

BRENNAN  

---

CENTER  

---

FOR JUSTICE  

---

TRANSPARENCY  
IN THE  
FIRST 100 DAYS:  
A REPORT CARD

Liberty & National Security Project

<b>INTRODUCTION</b> .....	1
<b>A NOTE ON METHODOLOGY</b> .....	2
<b>THE FIRST 100 DAYS</b> .....	3
<b>I. OPEN GOVERNMENT</b> .....	3
1. “Day One” emphasis on transparency.....	3
2. Restoration of presumption of disclosure under FOIA.....	4
3. Approach to public participation in policy-making .....	5
4. Support for the media’s right to report.....	6
<b>II. PRESIDENTIAL RECORDS AND COMMUNICATIONS</b> .....	8
5. Initiation of settlement talks in White House e-mails litigation.....	8
6. Settlement in litigation over White House aides’ congressional testimony .....	10
7. Executive order limiting former presidents’ ability to withhold records.....	11
8. Increased transparency in the President’s public schedule .....	12
<b>III. SECRET LAW</b> .....	13
9. Release of Bush-era Office of Legal Counsel opinions.....	14
10. Nomination of a transparency advocate to head OLC .....	15
11. Level of detail in signing statements .....	16
<b>IV. ACCOUNTABILITY</b> .....	18
12. Overbroad assertions of the state secrets privilege.....	18
13. Defense of immunity for telecommunications companies .....	20
14. Response to proposal for a commission of inquiry .....	21
15. Statement of authority to limit disclosure of information to Congress .....	22
<b>CONCLUSION</b> .....	25
<b>AUTHORS &amp; ACKNOWLEDGMENTS</b> .....	27

## Introduction

Government transparency is vital to a free and well-functioning democracy, and it is particularly so in the area of national security policies. History shows that these policies carry a heightened risk of intrusions into individual rights and liberties, making it all the more important that the people are kept informed of their government's actions. Moreover, because these policies may help protect us from catastrophic attack, it is critical that they we get them right. Policies developed in secret – without the benefit of public scrutiny, debate, and input – are invariably less effective.

To be sure, national security policies implicate some information that properly should be classified and kept secret. The careful classification of information that could endanger our national security if released is a key part of keeping the country safe. But experts agree that far too much information is classified, and too much non-classified information is swept into the ambit of secrecy – to the point that entire policies have been improperly withheld from public and even from Congress.

The Bush administration was among the most secretive in history. Policies regarding detention, interrogation, rendition, and domestic surveillance were developed behind closed doors by a small, select group of officials. Legal memoranda purporting to justify these policies were kept under lock and key. Congressional inquiries and judicial review were thwarted by overbroad assertions of privilege. The result was a set of policies that violated both the law and our nation's shared values. They also made us less safe by alienating our allies, providing powerful recruiting tools to our enemies, and undercutting our ability to insist on humane treatment of our own captured troops.

President Obama has pledged to take a different approach. Upon taking office, [he heralded](#) a “new era of openness” in which “this administration stands on the side not of those who seek to withhold information, but those who seek to make it known.” His commitment to transparency is heartening – but promises and action are two different things. If we are to protect our national security and our liberties, we must hold President Obama to his commitment: we must periodically take stock of his administration's performance, acknowledge and commend those actions that enhance government transparency, and insist on a correction of course when transparency is diminished. This report card is an effort to do just that.

## A Note on Methodology

*What the Report Card covers:* The purpose of this report card is to evaluate the Obama administration's record of transparency in matters bearing on national security policy. We therefore address actions specific to that area, such as claims of "state secrets privilege" or the release of legal memoranda regarding interrogation techniques. We also address actions that are more general in their scope if they could affect national security matters. For example, restoring a presumption of disclosure under the Freedom of Information Act (FOIA) may enhance the public's ability to obtain unclassified documents relating to counter-terrorism policies. We have not addressed transparency issues that are specific to other issues, such as the operation of the Troubled Asset Relief Program.

*Grading:* Almost any action at the 100-day point could be subject to future revision; but assigning a grade of "incomplete" to every item would defeat the purpose of assessing the administration's performance thus far. Our solution was a tripartite system:

- For actions that already have produced a concrete effect, we assigned a letter grade, even if future events may change the "final" grade.
- For actions that have symbolic or promissory value, but require follow-up by the administration in order to have a concrete effect, we graded the symbolic/promissory action – but added an asterisk.
- For actions whose value depends entirely on future action by the administration, we assigned a designation of "Incomplete."

# The First 100 Days: A Report Card

## I. OPEN GOVERNMENT

The principle of open government holds that the public has a right to know about, and participate in, the actions of government. It is rooted in the concept of democracy, as responsible self-governance is impossible when the people are uninformed about, and excluded from participation in, their government's operations. It is rooted in the concept of liberty as well, since an informed public is in a much better position to protect constitutionally guaranteed rights and freedoms. And it is rooted in the practical idea that when information is shared, the quality of the resulting government policies is improved.

