives aimed at making the business of the various agencies of the federal government more open to the general public in conjunction with efforts to encourage citizen engagement with the federal government in agency decision-making. Whether these process-based goals will lead to better governance, however, remains a point open to debate.

This Essay considers the Obama Administration's transparency and open-government initiatives. It also considers the ways in which the Obama Administration has arguably failed to live up to its promises of

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12. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010).

13. *See supra* note 10.

14. *See* CHRISTOPHER EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990). *But cf.* Patricia M. Wald, *The "New Administrative Law"—With the Same Old Judges In It?*, 1991 *DUKE L.J.* 647, 657–59 (1991) (questioning the ability of federal judges to work in partnership with executive branch personnel to achieve Edley's collaborative vision in the service of effective governance).

15. Transparency and Open Government: Memorandum for the Heads of Exec. Dep'ts and Agencies, 74 *Fed. Reg.* 4685 (Jan. 21, 2009) [hereinafter *Transparency Memorandum*].

16. *See* Peter H. Schuck, Book Review, *Is a Competent Federal Government Becoming Oxy-moronic?*, 77 *GEO. WASH. L. REV.* 973 (2009); *see also* EDLEY, *supra* note 14.

open, transparent government in some important specific instances.<sup>17</sup> Finally, it considers the potential utility of transparency and open government to securing effective, competent governance.<sup>18</sup> Although it would be quite wrong to focus solely on outcomes, and to ignore the importance of process entirely, in the end citizens want and expect a competent, effective, and reasonably efficient federal government.<sup>19</sup> Rather than commit to generic process values that will apply always and everywhere, it might advance the project of good governance more effectively if the administration were to tailor process, at least to some degree, to the precise nature of the problem at issue.<sup>20</sup>

## II. THE NEED FOR EFFECTIVE GOVERNANCE

As a native of the Mississippi Gulf Coast, with deep and long-standing ties to New Orleans, the perils of an incompetent government are perhaps more obvious to me than they might otherwise be. If anyone needs an object lesson in the importance of administrative competence, the aftermath of Hurricane Katrina speaks volumes about the ill effects of incompetent agency action.

FEMA's response to Hurricane Katrina's aftermath, both in New Orleans and also along the Mississippi Gulf Coast, was more than just a failure by a single government administrator, Michael "Brownie, you're doing a heckuva job" Brown.<sup>21</sup> Instead, failure to respond effectively to Katrina constituted the failure of an entire administrative agency to think carefully about the logistical requirements of a worst-case scenario hurricane along the central Gulf Coast. To blame a single administrator would be convenient, easy, and perhaps even deeply satisfying, but the

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17. See *infra* Section IV and accompanying notes.

18. See *infra* Section V and accompanying notes.

19. See Schuck, *supra* note 16, at 973–76, 991 (arguing that the Bush Administration failed to deliver competent and effective government services reliably and failed systematically in a number of important cases, creating a “sink of incompetence (or worse)” at the federal level of government).

20. I do not mean to suggest that process values are irrelevant; in many cases, well-designed agency procedures can and will help to ensure desirable outcomes. See *Ethyl Corp. v. EPA*, 541 F.2d 1, 66–68 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring). Instead, my more limited point is that we care about procedure primarily, although not exclusively, because of the relationship between process and outcomes. In fact, academic literature probably overstates the importance of substance and understates the contributions of process to good policy outcomes. See Schuck, *supra* note 16, at 975 (“It is the substantive merits and politics of policy proposals that almost always dominates public debates, not the often invisible, mundane processes of public administration.”). As Professor Schuck has noted, “[w]hereas the substance of policy design is considered sexy, the process of policy administration is usually seen as, well, boring.” *Id.*

21. See, e.g., Jason DeParle, *Orphaned*, N.Y. TIMES MAG., Aug. 27, 2006, at 26; Eric Lipton & Scott Shane, *Homeland Security Chief Defends Federal Response*, N.Y. TIMES, Sept. 4, 2005, at A26; Editorial, *Mr. Bush's Storm*, WASH. POST, Sept. 8, 2005, at A28.

problem demonstrated by FEMA's abject incompetence was—and remains—a great deal more complicated.

FEMA's failure had many authors. They included not only Michael Brown, but also professional staff at FEMA, prior FEMA directors, and the relevant committees of jurisdiction in Congress that conducted meaningful oversight of the agency only *after* the disaster of the Louisiana Superdome and Ernest N. Morial New Orleans Convention Center. And one should not forget the U.S. Army Corps of Engineers, the government agency responsible for both the construction and maintenance of the protective levee system around metropolitan New Orleans. To this list, one can and should also add the congressional committees charged with oversight of both FEMA and the U.S. Army Corps of Engineers.

It would be convenient to reduce the failure of government to address human suffering on a catastrophic scale to President George W. Bush simply making a bad choice for a FEMA director and to the Senate erring by confirming this pick. However, for better or worse, for an entity like FEMA to fail so spectacularly entails more than a single bad pick at the top. So, if you ask, "why should we care about administrative competence?," my response would be because lives, perhaps your life, or the life of a family member or friend, might well depend on it.

Moreover, these systemic failures of governance are not particularly rare, which is a very good reason indeed to spend considerable time and energy thinking about issues associated with administrative competence. Focusing, for the moment, solely on the central Gulf Coast, the recent Deepwater Horizon oil rig disaster, and subsequent massive oil spill, provide another object lesson in administrative failure.<sup>22</sup> It would be tempting to assess all blame for the oil rig's failure and subsequent spill on BP, or on the subcontractors BP retained to work on the Macando well,<sup>23</sup> but this would simply invite history to repeat itself at some point in the not-too-distant future.

One could add to the villains list the Minerals Management Service (MMS), a division of the Department of the Interior. We have learned, through the work of investigative journalists, that the MMS maintained entirely inappropriate relationships with the entities it was ostensibly

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22. See Neil King, Jr. & Keith Johnson, *Obama Decried, Then Used, Some Bush Drilling Policies*, WALL ST. J., July 6, 2010, at A1. The Obama administration, in fact, simply continued the policies of the prior administration. *Id.* ("But, once in office, President Obama ended up backing offshore drilling, bowing to political and fiscal realities, even as his administration's own scientists and Democratic lawmakers warned about its risks.").

23. See Ben Casselman & Spencer Swartz, *BP Report Pins Most of Blame on Others*, WALL ST. J., Sept. 9, 2010, at A4; Russell Gold, *Halliburton Faulted Over Cement Job*, WALL ST. J., Sept. 9, 2010, at A4.



supposed to be regulating.<sup>24</sup> MMS employees received free trips and even illicit drugs and the services of paid sex workers from industry representatives. In turn, the MMS turned a blind eye on various and sundry applications for drilling permits. Thus, the emergency response documents for multiple major oil companies operating in the Gulf of Mexico included assessments of damage to wildlife that encompassed walrus, a marine animal that does not inhabit the Gulf of Mexico.<sup>25</sup> Because the agency failed to exercise meaningful oversight and review over these applications, those engaged in Gulf drilling were not required to have a viable emergency response plan should a worst-case oil rig failure occur.

It is obvious and easy to condemn trading oil-drilling permits for trips to Las Vegas and high quality cocaine. But the failure of the MMS runs much deeper than simply a portrait of agency capture.<sup>26</sup> Where was

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24. See John M. Broder, *U.S. to Split Up Agency Policing the Oil Industry*, N.Y. TIMES, May 12, 2010, at A1 (reporting on “revelations two years ago that some minerals management officials in Colorado accepted gifts, trips, drugs and sexual favors from oil company representatives” and noting that “[t]he Interior Department’s inspector general found numerous abuses and characterized the agency as an ethical wasteland.”). The specific allegations involving gifts of illicit drugs and prostitutes involved MMS branch offices in Colorado and Louisiana. See Alec MacGillis, *Get Out of Town!: The Case for Breaking Up the Federal Government—and Scattering It Beyond the Beltway*, WASH. POST, July 25, 2010, at B1 (noting that “it was Colorado and Louisiana branches of the Minerals Management Service that were recently implicated in scandals involving drug use, prostitution and fraternizing with energy industry officials.”).

25. See Ian Urbina, *At Issue in Gulf: Who Was in Charge?*, N.Y. TIMES, June 6, 2010, at A1 (“The rig’s ‘spill response plan,’ provided to The Times, includes a Web link for a contractor that goes to an Asian shopping Web site and also mentions the importance of protecting walrus, seals and sea lions, none of which inhabit the area of drilling. The agency approved the plan.”); Steven Mufson & Juliet Eilperin, *Lawmakers Attack Companies’ Spill Plans: ‘Cookie-Cutter’ Strategies Quote Outdated Data, Give Contact Info for Dead Expert*, WASH. POST, June 16, 2010, at A1 (“The government-mandated plans all came under attack at a congressional hearing Tuesday: Three of them listed the phone number for the same University of Miami marine science expert, Peter Lutz, who died in 2005. Four talked about the need to protect walrus, which, as Rep. Edward J. Markey (D-Mass.) dryly noted, ‘have not called the Gulf of Mexico home for 3 million years.’ The plans also mentioned protecting sea lions and seals, which aren’t found in the gulf, either.”). Obviously, if anyone had reviewed the response plans with even a modicum of care, the cookie-cutter nature of the plans, and the failure to address the problems specific to Gulf wildlife and flora, would have been obvious, indeed, totally self-evident. The inescapable conclusion, then, is that no one at MMS ever bothered to review the oil spill response plans seriously.