To ensure that government functions openly, the people should have a right to view the records generated by governmental agencies except in narrow, carefully delineated circumstances. Moreover, policy-making should be conducted openly and with input from the true stakeholders in those policies: the people. President Obama's initial steps in these areas are quite positive, but much will depend on how he carries through on those steps – and whether he extends his views of open government to the area of national security.

### 1. “Day One” emphasis on transparency

On his first full day in office, President Obama firmly placed the weight of his office behind a commitment to government transparency, openness, and accountability. In an address to White House senior staff, he repudiated the secretive policies of the recent past and heralded what he called a “[new era of openness](#).” He proclaimed that “every agency and department should know that this administration stands on the side not of those who seek to withhold information, but those who seek to make it known.” To this end, he declared, “information will not be withheld just because I say so . . . . It will be withheld because a separate authority believes it is well-grounded in the Constitution.”

President Obama supported his stated commitment to openness with orders and memoranda that echoed the recommendations of open government groups and, if fully implemented, would result in a perhaps unprecedented level of transparency and openness in government:

- He issued a [memorandum on Transparency and Open Government](#). In addition to declaring his commitment to transparency, the memorandum directed the Office of Management and Budget to issue an Open Government Directive, which will instruct executive departments and agencies on actions they should take to make government information more readily available to the public.
- He issued a [memorandum](#) to the heads of executive agencies and departments instructing them that “[a]ll agencies should adopt a presumption of disclosure” in responding to [Freedom of Information Act](#) requests. The memorandum directed the Attorney General to issue new guidelines implementing this presumption.

- He issued an [executive order](#) rescinding President Bush’s overly restrictive policy regarding access to presidential records under the [Presidential Records Act](#) (PRA).

The substance of the FOIA and PRA orders are discussed and evaluated below. But the symbolic importance of issuing these orders (and the Transparency and Open Government memorandum) on the President’s first full day of office deserves its own commendation. With all the pressing and high-profile issues facing the administration – including the economy, wars in Iraq and Afghanistan, torture, and Guantánamo Bay – President Obama chose to highlight the importance of transparency, even though it meant using the Day One spotlight for such a little-known and arcane issue as the proper interpretation of the Presidential Records Act.

To be sure, President Obama did not mention national security information specifically, and too many Presidents have treated this area as an exception to almost any rule. Nonetheless, the President’s show of commitment is a promising indication of what is to come—a promise we hope his administration will live up to.

Grade: A\*

Recommendation for maintaining grade: Back up the promises with action, particularly in matters pertaining to civil liberties and national security.

## **2. Restoration of presumption of disclosure under FOIA**

One of President Obama’s “Day One” orders was a [memorandum](#) directing the Attorney General to issue new guidelines establishing “a presumption in favor of disclosure” under the [Freedom of Information Act](#) (FOIA). If the presumption is faithfully applied, it will reverse one of the most problematic policies of the Bush era.

FOIA is a key tool of open government that allows the public to request and obtain records from government agencies. Under the Act, the government is entitled to withhold a few categories of information, such as trade secrets or information that could compromise ongoing criminal investigations. But in many cases, the government has discretion to disclose information even if it is not required to do so. Accordingly, the operation of FOIA may be very different under different administrations.

Under Presidents Reagan and H.W. Bush, the Justice Department’s policy was that it would defend an agency’s decision not to disclose a document if there was any legal basis for the withholding. There was no incentive for agencies to exercise their discretion in favor of release, and the clear message was: “Withhold if you can.” But in 1993, Attorney General Janet Reno issued a [memorandum](#) establishing a “presumption of disclosure” for FOIA requests. The memo specified that the Justice Department would defend an agency’s decision to withhold records only if the agency had reasonably determined that disclosing the records would pose a risk of certain types of harm.

Government agencies largely honored the spirit of disclosure embodied in the Reno memorandum. Thus, when Attorney General John Ashcroft issued his own [memorandum](#) in 2001, eliminating the presumption of disclosure and going back to the Reagan/Bush I approach, the result was a [marked decrease](#) in the percentage of requested information that was released in full.

Attorney General Eric Holder's [FOIA guidelines](#), issued pursuant to the President's order, reinstate the Reno policy. They encourage discretionary disclosure even in situations where an agency legally could withhold information. Moreover, like the Reno guidelines, they allow the Justice Department to defend withholdings in court only when the law requires withholding or when disclosure poses a reasonably foreseeable risk of harm. The new policy applies not just prospectively but also to pending litigation "where there is a substantial likelihood" that the new rules "would result in a material disclosure of additional information."

While the new guidelines could lead to a significant increase in government transparency, much depends on their faithful implementation. To date, the guidelines have led to mixed results in pending FOIA cases. Many litigants and judges have requested that the government reconsider its position; in some instances, the government has agreed to stay the case while it considers the request, but in others, it has been less open to committing publicly to reconsideration. The actual effect of the guidelines on pending cases thus remains to be seen.

How the presumption of disclosure will play out in national security cases is another unknown. Much of the information in the public sphere about post-9/11 counter-terrorism policies was procured through FOIA requests made by attorneys, journalists, and open government advocates. In theory, the guidelines could result in greater disclosure of such information. In practice, however, the government may be more inclined to assert the risk of harm when such records are requested, resulting in minimal change from the status quo. For now, the FOIA guidelines remain primarily a promise – albeit an encouraging one.

Grade: A-\*

Recommendations for improving grade: Conduct a thorough review of the government's position in all pending cases; strictly apply presumption of disclosure to all requests.

### **3. Approach to public participation in policy-making**

One of the most important aspects of open government is public participation in policy-making. President Obama's "[Transparency and Open Government](#)" memorandum acknowledged the importance of this principle. It stated that "[p]ublic engagement enhances the Government's effectiveness and improves the quality of its decisions," and it ordered executive departments and agencies to "offer Americans increased opportunities to participate in policymaking and to provide the Government with the benefits of their collective expertise and wisdom."

In the area of transparency policy, the Obama administration has backed these words with action. The President's memorandum on Transparency and Open Government tasked the government's Chief Technology Officer with coordinating the development "by appropriate executive departments and agencies" of recommendations for an Open Government Directive to be issued by the Office of Management and Budget. As part of this process, the administration has solicited input, not only from the executive departments and agencies, but from outside experts and advocates representing the public's interest in transparency.

In the area of national security policy, however, this principle of open government is less in evidence (at least thus far). In two early executive orders, President Obama directed the creation of inter-agency task forces to study and make recommendations on (1) [interrogation and rendition policies](#) and (2) [policy options for the disposition of detainees](#). The executive orders contained no provision for the public to be informed about, or to provide input on, the policy options being considered. To date, the task forces have not solicited public input and they have operated behind closed doors.

Much of the task forces' work will involve classified information, and it would be imprudent to have all of their deliberations made public. But that does not mean the public should be shut out altogether. Public participation is just as important in forming national security policy as it is in other areas of governance. Indeed, one of the main reasons the Bush administration's national security policies were so misguided is that they were developed in secret, with the input of only a few individuals in some cases.

There are people outside the government with invaluable expertise in these matters, as well as laypeople who care deeply about the fundamental values implicated by policies for detention and interrogation. They should be made aware of how the task forces are operating and given the opportunity to weigh in on the policy options. There is still time for the Obama administration to follow this course of action.

Grade: B

Recommendation for improving grade: Direct the task forces on interrogation and Guantánamo to inform the public about how they are operating and solicit public input on policy options.

#### **4. Support for the media's right to report**

Early indications suggest that the Obama administration will be far more respectful of the media's right to report information about governmental matters than the Bush administration.

An important example of this respect for the right to report – one that bears directly on national security policy – is the President's decision to allow members of the press to cover the honor guard ceremonies at Dover Air Force Base that mark the return of military casualties. In the lead-up to the Gulf War, then-Secretary of Defense Dick Cheney instituted a ban on such coverage, which remained in place under the Clinton and Bush II administrations. In February, Secretary of Defense Robert Gates [announced](#) that press

coverage of returning casualties would be allowed with the consent of the fallen soldiers' families.

The significance of this change in policy is far greater than it may seem at first blush. Our government has chosen to conduct its fight against terrorism in part through the mechanism of war. Wars cannot – and arguably should not – be conducted without public support, and public support for wars may depend in part on their cost in American lives. As Hugh Shelton, former Chairman of the Joint Chiefs of Staff, has explained, the decision whether to go to war must take into account whether “the American public is prepared for the sight of our most precious resource coming home in flag-draped caskets into Dover Air Force Base in Delaware.”

When that sight is withheld from the American public, and the casualties of war reduced to impersonal statistics on a printed page, the public is denied a unique and powerful indicator of the true cost of the war. By allowing Americans to see the returning caskets, the Obama administration has given the American people information that may help them understand and assess the wars our government is conducting.

Another encouraging development is the administration's support for a federal media shield law that would limit courts' ability to subpoena confidential information, such as the identity of sources, from reporters. The issue of journalists' ability to protect their sources came to a head in 2005 when *New York Times* reporter Judith Miller went to jail for weeks rather than testify in a case regarding the leaking of CIA agent Valerie Plame's identity. The Newspaper Association for America [reports](#) that Miller is one of five reporters who have been sent to jail since 2001 for refusing to name sources in federal court. In 2006, close to 70 subpoenas were issued seeking confidential information from reporters, according to the association.

As a Senator, Obama cosponsored a [media shield bill](#). More than sixty major media companies and organizations [expressed their support](#) for the bill, arguing that the free flow of information to the public is diminished when potential sources know that reporters could be forced to disclose their identities. The Bush administration, however, vigorously opposed the idea and worked to defeat the legislation, which was filibustered by Republicans in the Senate.