26. See Tennille Tracy, *Offshore-Drilling Agency Overwhelmed, Officials Say*, WALL ST. J., Sept. 9, 2010, at A4, available at <http://online.wsj.com/article/SB10001424052748703453804575479752398200726.html?KEYWORDS=federal+agency+that+regulates+offshore+drilling+rarely+conducted> (“The federal agency that regulates offshore drilling rarely conducted unannounced inspections, allowed oil-rig operators to shop around for favorable decisions and gave its inspectors financial incentives for speeding up application approvals, according to an internal report released Wednesday by the Interior Department.”); see also OUTER CONTINENTAL SHELF SAFETY OVERSIGHT BOARD, U.S. DEP’T OF THE INTERIOR, REPORT TO SECRETARY OF THE INTERIOR KEN SALAZAR 6–16, 20–26 (2010), available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=43677>.

the internal oversight of the MMS from within the Department of the Interior? In particular, where was the Interior Department's Office of Inspector General? The problems with the MMS were well documented in the press,<sup>27</sup> yet neither the Bush Administration nor the Obama Administration took any affirmative steps to bring the agency to book until *after* the Deep Water Horizon disaster and spill. Once again, this is a case not merely of one agency failing to do its job, but rather of an entire cabinet department failing to meet the minimum expectation of competence, with the people and wildlife of the Gulf region paying the price of the Interior Department's systemic failure, just as the people of the region paid the price five years earlier for FEMA's incompetence in the aftermath of Hurricane Katrina.

And, in this case, the errors did not begin and end with the MMS approving the Deepwater Horizon drilling project based on shoddy scientific and technological analyses of BP's proposed spill response. The Obama Administration's immediate policy response to the oil spill, a categorical ban on all deepwater offshore drilling, had as much to do with managing public relations as with managing drilling policy based on sound science.<sup>28</sup> The ban could jeopardize as many as 23,000 jobs.<sup>29</sup> Although it is certainly true that drilling permits should not be issued based on form filings and inadequate emergency response plans, a flat ban on granting *any* deepwater drilling permits, without any sound scientific basis, seems equally misguided; we need domestic oil production in the United States. What was—and is—needed is not closure of offshore drilling operations, but rather effective administrative oversight of the enterprise.<sup>30</sup>

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27. See, e.g., Mark Jaffe & David Olinger, *Minerals Management Service: Drilling Overseer Dysfunctional From the Start*, DENV. POST, June 6, 2010, at A1.

28. Stephen Power & Leslie Eaton, *U.S. Saw Drill Ban Killing Many Jobs*, WALL ST. J., Aug. 21, 2010, at A1.

29. *Id.*

30. See *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627 (E.D. La. 2010) (invalidating as arbitrary and capricious the Department of Interior's emergency six month moratorium on all offshore deepwater drilling issued on May 28, 2010). The court held that "[a]fter reviewing the Secretary's Report, the Moratorium Memorandum, and the Notice to Lessees, the Court is unable to divine or fathom a relationship between the findings and the immense scope of the moratorium." *Id.* at 637. As Judge Feldman explains:

The Deepwater Horizon oil spill is an unprecedented, sad, ugly and inhuman disaster. What seems clear is that the federal government has been pressed by what happened on the Deepwater Horizon into an otherwise sweeping confirmation that all Gulf deepwater drilling activities put us all in a universal threat of irreparable harm. While the implementation of regulations and a new culture of safety are supportable by the Report and the documents presented, the blanket moratorium, with no parameters, seems to assume that because one rig failed and although no one yet fully knows why, all companies and rigs drilling new wells over 500 feet also universally present an imminent danger.

It would also be a mistake, when assigning blame, to stop with the Executive Branch of the federal government. Congress, again, has a duty to conduct regular and meaningful oversight of federal executive agencies, including the Department of the Interior and the MMS.<sup>31</sup> The committees of jurisdiction in both the House of Representatives and the Senate bear no less responsibility than the Department of the Interior or the White House for permitting a lax and obviously corrupt culture take root in the MMS. Congress has a co-equal role to play in securing good governance by holding executive agencies accountable and maintaining a meaningful level of oversight that incents agencies to perform their duties in a timely and effective fashion.<sup>32</sup> In the case of MMS, as in the case of the pre-Katrina FEMA, Congress also failed to do its job adequately or effectively.

The federal government's response to Hurricane Katrina and to the Deepwater Horizon disaster raise serious issues of competence. It is easy to make grand pronouncements about the importance of "transparency, public participation, and collaboration," but at the end of the day, would a more transparent, participatory, or collaborative administrative process at FEMA or MMS have averted these systemic governmental failures? If so, then by all means, these values should be comprehensively incorporated into the DNA of agency operations across all levels and departments of the federal administrative state. If not, then perhaps we should seek a different focus. A focus, for example, on administrative competence and accountability.

In the case of FEMA, Michael Brown resigned his position quickly after the agency's failure to meet the challenge presented by post-Katrina recovery efforts in both New Orleans and along the central Gulf coast.<sup>33</sup> On the other hand, Secretary Michael Chertoff, then the head of the Department of Homeland Security, of which FEMA is a constituent part, kept his position, largely without controversy.<sup>34</sup> The operation in

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*Id.* at 638. The reasons for the blanket moratorium thus had more to do with effective public relations than with sound science or rational governance.

31. See Douglas Kriner, *Can Enhanced Oversight Repair the "Broken Branch"?*, 89 B.U. L. REV. 765, 773–87, 791–93 (2009).

32. See, e.g., THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 15–18 (2006). Mann and Ornstein argue that Congress, at least in periods of unified control of Congress and the White House, has ceased taking its constitutional oversight duties seriously, instead viewing itself, essentially, as part of the president's team. See *id.* at 155.

33. See Richard W. Stevenson, *After Days of Criticism, Emergency Director Resigns*, N.Y. TIMES, Sept. 13, 2005, at A26.

34. See Abby Goodnough, *Chertoff Pushes for More Hurricane Readiness*, N.Y. TIMES, Apr. 13, 2006, at A16 ("Homeland Security Secretary Michael Chertoff said Wednesday that he would assign federal disaster-management officials to vulnerable regions before the hurricane season begins June 1, to help local governments prepare for potential storms."). Ironically, perhaps,

New Orleans was effectively militarized, with General Russel L. Honoré taking control of a centralized rescue and response operation in the flooded neighborhoods of the Crescent City.<sup>35</sup>

The response to the Deepwater Horizon disaster took a similar path, with the director of the MMS resigning her position, but with higher ups within the Department of Interior not facing any serious scrutiny for their failure to reign in MMS before disaster struck on April 20, 2010.<sup>36</sup> For example, Department of Interior Secretary Ken Salazar remained in his position even though he had almost 18 months in which to initiate some effort at reforming the MMS, but failed to act effectively. Thus, as

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former FEMA director Michael Brown attended the meeting at which Secretary Chertoff spoke and provided an alternative analysis of where matters involving hurricane preparedness stood:

Michael D. Brown, the former director of FEMA who resigned under fire after Hurricane Katrina, attended the conference and told reporters that none of the planned improvements would work unless the agency separated from the Department of Homeland Security. He said FEMA's new director, R. David Paulison, was well intentioned but would be ineffective if he had to report to Mr. Chertoff.

"The problem is that within the Department of Homeland Security you are stifled in what you can do," said Mr. Brown, now a private consultant, who said he was visiting several clients at the conference. "I think Chief Paulison's going to have a difficult time because he's going to be told what he can say and what he can do. And once again, there will be no accountability and people will suffer."

*Id.* Thus, even in the context of an abject government failure on the scale of the federal government's response to Hurricane Katrina, the government still possesses an irresistible urge to identify a scapegoat (in this instance, Michael Brown), announce that the problem has been solved, and to move on without holding anyone else within the organization accountable for the agency's shortcomings. Why Secretary Chertoff escaped any serious professional repercussions for the Department of Homeland Security's botched Katrina response remains a mystery. Today, Chertoff works as a paid security consultant and works to sell full body scanners to the federal government, often without bothering to mention his direct financial interest in promoting these devices on his client's behalf. See Clark Hoyt, *The Sources' Stake in News*, N.Y. TIMES, Jan. 17, 2010, at WK8 (noting that Chertoff granted the *New York Times* an interview about the Christmas 2009 "underwear bomber," during which "he said full-body scanners should be deployed at airports" and observing that "Chertoff, the former secretary of homeland security, did not volunteer that he is a consultant to a company that makes such equipment" at the time of the interview).

35. Anne E. Kornblut, *Bush Tours Sites of Gulf Revitalization*, N.Y. TIMES, Oct. 12, 2005, at A19; see also Lynne Duke, *The Category 5 General*, WASH. POST, Sept. 12, 2005, at C1. In point of fact, the Department of Homeland Security and FEMA both failed, miserably, to make adequate preparations for the impact of Hurricane Katrina, and the intra-agency squabbling that took place prior to the hurricane's landfall along the Mississippi-Louisiana state line, on August 29, 2005, presents a portrait of administrative failure. See Spencer S. Hsu, *Messages Depict Disarray in Federal Katrina Response*, WASH. POST, Oct. 18, 2005, at A11.