At his confirmation hearing, Attorney General Holder [stated](#) that he was “in favor of the concept of such a law.” He added, however, that he would “want to ensure . . . that we would still have the capacity to protect the national security and to prosecute any leaks of intelligence information that might occur.” He did not offer any specifics about how to do that, stating that he needed time to “become more familiar with the law.”

The media shield law, in both concept and practice, is not without its complications, the details of which go beyond the scope of this report. Nonetheless, the administration's support for legislation intended to enhance the media's ability to report is heartening. A key point going forward will be how the administration approaches the national security exception – an exception that could, [in the words](#) of one media attorney, “swallow the privilege.” Both the current [House bill](#), which passed in March, and the [Senate version](#) allow courts to compel reporters' testimony to prevent harm to national security regardless of

whether that harm is imminent. That would allow courts to compel testimony on overly speculative grounds, such as long-term harm to policy goals. The administration should work with Congress to craft a more narrowly tailored exception.

Grade: A-

Recommendation for improving grade: Support a carefully tailored national security exception to the media shield law.

## II. PRESIDENTIAL RECORDS AND COMMUNICATIONS

The President is an elected public servant, and as such, the public is entitled to exercise oversight over his performance. Information documenting what the President and his advisors are doing on a day to day basis can reveal a tremendous amount about the agenda and priorities of the administration. How the president and his aides spend their time, whose input and opinions they solicit, what types of arguments they find persuasive, and what interests they seek to advance all can provide the type of insight that is essential to a well-functioning democracy.

Despite its vital nature, however, such information is often the most closely guarded and difficult for both Congress and the public to access. The Freedom of Information Act does not extend to presidential records. Moreover, the executive branch may curtail public disclosure of information by making overbroad assertions of executive privilege, failing to honor the letter or spirit of disclosure statutes such as the Presidential Records Act or the Federal Records Act, or simply favoring non-disclosure in cases where no law or privilege applies. The Obama administration already has had several opportunities to indicate its approach in this area, and initial indicators are good – with room for improvement.

### 5. Initiation of settlement talks in White House e-mails litigation

The Obama administration has entered into settlement discussions with the plaintiffs in a lawsuit challenging the Bush administration's failure to preserve White House e-mails. The outcome of those discussions could affect not only what we know about the actions of the Bush administration, but the ongoing availability of White House electronic records and the wealth of information they reveal.

Under the Federal Records Act and the Presidential Records Act, the executive branch is required to maintain and archive its records. These records may then be accessed by the public under the terms set forth in the statutes. Access is important not only for the purpose of holding the executive accountable for its actions, but for deconstructing and explaining decision-making in all areas of government – including those that relate to national security policy and the protection of civil liberties.

While the preservation of paper records is fairly straightforward, the preservation of electronic records under these statutes has posed problems from the beginning. The

National Security Archive, an independent non-governmental research institute and library, filed a lawsuit against the Clinton administration challenging the adequacy of its electronic record-keeping. The lawsuit was settled, and as part of the settlement, the Clinton administration created a new electronic archiving system that helped ensure compliance with the statutes. The Bush administration, however, jettisoned this system.

In the spring of 2007, during the investigation into the firing of nine United States Attorneys, the Bush administration claimed that it had “lost” millions of its e-mails dating back to March 2003. It became apparent that the White House had failed to take appropriate steps to save electronic records and that White House officials had intentionally used non-governmental e-mail accounts to circumvent the laws requiring preservation of records. The National Security Archive, along with the non-profit organization Citizens for Responsibility and Ethics in Washington, filed suit against the White House to force it to recover its deleted e-mails and to preserve all records using a suitable archiving system. The Bush administration fought the lawsuit and steadfastly withheld information about what had happened from the court.

In his campaign literature, Obama [pledged](#) to “nullify the Bush attempts to make the timely release of presidential records more difficult.” Immediately upon becoming the defendant in the e-mail litigation, however, the Obama administration [filed a motion](#) to dismiss the case. The motion asserted that the case was moot because the White House had “expended substantial time and resources to ‘initiate action’ to allocate and restore emails ... and confirm that millions of emails are not, in fact, missing as plaintiffs allege.”

On March 30, 2009, in a commendable turnabout, the Justice Department joined the plaintiffs in filing a [joint motion to stay the case](#) to explore the possibility of reaching a settlement. The litigants will report to the court no later than June 30 regarding the progress of their negotiations. The plaintiffs have expressed cautious optimism that these talks will result in a settlement, like the one reached with the Clinton administration, that respects the record-keeping requirements of the law. Such a settlement would have ramifications for public access to electronic White House records, not just on the subject of the fired U.S. Attorneys, but on all subjects – including the subject of national security policy. But for now, it remains to be seen whether and how expeditiously the Obama administration will move forward in restoring Bush-era e-mails and ensuring that its own electronic records are adequately preserved.

Grade: Incomplete

Recommendation: Agree to a process for reconstructing and releasing the lost e-mails and ensuring proper retention of electronic records going forward.

## 6. Settlement in litigation over White House aides' congressional testimony

In early March, the House Judiciary Committee reached a settlement with former Bush aides Karl Rove and Harriet Miers over President Bush's refusal to allow these aides to testify before Congress. The agreement allows congressional investigators access to information they need in order to determine whether the Bush administration improperly fired several United States Attorneys and otherwise transformed the Justice Department into a tool of partisan political entrenchment.

The Committee had subpoenaed various documents, as well as the testimony of Miers and (later) Rove, to ascertain the role of the White House in the firing of the U.S. Attorneys. The Committee also sought to learn whether the administration had attempted to cover up its actions with respect to the firings. President Bush claimed "executive privilege" over the subpoenaed information – despite the fact that executive privilege applies only when the president is directly involved in an issue, and President Bush had asserted that he had no significant involvement in the firings. He also claimed that the aides had absolute testimonial immunity and could not even be required to appear before the committee to assert the privilege.

The House of Representatives filed a lawsuit against Miers and Joshua Bolten (in his role as custodian of the subpoenaed documents) to compel their compliance with the subpoenas, and the Justice Department represented the aides. (The Brennan Center filed an [amicus brief](#) in this case. In addition, the Brennan Center will soon issue a report entitled *Executive Privilege: A Legislative Remedy*, which proposes a bill to govern disputes between Congress and the Executive over access to information.) In June 2008, the trial court judge [issued a ruling](#) in the House's favor. Miers and Bolten appealed. Between the filing of the appeal and the deadline for the Justice Department to submit its brief to the appeals court, the change in administration took place.

The Obama Justice Department had three options: defend the Bush administration's position; assert a different position (including endorsing the trial court's ruling); or attempt to broker a settlement between the House and the former White House aides. It chose the third option. On March 4, the parties announced that they had [reached a settlement](#) under which the committee will receive most of the documents it sought and both Miers and Rove will be interviewed in private about the politicization of the Justice Department and the U.S. Attorney firings (although not about the potential cover-up). The interviews will be transcribed and may be made public.

By all accounts, the Obama administration exhibited strong leadership in the settlement negotiations and exerted significant pressure on the parties involved, virtually insisting that they reach a settlement and assisting them in doing so. The new administration was thus instrumental in achieving a resolution to this years-long standoff – a resolution that largely reaffirms Congress's right to carry out its oversight responsibilities and affords the opportunity finally to discover the truth.

Moreover, because the settlement leaves the trial judge’s decision in place, the administration’s action has helped to bolster the body of law that properly construes the boundaries of executive power. Even though the decision is binding only with regard to the particular facts of this case, future courts may look to it in conducting their own analysis. That would make it more difficult for Presidents to resist disclosure of all kinds of information – including information that pertains to national security policy.

But while pressure from the administration to settle the lawsuit certainly contributed to what has been [hailed](#) as a victory for the rule of law, President Obama could have done better. The trial court judge—a George W. Bush appointee—had emphatically rejected President Bush’s claims of immunity for his aides, referring to them as “unprecedented” and “without any support in the case law.” Legal experts agree that the judge’s decision was well-reasoned, careful, and correct. President Obama should have endorsed that decision and pledged to adhere to its precepts in all cases. And going forward, he should pledge to work with Congress to ensure that it has the information it needs to perform its oversight and legislative responsibilities.

Grade: B

Recommendations for improving grade: Develop, publish, and enforce a policy that rejects Bush’s claim of absolute testimonial immunity and ensures that assertions of executive privilege do not undermine Congress’s right to obtain needed information; support the Brennan Center’s forthcoming proposal for an Executive Privilege Codification Act.

## **7. Executive order limiting former presidents’ ability to withhold records**

One of President Obama’s “Day One” executive orders revised the implementation of the Presidential Records Act (PRA), revoking a Bush executive order that unduly restricted access to presidential records and reinstating the pre-Bush regime for implementing the Act.

The PRA governs the preservation and use of official records of Presidents and Vice Presidents. It mandates that, when a president leaves office, his records automatically become the property of the federal government. They are transferred to the Archivist of the United States and must be made available to the public under terms established by the Act. Specifically, the PRA allows the public to access presidential records through the Freedom of Information Act (FOIA) after a period of 5 years, but allows the President to impose certain restrictions to public access for up to 12 years.

Since 1989, the implementation of the PRA within the executive branch has been governed by executive order. Under [the 1989 order issued by President Reagan](#), former presidents were permitted to claim executive privilege over records from their administrations – but the decision whether to honor the claim rested with the Archivist, in consultation with the incumbent President and Attorney General. In 2001, George W. Bush issued an executive order – [Executive Order 13233](#) – that altered this framework dramatically. The Bush order essentially forced the Archivist to honor claims of executive privilege, not only by living former presidents, but also by the heirs or designees of deceased former presidents and by former vice presidents.