36. Juliet Eilperin & Madonna Lebling, *Minerals Management Service's Troubles*, WASH. POST, May 29, 2010, at A8 (reporting that Elizabeth Birnbaum, director of the MMS, resigned her position on May 27, 2010, after the Deepwater Horizon disaster, and also noting a litany of problems at the agency dating back to 2008). As with Homeland Security Secretary Michael Chertoff, Interior Secretary Ken Salazar retained his position, and did so without much controversy.

with the Department of Homeland Security in the wake of Hurricane Katrina, a subordinate officer within the agency took the fall for the agency's failure to perform its duties adequately.

In thinking about the nuts and bolts of how government actually works on a day-to-day basis, it is well and good to make blanket pronouncements, such as "lobbyists have too much influence" or "government should be transparent." These global claims might well be true in many instances. But, surely, they are not universal truths. Moreover, in at least some cases adherence to a firm commitment to a particular process value might well impede, perhaps even render impossible, the attainment of specific substantive policy objectives. When these generic, ostensibly universal commitments conflict with the attainment of crucial government objectives, such as responding to a national disaster, it might prove necessary to make a hard choice between maintaining a pre-existing commitment to particular procedural rule or, in the alternative, abandoning process in order to better achieve a particular goal. This is not to say that the ends government seeks to achieve always and invariably justify the means used to achieve them, but rather that a certain flexibility might prove essential to maximizing the possibility of effective outcomes, at least in some cases.

### III. THE OBAMA ADMINISTRATION'S TRANSPARENCY AND OPEN GOVERNMENT INITIATIVES

The Obama Administration has sought to make a clean break with the secretive practices observed by the George W. Bush Administration. And, on the whole, the formal policies of the Obama Administration reflect a logical and comprehensive government-wide commitment to transparency and openness.

President Obama has strong ideas about a necessary condition for achieving effective governance—he believes, at least in general, that government should be "transparent," "participatory," and "collaborative."<sup>37</sup> Indeed, on his first day on the job, January 21, 2009, President Obama issued two memoranda that set forth his vision of how better to achieve effective government.<sup>38</sup> Given the scope and breadth of these open government initiatives, this project, and this general policy commitment to operating the federal government in an open and transparent

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37. Transparency Memorandum, *supra* note 15, at 4685.

38. See Transparency Memorandum, *supra* note 15; Freedom of Information Act: Memorandum for the Heads of Exec. Dep'ts and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter FOIA Memorandum].

fashion, plainly reflect an important administrative law priority for the new administration.<sup>39</sup>

A. *The Initiative To Increase the Transparency and Openness of the Federal Government*

The first major Obama Administration initiative on increasing the accessibility, and hence accountability, of the federal government, entitled “Transparency and Open Government,” announces that the Obama Administration “is committed to creating an unprecedented level of openness in government” and “[w]e will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration.”<sup>40</sup> Why do these things? Because “[o]penness will strengthen our democracy and promote efficiency and effectiveness in Government.”<sup>41</sup>

President Obama directed this memorandum to the heads of executive departments and agencies. In it, he instructed every agency subject to direct presidential control to undertake initiatives aimed at enhancing the transparency of the entities’ operations, expanding opportunities for citizen participation in the day-to-day operations of government, and to facilitate “collaborative” interactions between government agencies, private enterprise, and the general public.<sup>42</sup>

B. *A Presumption in Favor of Disclosure of Government-Held Information*

The second major open government initiative, also announced on January 21, 2009, involves the way the federal government processes information requests filed under the auspices of the Freedom of Information Act (FOIA).<sup>43</sup> On his first day in office, President Obama signed a second memorandum, addressing the new administration’s policy toward FOIA requests, that constitutes a radical break from the notoriously secrecy-oriented George W. Bush Administration.<sup>44</sup>

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39. See Cheryl Bolen, *Sunstein Claims New Approach to Regulation Under Obama Watch*, 78 U.S.L. WKLY. 2738, 2739 (2010) (reporting OIRA Administrator Cass R. Sunstein’s observation that the Obama Administration’s transparency initiatives constitute one of the three or four most important administrative process initiatives and also his assertion that “the administration has promoted transparency and open government in unprecedented ways,” including “using disclosure as a low-cost, high-impact regulatory tool . . .”).

40. Transparency Memorandum, *supra* note 15, at 4685.

41. *Id.*

42. *Id.*

43. See 5 U.S.C. § 552 (2006).

44. FOIA Memorandum, *supra* note 38, at 4683.

In this memorandum, President Obama explains that:

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, “sunlight is said to be the best of disinfectants.” In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.<sup>45</sup>

Thus, the Obama Administration clearly links the concepts of disclosure and accountability, arguing that without disclosure, accountability becomes more difficult to maintain.

To be sure, this is an important document that establishes a high bar in favor of disclosure of government-held information.<sup>46</sup> Indeed, the memorandum orders a reversal of the Bush Administration’s policy of broadly defending agency refusals to share government information with the public, provided that a plausible legal basis for the secrecy claim existed, in favor of a rule that provides, “[a]ll 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.”<sup>47</sup> Moreover, “[t]he presumption of disclosure should be applied to all decisions involving FOIA.”<sup>48</sup> The memorandum also includes a mandate to adopt new, information-seeker friendly rules and a general mandate that “[a]ll agencies should use modern technology to inform citizens about what is known and done by their Government.”<sup>49</sup>

In turn, Attorney General Eric Holder, in a memorandum dated March 19, 2009, issued specific interagency guidelines on the use of FOIA exemptions, including exemptions to protect information related to national security, personal privacy, privileged records, and law enforcement interests.<sup>50</sup> The new guidelines admonish agencies not to withhold information because an agency “can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption” and to consider “whether it can make a partial disclosure” when a full disclosure is not possible, thereby overturning the Department of Justice’s prior policy standard of defending an agency decision to refuse to

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45. *Id.*

46. *See id.* (“The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.”).

47. *Id.*

48. *Id.*

49. FOIA Memorandum, *supra* note 38, at 4683.

50. Office of the Attorney Gen., Freedom of Information Act (FOIA): Memorandum to the Heads of Exec. Dep’ts and Agencies (Mar. 19, 2009) [hereinafter Holder FOIA Memorandum], <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

comply with a FOIA request whenever “a sound legal basis” existed for so doing in favor of a presumption of disclosure.<sup>51</sup> As Attorney General Holder states the new policy, “an agency should not withhold information simply because it may do so legally.”<sup>52</sup>

The Holder FOIA Memorandum expressly rescinds the prior Department of Justice FOIA Memorandum, issued by then-Attorney General John Ashcroft on October 12, 2001, under which the Department of Justice announced a policy of defending any refusal to comply with a FOIA request provided that the decision did not “lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”<sup>53</sup> Under the new policy, the Department of Justice will defend refusals of FOIA requests “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>54</sup>

The Holder FOIA Memorandum also establishes a policy of voluntary, proactive disclosure of government information: Under the new policy, “agencies should readily and systematically post information online in advance of any public request.”<sup>55</sup> The idea behind this initiative is that “[p]roviding more information online reduces the need for individualized requests and may help reduce existing [FOIA request] backlogs.”<sup>56</sup>

### C. *The Open Government Directive Initiative*

In addition to its general call for transparency, participation, and collaboration, and its new FOIA-friendly policies, the Obama administration also has revised the rules governing classified information and adopted an open government directive. As President Obama explained these initiatives, “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>57</sup>

On May 27, 2009, President Obama initiated a review of government policies regarding classified and controlled information.<sup>58</sup> and on

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51. *See id.* at 1–2.

52. *Id.* at 1.

53. *Id.* at 1–2.

54. *Id.* at 2.

55. *Id.* at 3.

56. *Id.*

57. Classified Information and Controlled Unclassified Information: Memorandum for the Heads of Exec. Dep'ts and Agencies, 74 Fed. Reg. 26277 (June 1, 2009) [hereinafter Classified Information Memorandum]; *see also* Carrie Johnson, *Review of Government Secrecy Ordered*, WASH. POST, May 28, 2009, at A3.

58. *See* Classified Information Memorandum, *supra* note 57, at 26277.



December 29, 2009, he issued Executive Order 13,526, which totally revises the federal government's system of classifying information.<sup>59</sup> Like the Obama administration's new and improved FOIA policies, its policies on classifying information as secret incorporate a presumption in favor of disclosure and against classification.<sup>60</sup> Moreover, information, even if classified, must be listed for automatic declassification within a specific time frame or event; the default rule calls for declassification within ten years generally and twenty-five years for "sensitive" information.<sup>61</sup>

Executive Order 13,526 prohibits classification of information to "conceal violations of law, inefficiency, or administrative error," to "prevent embarrassment to a person, organization, or agency," or for other improper purposes.<sup>62</sup> Significantly, Executive Order 13,526 also prohibits classification of "basic scientific research information" and, to be classified, information must be "owned by, produced by or for, or is under the control of the United States government."<sup>63</sup>

In adopting Executive Order 13,526, President Obama explained, "[o]ur democratic principles require that the American people be informed of the activities of their Government."<sup>64</sup> Moreover, "our Nation's progress depends on the free flow of information both within the Government and to the American people."<sup>65</sup>

After President Obama announced that his "open government directive" was to be implemented by the OMB, OMB Director Peter Orszag released memorandum M-10-06 on December 8, 2009,<sup>66</sup> along with a report entitled "Open Government: A Progress Report to the American People."<sup>67</sup>

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59. See Exec. Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5 2010) [hereinafter Exec. Order No. 13,526]. For an overview of the Obama administration's policies on national security secrets, see William H. Leary, *Promoting Openness and Accountability by Making Classification a Two-Way Street*, THE WHITE HOUSE BLOG (Dec. 29, 2009, 2:38 PM), <http://www.whitehouse.gov/blog/2009/12/29/open/promoting-openness-and-accountability-making-classification-a-two-way-street>.

60. See Exec. Order No. 13,526, *supra* note 59, at 707 ("[i]f there is significant doubt about the need to classify information, it shall not be classified.").

61. See *id.* at 709.

62. See *id.* at 710.

63. See *id.* at 707, 710.

64. *Id.* at 707.

65. *Id.* at 707.

66. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. M-10-06: MEMORANDUM TO THE HEADS OF EXEC. DEP'TS AND AGENCIES (2009) [hereinafter Orszag Memorandum].

67. OPEN GOVERNMENT: A PROGRESS REPORT TO THE AMERICAN PEOPLE (2009) [hereinafter OMB Report], <http://www.whitehouse.gov/sites/default/files/microsites/ogi-progress-report-american-people.pdf>.

The OMB will be requiring federal agencies to adopt more transparent operating procedures that facilitate public input and participation. As Orszag states the matter, “[p]articipation allows members of the public to contribute ideas and expertise so that their government can make policies with the benefit of information that is widely dispersed in society.”<sup>68</sup> The OMB has mandated that “to increase accountability, promote informed participation by the public, and create economic opportunity, each agency shall take prompt steps to expand access to information by making it available online in open formats” and must also adopt a “presumption . . . in favor of openness.”<sup>69</sup> The mandate is meant to “create an unprecedented and sustained level of openness and accountability in every agency.”<sup>70</sup> In turn, the OMB’s report on open government describes various other White House initiatives, such as releasing White House visitor logs (a policy that the White House originally rejected and contested in federal court).<sup>71</sup>

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68. *Id.* at 1.

69. *Id.* at 2.

70. *Id.* at 4.

71. *Id.* at 2 (“Most recently, the White House, for the first time ever, began publishing the names of everyone who visits the White House.”). What the OMB Report fails to mention is that the White House adopted the policy after losing litigation pending in federal district court. The Obama Administration initially refused to disclose these records to the public. *See* Bill Dedman, *Obama Blocks List of Visitors to White House*, MSNBC.com (June 16, 2009, 4:54 PM), <http://www.msnbc.msn.com/id/31373407> (“The Obama administration is fighting to block access to names of visitors to the White House, taking up the Bush administration argument that a president doesn’t have to reveal who comes calling to influence policy decisions.”); Josh Gerstein, *W.H. Defends Bush Visitors Policy*, POLITICO (June 16, 2009, 11:00 PM), <http://www.politico.com/news/stories/0609/23805.html> (“President Barack Obama’s administration is adhering, at least for now, to a Bush administration policy that White House visitor logs are presidential records that the public has no right to see.”). A group called Citizens for Responsibility and Ethics in Washington filed a lawsuit in the U.S. District Court for the District of Columbia, seeking a judicial injunction mandating release of the White House visitor logs. *See* Michael D. Shear, *Group Files Suit Against Obama Administration for Access to Visitor Logs*, WASH. POST, Dec. 31, 2009, at A2. While the litigation remained pending before the federal courts, the White House decided to change course and released the information voluntarily. *See, e.g.*, Michael A. Fletcher, *In Shift from Prior Administrations, White House to Open Visitor List*, WASH. POST, Sept. 5, 2009, at A5. However, the district court had issued rulings suggesting that these records were subject to mandatory disclosure under FOIA, and accordingly it is difficult to ascertain whether the White House made a principled decision or rather attempted to make a virtue of a judicially-imposed necessity. *See* Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Homeland Sec., 592 F. Supp. 2d 127, 131 (D.D.C. 2009); *see also* Citizens for Responsibility & Ethics in Washington v. Dep’t of Homeland Sec., 532 F.3d 860 (D.C. Cir. 2008). The Obama administration actually appealed Judge Lamberth’s ruling to the U.S. Court of Appeals for the District of Columbia Circuit. *See Freedom of Information—FOI Act: Obama Commitment to Transparency Called into Question in FOIA Litigation*, 78 U.S.L.W. 1043 (2009) (noting that “the Obama administration has appealed that ruling” and “is raising the same defenses asserted by the Bush administration.”). Ultimately, however, the Obama Administration changed course and established a generic policy favoring release of the White House visitor logs. But, in light of the litigation history, and particularly the appeal of Judge Lamberth’s January 2009 FOIA ruling, to call this decision entirely voluntary is to engage in an excessive amount of spin. *Cf.* Michael D.

The Obama Administration has also initiated a government-wide push to require all federal agencies to maintain and utilize web-based resources to facilitate two-way communication between agencies of the federal government and the citizenry.<sup>72</sup> “Data.gov is a flagship Administration initiative intended to allow the public to easily find, access, understand, and use data that are generated by the Federal government.”<sup>73</sup> As with the Administration’s other transparency and accessibility initiatives, this policy initiative rests on the notion that “[a] vibrant democracy depends on straightforward access to high quality [government] data and tools.”<sup>74</sup> And, “[a]t the core of Data.gov is the intent to make Federal sector data more accessible and usable,” thereby “[i]ncreasing the ability of the public to discover, understand, and use the vast stores of government data” and enhancing “government accountability and unlock[ing] additional economic and social value.”<sup>75</sup>

#### D. *Revisions to the State Secrets Doctrine Policy*

The Department of Justice also released a revised policy on invoking the state secrets doctrine as a defense in federal court litigation. Released on September 23, 2009, Attorney General Holder’s memorandum limits invocation of the doctrine to circumstances in which disclosure of information “reasonably could be expected to cause significant harm to the national defense or foreign relations . . . of the United States” and also calls for narrow tailoring of invocations of the state secrets privilege.<sup>76</sup> This constitutes a more refined standard for invocation of the doctrine than that which prevailed under the George W. Bush Administration.<sup>77</sup>

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Shear, *White House Visitors Log Reflects Obama Agenda*, WASH. POST, Dec. 31, 2009, at A2 (noting that White House visitors logs have been “made public as part of President Obama’s effort to keep his promise of government transparency” but also noting that “[t]housands of entries remain somewhat mysterious, offering no explanation for the reason for the visit, and some visits are not disclosed at all, including those of visitors whose known presence at the White House would pose a national security risk.”).

72. See OFFICE OF E-GOV’T AND IT OFFICE OF MGMT. AND BUDGET, FED. CHIEF INFO. OFFICERS COUNCIL, DATA.GOV CONCEPT OF OPERATIONS DRAFT, VERSION 0.7 (2009), <http://www.ideascale.com/userimages/sub-1/736312/ConOpsFinal.pdf> [hereinafter DATA.GOV OPERATIONS DRAFT].

73. *Id.* at 4.

74. *Id.* at 5.

75. *Id.* at 6.

76. Memorandum from Attorney Gen. Eric Holder to the Heads of Exec. Dep’ts and Agencies and the Heads of Dep’t Components 1 (Sept. 23, 2009), <http://www.justice.gov/opa/documents/state-secret-privileges.pdf> [hereinafter Holder State Secrets Memorandum]; see also Charlie Savage, *Justice Dept. Planning to Limit Government’s Use of State Secrets Privilege*, N.Y. TIMES, Sept. 23, 2009, at A16.

77. Even so, however, the Obama Administration has continued to invoke the state secrets privilege in litigation involving claims associated with the federal government’s use of

E. *The Obama Administration's Campaign To Make Government More Transparent, Accessible, and Collaborative Plainly Represents a Significant and Meaningful Change of Direction from the Policies of the Bush Administration*

If one considers all of these policies in conjunction, it's clear that the Obama Administration possesses a strong commitment, in general, to openness, transparency, collaboration, and, in theory, accountability. The scope of the project is impressive, and the Obama Administration has approached questions of transparency in a consistent fashion, articulating over and over again the linkage that exists between transparency, on the one hand, and the accountability of government, on the other.

Notwithstanding the scope of this undertaking, however, it is easier to favor transparency and openness when the question presents itself as an abstract matter. When openness and transparency are likely to impede the achievement of a major administration objective, such as congressional enactment of a major health care reform bill, or when transparency makes the administration appear to be inept in responding to a major national crisis, such as the Deepwater Horizon oil spill disaster, the willingness of an administration to suit its deeds to its prior words will be tested. In many significant respects, the Obama Administration's commitment to open and transparent government seems to be more theoretical than real.