Executive order 13233 was extremely troubling. The PRA established the principle that presidential records are the property of the United States government, and that access to such records should be governed, not by the administration that generated the records, but by the Archivist of the United States. President Bush's order subverted that principle, potentially denying journalists, historians, and government officials access to a rich trove of information on a limitless range of subjects. Equally disturbing from a legal perspective, the Bush order would have allowed people who had never even served in government to exercise a constitutional prerogative of the President of the United States.

President Obama's [executive order](#) repeals the Bush order and reverts nearly verbatim to the regime instituted by Reagan's order. It thus prevents anyone other than a former or incumbent president from asserting a claim of executive privilege, and it restores the final decision on former presidents' claims to the incumbent administration.

This action, taken on the first full day of the new administration, was a strong signal of President Obama's commitment to transparency and could result in much greater access to historical presidential records. Like President Obama's other "Day One" orders, however, much of its effect will depend on implementation. If the Attorney General and White House Counsel advise the Archivist to comply with every claim of executive privilege asserted by former presidents, the policy improvement that this order represents will become illusory.

The stakes for liberty and national security are significant. If we as a nation are to learn the lessons of the past, those lessons must be made available to us. The records of the Bush administration promise to reveal a host of cautionary tales about the formulation and implementation of post-9/11 national security policy. Those are tales that must be told.

Grade: A\*

Recommendation for maintaining grade: Comply with both the letter and the spirit of the new executive order, exercising independent judgment over privilege claims by former presidents and limiting public access to presidential records only when strictly necessary.

## **8. Increased transparency in the President's public schedule**

During the first 100 days of the Obama administration, much of the President's schedule has been made available to the public through a combination of disclosure to the media and posting information on the White House website.

This rather rudimentary step toward government transparency – enabling citizens, journalists, and members of Congress to see what the people's elected leader is doing on the job – is a shift from previous administrations. Presidential schedules released by prior White House offices have often consisted of a sparse list of public appearances. Aggregating the day's official public events does not provide much new information about government or present a meaningful accounting of the President's time.

By contrast, the Obama administration has provided references to private meetings, including the timing of the meetings and the identity of the participants, in its public schedules. Such information enables the press and the public to verify the government's assertions about which individuals, groups, and views are presented during the policymaking process. In addition, the White House Press Office releases written "readouts" describing the President's calls with foreign leaders, instead of mere oral reports to accompany the schedule (the previous practice). And the White House releases a similarly detailed schedule for the Vice President, a marked improvement from the scant information provided about the Vice President's schedule and activities during the previous administration.

For citizens interested in seeing how the President spends his time and with whom he meets to make national security and other decisions, the Obama administration has made quick and substantive progress on transparency. Nonetheless, the administration could go further. As the *New York Times* has reported, not all of the President's private meetings have made it into the public schedule. There are legitimate reasons for the President not to disclose some private meetings (for example, sensitive diplomatic contacts). But without knowing what kinds of meetings have been excluded and why, it is difficult to assess how transparent the President's public schedule is, or to understand the context of the information that the President chooses to present. The President accordingly should develop and disclose criteria for what aspects of his schedule will be publicly released.

Grade: A-/B+

Recommendation for improving grade: Develop and disclose criteria for placing items on the public schedule; make the full public schedule available on the White House website.

### III. SECRET LAW

In a free democratic society, the law should be public. Indeed, the notion of secret law has been described by judges and academics alike as "repugnant" and "an abomination". Thus, with very few exceptions, federal statutes are published and made widely accessible.

But "the law," properly conceived, includes more than just the words that legislators place in the U.S. Code – it also includes the interpretations of those words that govern how the executive branch actually implements them. Interpretations by judges, for example, are understood to be an operative part of the law (and are generally made public). The same is true for authoritative legal interpretations by the executive branch, whether issued by the Justice Department's Office of Legal Counsel or by the President himself.

The Bush administration closely guarded its interpretations of the law, leaving the public and Congress to guess at how – or even whether – the statutes on the books were being implemented. The Obama administration has done much to shed light on the Bush administration's secret interpretations of the law; perhaps even more important, it has taken steps suggesting that it will be more forthcoming about its own interpretations.

## 9. Release of Bush-era OLC opinions

President Obama has released many of the most controversial memoranda issued by the Justice Department's Office of Legal Counsel (OLC) under the Bush administration. These opinions were withheld from Congress and the public for years, existing as a body of secret law known only to the executive branch. President Obama's release of these memos takes a significant step toward shedding light on the excesses of the Bush administration and, more broadly, repudiating the concept of secret law.