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extraordinary rendition, coupled with the use of torture (or, in the language of the Bush Administration, "coercive interrogation techniques"). See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc); see also Tom Carter, *Federal Appeals Court Adopts Obama "State Secrets" Doctrine to Block Torture Case*, GLOBALRESEARCH.CA (Sept. 9, 2010), <http://www.globalresearch.ca/index.php?context=va&aid=20969> ("The US Ninth Circuit Court of Appeals . . . dismissed a lawsuit by five victims of the CIA's 'extraordinary rendition' program against Jeppesen Dataplan, a unit of Boeing. The six-five ruling adopts as a rationale the anti-democratic 'state secrets' doctrine advocated by the Obama administration."); John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 10, 2009, at A12 ("In a closely watched case involving rendition and torture, a lawyer for the Obama administration seemed to surprise a panel of federal appeals judges on Monday by pressing ahead with an argument for preserving state secrets originally developed by the Bush administration."). The U.S. Court of Appeals for the Ninth Circuit initially rejected the state secrets defense and permitted the litigation to proceed; the Obama Administration, and Attorney General Holder's Department of Justice, sought and obtained en banc review, and prevailed on en banc review by a vote of six to five. See *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009), *rev'd en banc*, 614 F.3d 1070 (9th Cir. 2010). Writing for the panel majority, Judge Hawkins emphatically rejected the Obama Administration's arguments for applying the state secrets privilege in this litigation, explaining that "[a]ccording to the government's theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law." *Id.* at 955.

#### IV. THE OBAMA ADMINISTRATION'S COMMITMENT TO TRANSPARENCY AND OPENNESS IS FAR FROM TOTAL

Notwithstanding the seriousness and consistency with which President Obama and his team have worked to create general government policies favoring transparency and disclosure, the Administration's approach to specific issues does not always seem consistent with these high-minded theoretical commitments. Several important examples of the Administration resiling from its promise of transparency exist and merit some consideration. They include the promise to conduct health care negotiations in public (and on C-SPAN), the efforts to limit and suppress media coverage of the environmental effects of the Deepwater Horizon oil spill disaster, and the continued invocation of the state secrets privilege to insulate government contractors from any and all liability associated with extraordinary renditions and human torture.

In citing these counterexamples, I do not seek to diminish or ignore the importance of the Administration's considerable—and commendable—efforts to make government operations more transparent in an effort to enhance accountability.<sup>78</sup> However, it is very easy to proclaim an abstract commitment to transparency and accountability, and another matter entirely to practice these virtues when doing so will cast the Administration in an unfavorable light. If President Obama truly values transparency, however, his failure to consistently practice it does seem troubling. At a minimum, it reflects a kind of hypocrisy that seems inconsistent with his promise of overseeing a clean and accountable government as a presidential candidate.

At a broader level of analysis, however, the counterexamples might well constitute exemplars of why an absolute commitment to transparency is not a particularly desirable policy. In other words, if transparency is the enemy either of government effectiveness or achieving progress on a major social problem, such as the millions of uninsured persons living in the United States, perhaps the larger lesson is that the Administration should rethink whether transparency should be an absolute, rather than relative, value.

The easiest, and perhaps most notorious, example of the Obama Administration breaking with its promise of total transparency involves the negotiations associated with drafting and passing a major health care reform bill. During the 2008 presidential campaign, then-Senator Obama repeatedly promised to run a lobbyist-free administration that would conduct the people's business out in the open. With respect to negotiations regarding the scope and content of health care legislation, Senator

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78. *See supra* Sections III.A–D.

Obama said that his approach “would involve ‘bringing all parties together, and broadcasting those negotiations on C-SPAN so that the American people can see what the choices are.’”<sup>79</sup> At a national forum on health care reform, which, unlike the final negotiations on the health care reform bill, *was* carried live on C-SPAN, Senator John McCain noted that “eight times you said that negotiations on health-care reform would be conducted with the C-SPAN cameras,” suggesting that President Obama had not lived up to this campaign promise.<sup>80</sup> In point of fact, President Obama did not honor this commitment—the negotiations conducted on the bill took place in private, outside the view of the public and the press.<sup>81</sup>

Thus, the President’s promise to televise the health care bill negotiations came to naught. Despite C-SPAN President Brian Lamb’s public offer to televise the negotiations on C-SPAN, the Administration resiled from its earlier commitment to an open process in order to ensure that “special interests” did not secure “corrupt deals.”<sup>82</sup> So, it would seem that sunshine, contrary to Justice Brandeis’s admonition, is not always the best of disinfectants; perhaps the conduct of the government’s business under the watchful gaze of the public and the press works to better the quality of both the deliberative process and the ultimate government policy most of the time, but not when one is negotiating legislation that would radically expand the government’s control of 1/6 of the national economy.

It seems rather odd to require transparency in FDA proceedings to regulate raw oysters to prevent vibrio infections,<sup>83</sup> but not in the final

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79. See Warner, *supra* note 11, at A4; see also Peter Nicholas, *Transparency Pledge Cracked: Talks on TV Were Promised; Closed Doors Are Reality*, CHI. TRIB., Feb. 1, 2010, at C10 (“Instead of health care negotiations broadcast on C-SPAN, as candidate Obama famously promised, the fate of the landmark bill is being hashed out in private. And recent polls indicate that the public has lowered its expectations about the prospect of a more open government.”); James Rainey, *Reporters’ Dim View of Transparency*, L.A. TIMES, Jan. 20, 2010, at D1 (“It’s been clear for months—and especially now as Democrats try to fashion a bill, even as a Massachusetts senate race erases their filibuster-proof majority—that the president and the majority party have no intention of broadcasting the healthcare endgame, if they ever did.”).

80. Shailagh Murray & Anne E. Kornblut, *Stark Divide on Display at Health Summit*, WASH. POST, Feb. 26, 2010, at A1; see also Bob Keefe, *Georgia GOP: Put Health Talks on TV*, ATLANTA J.-CONST., Jan. 12, 2010, at A1 (“President Barack Obama pledged repeatedly on the campaign trail in 2008 that all of the health care debate would be televised on C-SPAN.”).

81. See Nicholas, *supra* note 79, at C10.

82. See Paul Greenburg, *The Transformation of Barack Obama: Surprise Us, Mr. President*, SUN-SENTINEL (Ft. Lauderdale), Jan. 20, 2010, at 6; Editorial, *Let C-SPAN In: President Should Keep His Campaign Promise, Encourage Televised Health Care Proceedings*, HOUSTON CHRON., Jan. 16, 2010, at B6.

83. See Gardiner Harris, *Food Agency Delays Ban on Oysters After Outcry*, N.Y. TIMES, NOV. 14, 2009, at A11.

negotiations for the health care bill. Words certainly matter, but deeds matter even more.

An even more disturbing example of the Obama Administration failing to observe its self-proclaimed standards of transparency took place over the late spring and early summer of 2010, following the catastrophic failure of the Deepwater Horizon oil rig in the waters of the north-central Gulf of Mexico. On April 20, 2010, following a massive explosion on the platform that killed eleven rig workers, the blowout preventer failed and the pipes connected to the oil well began to spew literally millions of gallons of crude oil into the waters of the Gulf of Mexico.<sup>84</sup>

In the aftermath of the rig's failure, the environmental effects of the disaster were inescapable, and both print and broadcast news featured heartrending pictures of oiled turtles and sea birds.<sup>85</sup> Even cable news stations generally sympathetic to the Obama Administration, such as MSNBC, featured increasingly critical coverage of the Administration's response to the oil spill disaster in general and, in particular, to the Administration's reliance on BP to lead the clean up response. The narrative, in general, was that this approach put the perpetrator of a major environmental crime in charge of treating the victims' injuries.

Sadly, it seems that all presidential administrations, regardless of political party, are prone to suppress bad news whenever possible. In June 2010, at the height of the negative media coverage of the government's ineffectual efforts to stop the spill and clean up the oil, the Coast Guard issued regulations banning anyone from approaching disaster response team members, even on public beaches or in waters otherwise open to the public.<sup>86</sup> On June 30, 2010, the Coast Guard Unified Command responding to the Deep Water Horizon oil spill disaster issued regulations that prohibit anyone, including journalists, from coming within sixty-five feet (twenty meters) of *any* Deepwater Horizon oil disaster recovery operation, including, for example, beach clean up operations and oil-resistant booms placed in coastal waters.<sup>87</sup> The Federal

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84. Steven Mufson, *Spilled Oil Burned in Gulf in Hopes of Saving Coast*, WASH. POST, Apr. 29, 2010, at A1; Susan Saulny & John M. Broder, *Containment Effort Inches Closer to Oil Target*, N.Y. TIMES, May 8, 2010, at A12.

85. See, e.g., Shaila Dewan, *Sifting a Range of Suspects as Gulf Wildlife Dies*, N.Y. TIMES, July 15, 2010, at A1.

86. See Patrik Jonsson, *Gulf Oil Spill: Al Gore Slams BP for Lack of Media Access*, CHRISTIAN SCI. MONITOR (June 15, 2010), <http://www.csmonitor.com/USA/Politics/2010/0615/Gulf-oil-spill-Al-Gore-slams-BP-for-lack-of-media-access>; Jeremy W. Peters, *Efforts in Gulf of Mexico to Limit Flow of News About the Spill*, N.Y. TIMES, June 10, 2010, at A20.

87. See Press Release, Deepwater Horizon Incident Joint Info. Ctr., Coast Guard Establishes 20-Meter Safety Zone Around All Deepwater Horizon Protective Boom Operations (June 30, 2010), <http://www.restorethegulf.gov/release/2010/06/30/coast-guard-establishes-20-meter-safety->

Aviation Administration also banned flights below 3,000 feet proximate to the spill or recovery effort.<sup>88</sup>

On July 12, 2010, after intense public criticism, the Coast Guard revised the policy to permit “credentialed media” more liberal access to clean up sites.<sup>89</sup> While it was in force, however, the directive had the effect of rendering it virtually impossible to photograph the adverse environmental effects of the spill on both wildlife and beaches along the central Gulf Coast.

Although it is entirely understandable that the Obama Administration would seek to minimize the political damage caused by its inept response to the Deepwater Horizon disaster, the desire to suppress images that could be damaging to the Administration’s credibility with the public seems unreconcilable with its earlier, and more formal, pronouncements on transparent, participatory, and collaborative governance.<sup>90</sup>

My third example is arguably the most disturbing. One could simply write off candidate Obama’s promise to televise the health care legislation negotiations as a poorly conceived idea that simply reflected bad political judgment. It was a promise made during the heat of the campaign, and perhaps without sufficient forethought.<sup>91</sup>

The effort to suppress adverse press coverage of the Deepwater Horizon disaster was both stupid and, at the same time, wholly ineffective. Given the scope of the spill, which was visible from space by satellite, trying to prevent journalists from filming or speaking with beach cleanup crews was unlikely to significantly impede the media’s ability to convey the horrific scale of the oil spill’s environmental impact. Thus, the policy, while it lasted, did very little to affect the substance of the negative press coverage and simply made BP and the Obama Administration appear desperate (having already proved themselves to be both

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zone-around-all-deepwater-horizon-protect; see also Chris Kirkham, *Coast Guard Puts Puts Up 65-Foot Cleanup Buffer*, TIMES-PICAYUNE (New Orleans) (July 2, 2010), <http://nola.live.advance.net/news/t-p/frontpage/index.ssf?/base/news-15/127805231036310.xml&coll=1>.

88. Kirkham, *supra* note 87.

89. See Press Release, Deepwater Horizon Incident Joint Info. Ctr., Coast Guard Announces New Procedures for Media Access to Boom Safety Zones (July 12, 2010), <http://www.restorethegulf.gov/release/2010/07/12/coast-guard-announces-new-procedures-media-access-boom-safety-zones>; see also Chris Kirkham, *Media Allowed to Enter ‘Safety Zones’*, TIMES-PICAYUNE (New Orleans), July 14, 2010, at A6.

90. See Transparency Memorandum, *supra* note 15, at 4685 (“Transparency promotes accountability and provides information for citizens about what their government is doing.”). Or, in the case of the sluggish response to the Deepwater Horizon disaster, what the government and BP *were not* doing.

91. As Speaker of the House Nancy Pelosi wryly observed when questioned about President Obama’s C-SPAN commitment, “Really? . . . There are a number of things that [President Obama] swore on the campaign trail.” Keefe, *supra* note 80, at A1.



ineffective and incompetent). The third example, involving the invocation of the state secrets privilege, reflects a much darker side of the Obama Administration and suggests, perhaps, that The Who's rather pessimistic assessment of the possibility of "change we can believe in" was perhaps spot-on.<sup>92</sup>

The Obama Administration has continued to press the state secrets privilege (initially invoked by the George W. Bush Department of Justice) to block litigation involving credible allegations of government contractors facilitating extraordinary renditions (done for the purpose of relocating persons held by the federal government to jurisdictions in which it is possible to torture them without meaningful legal consequence).<sup>93</sup>

Writing for the panel that initially rejected the Obama Administration's attempt to preclude Mr. Mohamed's suit from being adjudicated on the merits, Judge Michael D. Hawkins explained why the state secrets privilege must be construed narrowly to avoid indirectly sanctioning unconstitutional government action:

Separation-of-powers concerns take on an especially important role in the context of secret Executive conduct. As the Founders of this Nation knew well, arbitrary imprisonment and torture under any circumstance is a "gross and notorious . . . act of despotism." *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) . . . (Scalia, J., dissenting) (quoting 1 *Blackstone* 131–33 (1765)). But "confinement [and abuse] of the person, by *secretly* hurrying him to [prison], where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." *Id.* (Scalia, J., dissenting) (quoting 1 *Blackstone* 131–33 (1765)) (emphasis added). Thus it was "the central judgment of the Framers of the Constitution" that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at

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92. See *THE WHO*, *supra* note 1.

93. See *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949–52 (2009), *rev'd en banc*, 614 F.3d 1070 (9th Cir. 2010). This strategy came as a surprise to the panel hearing the case, as well as to progressive supporters of President Obama. See Schwartz, *supra* note 77, at A12. Andrew D. Romero, executive director of the ACLU, condemned this decision:

This is not change. . . . [t]his is definitely more of the same. Candidate Obama ran on a platform that would reform the abuse of state secrets, but President Obama's Justice Department has disappointingly reneged on that important civil liberties issue. If this is a harbinger of things to come, it will be a long and arduous road to give us back an America we can be proud of again.

*Id.*

stake.” *Id.* at 536 . . . (quoting *Mistretta v. United States*, 488 U.S. 361, 380 . . . (1989)).<sup>94</sup>

Judge Hawkins then defined the scope of the state secrets privilege narrowly, and concluded that “[t]he subject matter of this action therefore is not a state secret, and the case should not have been dismissed at the outset.”<sup>95</sup> This disposition, in turn, permitted Mr. Mohamed to continue his efforts to prosecute his suit against Jeppesen for facilitating his unlawful capture, relocation, imprisonment, and torture.<sup>96</sup>

In thinking about the importance of government accountability, and its relationship to the project of democratic deliberation, disclosure of whether the federal government hired a subsidiary of Boeing to facilitate the kidnapping and subsequent torture of foreign nationals seems far more important than whether the Census Bureau makes its data sets available to sociologists on a timely basis.<sup>97</sup> Moreover, the fact that the Obama Administration seems anxious to sweep the alleged sins of the George W. Bush Administration under the rug appears radically inconsistent with its promise of transparent, accountable governance.<sup>98</sup>

I do not know precisely the requirements of the War on Terror, and I cannot speak to the necessity or value of the program that Jeppesen allegedly helped to facilitate on behalf of the federal government. If the allegations contained in the *Mohamed* complaint are even half true, however, it suggests that our government is not living up either to our national ideals or to the requirements of the Bill of Rights. Moreover, it

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94. *Mohamed*, 579 F.3d at 956.

95. *Id.*

96. The panel remanded the case back to the district court, where it permitted the federal government another opportunity to establish that the state secrets privilege would preclude adjudication of Mr. Mohamed’s lawsuit:

On remand, the government must assert the privilege with respect to secret evidence (not classified information), and the district court must determine what evidence is privileged and whether any such evidence is indispensable either to plaintiffs’ prima facie case or to a valid defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the complaint.

*Id.* at 962. Strictly speaking, then, Judge Hawkins’s panel opinion did not absolutely preclude application of the state secrets privilege in this case.

97. See DATA.GOV OPERATIONS DRAFT, *supra* note 72, at 4–6 (describing the Obama Administration’s “Data.gov” initiative to make government held data more widely available to both the general public and academic researchers).

98. In fact, the Administration has not offered any meaningful alternative to judicial review of allegations of kidnapping and torture, such as, for example, some form of congressional oversight. As one observer has noted, President Obama’s new policy on the invocation of the state secrets doctrine “doesn’t necessarily carry a lot of weight in regards to the state secrets doctrine,” and, moreover, President Obama has “failed to mention any greater judicial review of the facts underpinning an executive assertion of the privilege, and described only the barest step towards a notional congressional oversight role.” Clint Hendler, *Parsing Obama on State Secrets*, COLUM. JOURNALISM REV. (May 21, 2009, 4:40 PM), [http://www.cjr.org/campaign\\_desk/parsing\\_obama\\_on\\_state\\_secrets.php](http://www.cjr.org/campaign_desk/parsing_obama_on_state_secrets.php).

seems very odd for an administration committed to “transparency, participation, and openness” to hide behind the state secrets privilege to avoid explaining highly questionable government actions undertaken incident to the War on Terror.<sup>99</sup>

At the same time, it would be naive, perhaps hopelessly so, to expect *any* administration to be transparent about CIA-operated illegal kidnapping, detention, and torture programs. Yet, if our government is no longer engaged in such activities, and, as President Obama opined on his first day in office, “sunlight is said to be the best of disinfectants,”<sup>100</sup> why has the Obama Administration continued to hide this alleged government misconduct behind the state secrets privilege shield? If, as President Bush repeatedly told the nation, “[the United States] does not torture,”<sup>101</sup> there should not be any substance to the *Mohamed* complaint.