OLC's interpretations of the law are binding on the entire executive branch. Absent a contrary court ruling, they are the last word on how the executive branch implements the law. As such, it is critical for Congress and the public to have access to these opinions in order to advance accountability and informed public deliberation. The Bush administration, however, refused to disclose OLC opinions on its controversial counter-terrorism programs, citing a variety of privileges and classifying opinions even when they did not contain any information that could compromise national security.

This withholding of OLC opinions was particularly disturbing because of what they contained. Several of the opinions – in particular, those that discussed “enhanced” interrogation techniques and warrantless wiretapping – concluded that the executive branch was not required to adhere to the terms of federal statutes or treaties. Regardless of one's views on whether the executive branch may simply disregard laws it considers unconstitutional, the public has a right to assume that the executive branch is adhering to the statutes passed by Congress, and to be informed if that is not the case. Otherwise, the country would be governed by two sets of laws: the public law, known to Congress and the public, and a contradictory regime of secret law, known only to the executive branch. A democracy cannot function on those terms.

The Brennan Center has [long advocated](#) the release of these secret OLC opinions. On March 2, 2009, the administration on its own initiative released nine of the previously [secret memoranda](#). They shed much-needed light on the legal reasoning behind many of the Bush administration's most controversial counter-terrorism policies, including the legal rationale for the CIA's program of “enhanced” interrogation techniques. The memos detailing the techniques themselves, however, remained undisclosed.

Facing a deadline in a FOIA lawsuit brought by the American Civil Liberties Union, the administration stated its intent to release this second category of memos. According to news reports, Attorney General Eric Holder, Director of National Intelligence Dennis Blair, and White House Counsel Greg Craig supported the release of these memoranda. Other members of the intelligence community, however – in particular, former Bush CIA officials and current CIA Director Leon Panetta – strongly opposed disclosure and threatened dire consequences if the specific techniques were released.

To his credit, President Obama resisted the strong political pressures against disclosure and released [four OLC memoranda](#) on April 16, 2009. Because of these memoranda, we now have certain knowledge that the CIA's interrogation program – discontinued by the Obama administration – included techniques such as waterboarding,

forcing detainees into “stress positions,” confining them in small boxes, depriving them of sleep for up to a week at a time, and dousing them in frigid water. There is no longer any serious question that the Bush administration endorsed and practiced torture in violation of U.S. and international law. In that regard, the release of the memoranda is a significant victory for transparency.

Two caveats apply, however. First, the release was accompanied by a statement by President Obama pledging that the administration would not prosecute any violations of the law by CIA employees who relied on the memoranda. Many have speculated that a “deal” was struck: the intelligence community would drop its vocal opposition to the memos’ release if President Obama pledged to forego prosecution.

If true (and it is only speculation at this point), this would be quite disturbing. Reasonable people can disagree on whether the OLC memoranda should insulate CIA employees who relied on them. But one thing should be clear: a decision not to prosecute should be based on the merits – not as a *quid pro quo* for obtaining acquiescence in the release of the memoranda. One of the core functions of transparency is to enable accountability. If accountability is traded for transparency, then it is a hollow victory at best.

Second, many of the Bush-era OLC memos, including several that address Bush’s warrantless wiretapping program, have yet to be released. According to a [tally by the ACLU](#), there are almost sixty OLC memos from the Bush administration on the subjects of interrogation, detention, rendition, or surveillance that remain secret. In releasing the interrogation memos, President Obama stated that “exceptional circumstances” justified the release, and that “the exceptional circumstances surrounding these memos should not be viewed as an erosion of the strong legal basis for maintaining the classified nature of secret activities.” It is thus unclear whether the release of the interrogation memos heralds an era of greater transparency for other OLC opinions addressing national security matters.

Grade: A-

Recommendation for improving grade: Without waiting for further lawsuit deadlines, provide an exhaustive list of as-yet-unreleased OLC memoranda and promptly release them, redacting only those operational details that are properly classified.

## **10. Nomination of a transparency advocate to head OLC**

Reforming government secrecy requires more than changing policy and law. It also requires a change in attitude, norms, and bureaucratic culture, which in turn requires the right leadership within government agencies and offices. In that regard, President Obama’s nomination of Dawn Johnsen to head OLC holds enormous potential for ending that office’s regime of secret law.

Johnsen, an Indiana University law professor, was an OLC attorney for several years and headed the office for a two-year period under President Clinton. Both in and out of government, she has been a strong and thoughtful advocate for transparency on the part of

OLC. As the Brennan Center [has argued](#), her nomination is a step toward restoring the rule of law at the Department of Justice.

Johnsen decried the blanket secrecy that the Bush administration applied to OLC memos. In 2004, she co-authored a set of “[Principles to Guide the Office of Legal Counsel](#),” joining 18 other attorneys with OLC experience to advocate the values of transparency, accountability and the rule of law. The document includes the principle that “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.” It explains that “[s]uch disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority.” It further notes that “Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.”