Yet, the federal government’s fierce determination to preclude the federal courts from reaching the merits of the *Mohamed* complaint suggests that the allegations probably have more than a little basis in fact. Indeed, as Judge Hawkins warned, “[a] rule that categorically equated ‘classified’ matters with ‘secret’ matters would, for example, perversely encourage the President to classify politically embarrassing information simply to place it beyond the reach of judicial process.”<sup>102</sup>

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99. *But cf.* Bob Egelko, *Court Reinstates Suit in CIA Rendition Case*, S.F. CHRON., Apr. 29, 2009, at A8 (noting that the Obama Administration argued before the Ninth Circuit that Mr. Mohamed’s lawsuit should be dismissed under the state secrets privilege, adopting the legal arguments of the George W. Bush Administration’s Department of Justice, arguing that “any lawsuit by the alleged torture victims could reveal national security secrets, such as government-sanctioned interrogation methods and the CIA’s relationships with contractors” and therefore could not be permitted to proceed). Judge Hawkins had a powerful response to the Administration’s argument that permitting the suit to proceed would unduly impair national security:

According to the government’s theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law.

We reject this interpretation . . . not only because it is unsupported by the case law, but because it forces an unnecessary zero-sum decision between the Judiciary’s constitutional duty “to say what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 . . . (1803), and the Executive’s constitutional duty “to preserve the national security,” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 880 . . . (1982). We simply need not place the “co-equal branches of the Government” on an all-or-nothing “collision course.” *Cheney*, 542 U.S. at 389 . . . .

*Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 955 (2009).

100. FOIA Memorandum, *supra* note 38, at 4683.

101. Frank Rich, Op-Ed., *The ‘Good’ Germans Among Us*, N.Y. TIMES (Sunday Late Edition), Oct. 14, 2007, § 4, at 13 (quoting former President Bush as claiming that “[t]his government does not torture people.”).

102. *Mohamed*, 579 F.3d at 959.

The fact that, as a candidate, President Obama promised greater transparency and accountability for these government policies only exacerbates the inconsistency of the Administration's approach in this area.<sup>103</sup> It also undermines, and indeed betrays, the Administration's ostensible commitment to securing the accountability of the government to the people. If we do not know precisely what the George W. Bush Administration did, and perhaps even what this Administration is presently doing, how can "We, the People," make even a pretense of holding those responsible for these evil policies accountable?<sup>104</sup>

Nor is the state secrets question the only example of this sort of important backsliding on transparency.<sup>105</sup> As a presidential candidate, Senator Obama attacked the Bush Administration's warrantless domestic spying programs before voting in June 2008 for an extension of the Patriot Act that provided telecommunications companies with comprehensive retroactive immunity for their cooperation in these programs.<sup>106</sup> By supporting comprehensive, retroactive immunity, Obama rendered it highly unlikely (and probably impossible) for the American people to ever learn the full scope and effects of these unconstitutional government activities. Once again, transparency might have advanced accountability in this context, but since taking office, President Obama has done *nothing* to facilitate disclosures involving the scope and scale of these programs, which, unlike the covert extraordinary rendition, detention, and torture programs, undoubtedly involved invasions of the constitutional rights of U.S. citizens.

Perhaps, as Emerson warned us, "[a] foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines."<sup>107</sup> If this is so, then President Obama certainly does not

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103. See Charlie Savage, *Obama Moves to Curb Secrecy with Order on Classified Documents*, N.Y. TIMES, Dec. 30, 2009, at A19 ("As a presidential candidate, Mr. Obama campaigned on a theme of making the government less secretive. But in office his record has been more ambiguous, drawing fire from advocates of open government by embracing Bush-era claims that certain lawsuits involving surveillance and torture must be shut down to protect state secrets.").

104. See Paul Krugman, Op-Ed., *Reclaiming America's Soul*, N.Y. TIMES, Apr. 24, 2009, at A27 (arguing that those responsible for the Bush Administration torture policies must be held accountable and positing that "the only way we can regain our moral compass, not just for the sake of our position in the world, but for the sake of our own national conscience, is to investigate how that happened, and, if necessary, to prosecute those responsible.").

105. See Jim Harper, *A Flagging Obama Transparency Effort*, CATO@LIBERTY.ORG (Apr. 9, 2009, 6:31 PM), <http://www.cato-at-liberty.org/a-flagging-obama-transparency-effort> (noting that the White House has failed to honor its pledge to post all bills pending before the President on the White House website "for five days before he sign[ed] them.").

106. See Michael Gerson, Editorial, *The Audacity of Cynicism*, WASH. POST, July 2, 2008, at A15; see also Editorial, *The Quest for the Middle*, THE GLOBE AND MAIL (Can.), July 14, 2008, at A12.

107. Ralph Waldo Emerson, *Self-Reliance*, in *SELECTED WRITINGS OF RALPH WALDO EMERSON* 138 (Brooks Atkinson ed., modern library ed. 1992).

fall within the category of “little statesman and philosophers and divines,” at least if one considers in broader strokes his Administration’s willingness to actually practice the commitment to transparency and openness that it proclaims. In the case of the state secrets privilege and immunity for participation in domestic spying programs, this inconsistency reflects poorly on the values of a President who once taught constitutional law at one of the nation’s finest law schools. On the other hand, however, the notion that transparency, in and of itself, always and everywhere constitutes a public good, is a proposition that reasonable people can, and probably should, contest.

V. PROCESS VALUES CANNOT BE THE SOLE METRIC IN EVALUATING ADMINISTRATIVE PROCEDURES, NOR IS FORMALISTIC OPENNESS TO PUBLIC INPUT AND PARTICIPATION NECESSARILY A GOOD THING

At the end of the day, a thoroughgoing commitment to transparency probably matters less than reliably and consistently achieving desirable policy outcomes. Again, I do not wish to be construed as endorsing the proposition that the ends inevitably justify the means; such an approach would sanction gross violations of human rights and basic human dignity.<sup>108</sup> With that caveat, however, I harbor serious doubts about whether most Americans really care whether the health care bill negotiations are televised on C-SPAN, as much as they care about a health reform bill advancing sensible policies in a coherent fashion.

The Constitution itself arguably provides the best example of this proposition. If Brian Lamb’s eighteenth century equivalent had publicized the debates at the Federal Convention in 1787, we probably would have Queen Elizabeth II on our coinage today. Hard bargaining can require secrecy. Indeed, secrecy can be highly conducive to candor. It is naive to think that the Chamber of Commerce or the American Petroleum Association would negotiate in private in the same way as its public press releases read.

Thus, in any administrative process, an affected industry or public interest group’s willingness to compromise will not necessarily be visible on the face of its public comments and press releases. Forcing all of the public’s business to be conducted in the open might well impede

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108. See *Judgments of the Israel Supreme Court: Fighting Terrorism Within the Law*, JEWISH VIRTUAL LIBRARY (Jan. 2, 2005), <http://www.jewishvirtuallibrary.org/jsourc/Politics/scterror.html> (citing HCJ 5100/94 Pub. Comm. Against Torture in Israel v. Israel 53(4) PD 817, 9–13); see also Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 148–53 (2002); Richard Goldstone, *Zero Tolerance for Torture*, 37 CASE W. RES. J. INT’L L. 343, 343–46 (2006).

getting the public's business done effectively. Simply put, fierce compromises and hard bargaining are easier to accomplish when the cameras are not rolling.

To be sure, public participation in the project of governance is a wonderful notion, and the civic republican ideal of an active, engaged citizenry has many attractive characteristics.<sup>109</sup> Administrative agencies, however, probably lack the capacity to consider meaningfully hundreds, or even thousands, of citizen comments (most of which are likely to constitute form responses organized by interest groups anyway). The best way for citizens to make their views known is through associations that have credibility with agencies because they are capable of seeking judicial review of agency action. As between opening EPA rule making proceedings to the fine burghers of Peoria, and allowing the Sierra Club to challenge Clean Water Act regulations before the D.C. Circuit, let's not mistake the larger constraint on agency bad behavior.

One also should consider carefully what the result of that participation will be if large numbers of citizens elect to accept the Obama Administration's invitation to participate in regulatory government. If citizens attempt to engage federal agencies regarding pending regulatory matters only to be ignored or patronized by generic form responses, I would argue that the net effect will be to reduce, rather than enhance, citizens' confidence in the federal government. We know, based on the work of scholars like Tom Tyler, that the quality of process fundamentally affects how people respond to adverse outcomes; people who feel that they were taken seriously will accept an adverse outcome more readily, and more cheerfully, than people who feel that they were ignored, degraded, or perhaps both.<sup>110</sup>

If federal agencies, pursuant to the Obama Administration's "Google government" initiatives, create ersatz forms of citizen participation, it will almost certainly do more harm than good. "Collaboration" and "participation" mean more than simply agreeing to support the regulatory priorities and proposals of the incumbent administration. If government encourages citizens to engage agencies substantively, then agencies must have the ability, including the requisite staffing levels, to engage these citizen concerns. I fear, however, that form automated

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109. Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1541, 1545–54 (1988); see also Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 *HARV. L. REV.* 1695 (1989); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1511 (1992).

110. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 60–92, 100–05 (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19–20, 57–68, 104–12, 125–57, 170–78, 234–35 (1990); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedural Reform*, 45 *AM. J. COMP. L.* 871, 887–92 (1997).

responses, based on mathematical algorithms, will probably constitute the second most common agency response were large numbers of ordinary people to attempt to participate in administrative proceedings. A complete failure to respond, in any way, shape, or form, to unsolicited citizen comments, would be my prediction for the most probable outcome.

Even if one brackets the difficulties of implementing these new efforts to encourage and facilitate more direct forms of citizen involvement in the regulatory process, there remain questions about the ability of the White House, and the OMB, to effectively force agencies to adopt a new communications paradigm. The hard truth is that old agency habits often die hard, and changing the culture of an agency staffed with career workers often proves more difficult than presidents, or OMB directors, realize or anticipate.

Perhaps the most promising of the new transparency reforms involves the change in favor of a presumption of disclosure in the context of FOIA requests. Again, agency compliance with this directive might well prove to be less than optimal—in fact, only time will tell. The first question will be whether, in practice, agency employees charged with responding to FOIA requests actually incorporate this new standard into their day-to-day operations. But, this presumes that someone will actually consider, substantively, a particular FOIA request. Many federal agencies maintain shockingly high FOIA request backlogs, meaning that no one has actually made any effort to respond to requests, often for periods of months, if not years, and, in more than a few instances, *decades*.<sup>111</sup>

Does the OMB plan to conduct FOIA compliance spot checks to force laggard agencies to actually process FOIA requests on a timely basis? And, if not, precisely what consequence will a noncompliant agency face for failing to operate in a fashion consistent with the administration's transparency, participation, and collaboration policies?

Thus, whether in practice the new FOIA enforcement imperative, or limits on the invocation of the state secrets privilege, change agency behavior in practice very much remains to be seen. Again, it bears noting that many, if not most, federal agencies have a multi-year FOIA backlog, some stretching out to twenty years.<sup>112</sup>

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111. See Editorial, *Let the Sun Shine on Records*, USA TODAY, Jan. 28, 2009, at A10 ("Under the law, federal agencies are supposed to respond to FOIA requests within 20 days. But, in 2007, a report by the Knight Foundation and the National Security Archive watchdog group found 12 agencies with FOIA backlogs of 10 years or more. One request to the State Department had languished for two decades.").

112. *Requests for Records Continue To Pile Up Despite Bush Order*, STAR-LEDGER (Newark), Mar. 17, 2008, at A4 (reporting on massive FOIA request backlogs at many federal agencies);

Clearing the backlog will require staff. Staff requires money. Unless I have missed something, the FOIA initiative did nothing to re-deploy agency staff to clear the existing backlog of FOIA requests. One can only get to the point of facing a refusal to deliver information after an agency finds the records that you have requested. If this process is measured in years (or decades), the exemptions process seems less relevant than agency indifference to acting on FOIA requests in the first place. And, at an agency like FEMA, do we really want staff time used on prompt FOIA request answers rather than on planning how to deliver food and water if a Richter scale 7.2 magnitude earthquake strikes San Francisco or Seattle? Should we prioritize locating MMS records solicited from the Department of the Interior, or should we focus every available agency resource on establishing and executing an effective oil exploration safety and spill response protocol?

At the risk of sounding unduly cynical, I question whether the Obama Administration's new commitment to transparency, participation, and collaboration will secure better, more effective governance. If forced to choose between transparency, participation, and collaboration, on the one hand, and an effective and efficient government agency on the other, I would prefer the latter.

At a larger level of abstraction, I wonder whether accountability is really what we want. It is true that transparency facilitates accountability, but it also might impede effective government. If addressing global warming effectively requires secret, off-the-record negotiations between the White House, Congress, the EPA, and large scale industrial polluters, I would gladly and happily sacrifice transparency, participation, and short term accountability for an effective policy that addresses a global crisis. Consider too that, at least in the context of legislation or regulation, the outcome of the secret negotiations will have to become public as part of the legislative process itself. A bill cannot become a law without votes on the floor of the House of Representatives and the Senate. Moreover, consistent parliamentary practice in both chambers also includes consideration of pending legislation by committees of jurisdiction. Thus, the legislative process could not be more open to the public, and private negotiations that inform the content of a bill do not, and constitutionally cannot, mean that a bill's content will remain private if it is to become a law.

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Scott Shane, *Survey Finds Action on Information Requests Can Take Years*, N.Y. TIMES, July 2, 2007, at A15 ("The Freedom of Information Act requires a federal agency to provide an initial response to a request within 20 days and to provide the documents in a timely manner. But the oldest pending request uncovered in a new survey of 87 agencies and departments has been awaiting a response for 20 years, and 16 requesters have been waiting more than 15 years for results.").



So too, in most cases, will an agency's internal deliberations about a regulatory question eventually give way to a public proceeding, such as a notice-and-comment rule-making or a formal adjudication. Even in cases where the public process is limited or even non-existent (as might be the case for many informal adjudications), the possibility of judicial review ensures that an agency cannot keep its reasoning secret from the public indefinitely. When mechanisms for disclosure and accountability exist post-enactment, pre-enactment transparency need not constitute an indispensable component of effective governance or wise policymaking.

Of course, the ultimate form of accountability, at least in a democracy, is free and fair elections held with reasonable regularity. At the end of the day, the Obama Administration need not worry about accountability; it will face accountability at the polls in 2010 in an indirect fashion and more directly in the 2012 federal elections. When government must answer at regular intervals to the voters, the need for an ongoing dialectic with the electorate on a day-to-day, issue-by-issue basis seems non-essential. In other words, the need for congressional action on legislation, the availability of judicial review of most agency actions, and the certainty of regular elections all contribute to the accountability of the federal government. Creating new forms of accountability and participation that attempt to inject the body politic into administrative decision-making might add a new dimension or vector of accountability, but I do not think that we presently suffer from any serious deficits on this score.

Moreover, there is always a potential tension between process values and substantive outcomes. Mussolini made the trains run on time; I certainly do not advocate abandoning process values if doing so makes effective government action easier (and the Framers did not leave this choice open to the president in any event). But, assessing the costs and benefits of enhanced process involves careful and systematic consideration of whether enhanced process actually yields better results in a particular policy context. This is a fair question to raise in response to the Obama Administration's generic and universal commitments to open and transparent federal government operations.

## V. CONCLUSION

As between "Google government" (in which we know when the President takes a water break in his meeting with Gordon Brown and who received a White House Christmas card in 2009),<sup>113</sup> and a government that can deliver emergency services reliably and effectively in Haiti or New Orleans, it seems reasonable to at least ask if competence

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113. See Jose Antonio Vargas, *e-Hail to the Chief*, WASH. POST, Dec. 31, 2008, at C1.

is more important than transparency because in some circumstances (including, for example, negotiations on the content of a major health care reform bill) transparency will likely be the enemy of good government. Thus, we sometimes must choose—and the Obama Administration will be forced to choose—between meeting the imperatives of its open government initiative and meeting the substantive needs of the American people.

When effective governance requires something less than total transparency, we should view this as an essential concession to the realities of governance. Indeed, we should not expect complete transparency when its practice is antithetical to achieving important government objectives and the government itself is not engaged in behavior that transgresses constitutional imperatives, such as honoring a baseline concept of due process that prevents our government, or its agents, from using torture as primary means of gathering intelligence.

Ironically, perhaps, the Obama Administration's commitment to transparent and open government seems to apply with most certainty in contexts where, quite literally, there is likely little to hide and, even if there were, the prospect of judicial review of agency action under the Administrative Procedure Act would provide a bulwark against truly terrible government policymaking. In a context such as credible allegations of extraordinary renditions for the purpose of indefinitely imprisoning and torturing a detainee, however, it seems to me that our most basic constitutional values are squarely at issue, and the government's need to embrace transparency ought to be at its zenith. Yet, in this circumstance, the Obama Administration's commitment to transparency and open government is something less than total.

For transparency to facilitate accountability, it must include matters both large and small, and contexts in which disclosure could significantly and negatively impact our attitude toward our government and its agents. To commit to transparency in contexts where the stakes are low is not to make much of a commitment at all. If the George W. Bush Administration took government secrecy to absurd lengths, restoring a policy that favors disclosure in most circumstances simply reflects a return to a reasonable status quo; it surely does not reflect progress or change we can believe in.

As much as I hope that my pessimistic view understates the Obama Administration's commitment to meaningful transparency in circumstances where disclosure could prove damaging to the Administration's reputation—for example, in matters such as extraordinary renditions for the purpose of torturing persons held in the custody of the federal government, or the considerably less awful, but still patently unconstitu-

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tional, activities such as domestic spying programs that involve the surveillance of U.S. citizens' telephone conversations without a warrant—I fear that the desire to suppress politically embarrassing information does not wear a partisan label.

All presidents, of whatever party, seek to avoid disclosing information that makes them and their administrations appear anything less than sterling.<sup>114</sup> In this respect, then, the Who's admonition, "meet the new boss, same as the old boss,"<sup>115</sup> has salience, even in the context of an administration that, as a general matter, wishes to distinguish itself favorably through its commitment to open, transparent government.

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114. See, e.g., Stephanie Strom, *Nonprofit Fund Faces Questions About Conflicts and Selection Procedures*, N.Y. TIMES, Aug. 22, 2010, at A15 (reporting on ethical questions surrounding grants approved by the Social Innovation Fund, "a new \$50 million federal program aimed at financing the replication of nonprofit programs that work" and noting that calls for transparency grow as millions in grants are awarded). In this case, "what was supposed to have been an emblem of the administration's commitment to nonprofit groups has become instead a messy controversy over potential conflicts of interest and the process used to select the grantees." *Id.*

115. THE WHO, *supra* note 1.