The document also states that “some legal advice . . . properly should remain confidential, most notably, some advice regarding classified and some other national security matters.” However, Johnsen appears to construe this national security exception much less broadly than the Bush administration did. Thus, when one of the infamous torture memos was made public in 2008 (five years after its issuance), [Johnsen expressed “outrage,”](#) not only at the memo’s contents, but at “the fact that it was kept secret for years and that the Bush administration continues to withhold other memos like it.”

In 2008, Johnsen [testified](#) before the Senate Judiciary Committee’s Constitution Subcommittee that excessive secrecy undermines democratic accountability. “Congress and the courts cannot possibly safeguard against executive branch overreaching or abuses if they (and potential litigants) do not know what the executive branch is doing,” she stated. She raised concerns about OLC’s “central role” in advancing secret law: “OLC has been terribly wrong to withhold the content of much of its advice from Congress and the public – particularly when advising the executive branch that in essence it could act contrary to federal statutory constraints.” Following that hearing, Johnsen assisted in the drafting of, and wrote a [letter](#) supporting, [the OLC Reporting Act of 2008](#), a bill that would require the Justice Department to notify Congress when it determines that the executive branch is not bound by a statute.

At time of writing, the Senate has not yet voted on whether to confirm Johnsen. But the nomination on its own speaks volumes about the level of transparency President Obama contemplates for OLC under his administration.

Grade: A

Recommendation for maintaining grade: Strongly defend Johnsen’s nomination.

## **11. Level of detail in signing statements**

On two occasions, President Obama has followed his predecessor’s practice of using signing statements to signal that he will not fully comply with a federal statute. While these signing statements are deeply problematic from a rule of law perspective, the relatively

detailed nature of President Obama’s signing statements represents an improvement from a transparency perspective.

Signing statements historically have been used to convey the President’s impressions and interpretations of federal statutes. Presidents have frequently issued statements praising statutes’ goals or setting forth their interpretation of ambiguous provisions. On occasion, however, Presidents have used signing statements to indicate their belief that certain provisions of the statute are unconstitutional. Insofar as these statements convey an intent not to enforce those provisions (or to “construe” them in a way that essentially nullifies them), [some legal scholars view them](#) as the functional equivalent of a “line-item veto,” which the Constitution does not permit.

The Bush administration’s abuse of signing statements was particularly problematic. Whereas previous administrations, all combined, used signing statements to challenge the constitutionality of some 600 statutory provisions, the Bush administration challenged more than 1,100 statutory provisions in eight short years. Moreover, many of President Bush’s signing statements were vague to the point of being uninformative: they identified neither the statutory provision at issue, nor the basis for the administration’s objection. Congress and the public were thus left to guess at which parts of the statute would be implemented and which would be ignored, as well as what changes might be necessary to satisfy the President of the statute’s constitutionality.

During his presidential campaign, [Obama stated](#) that he would “not use signing statements to nullify or undermine congressional instructions as enacted into law.” After he took office, President Obama added an important qualification to this statement: he [asserted](#) that he would not use signing statements “to suggest that the President will disregard statutory requirements *on the basis of policy disagreements*” – leaving open the possibility that he would use signing statements to nullify congressional instructions where those instructions, in his view, posed constitutional concerns. But he added that his signing statements would “identify [his] constitutional concerns about a statutory provision with sufficient specificity to make clear the nature and basis of the constitutional objection.”

In a March 9, 2009 [statement](#) accompanying the Omnibus Appropriations Act and a March 30, 2009 [statement](#) accompanying the Omnibus Public Land Management Act, President Obama reneged on his campaign promise not to nullify or undermine congressional instructions. The subject of this report card, however, is transparency – and on that count, he did much better. The signing statements in question specifically identified most of the statutory provisions to which the President objected – although in some cases, he used more general language like “[c]ertain provisions of the bill in titles I and IV of Division B, title IV of Division E, and title VII of Division H.” Furthermore, he specifically identified the nature of his objection in each instance. This transparency allows the public to understand and debate the President’s action, a process that is in fact taking place with respect to both signing statements.

On the matter of the transparency of his signing statements, we must give President Obama a fairly high score. Nonetheless, although it is beyond the scope of this report, we call on the President to renounce the use of signing statements to circumvent the law ([as we did](#) under the previous administration). The President can and should veto statutes that he

believes to be unconstitutional, with his veto subject to congressional override. If he objects only to certain provisions, he should work with Congress to change them. Beyond that, however, the President's assessment of a statute's constitutionality is no more authoritative than that of Congress. Only the courts are entitled to strike down statutes or provisions thereof. This is the [system of checks and balances that the Founders intended](#), and one that ensures adherence to the rule of law.

Grade: B

Recommendation for improving grade: Specifying every objectionable statutory provision would help... but ceasing reliance on this type of signing statement would be even better.

## IV. ACCOUNTABILITY

The principles of government transparency and accountability are inextricably linked. Whenever government information is withheld from the people, the people lose their ability to assess the performance of their representatives and react accordingly. Each of the above sections of the report thus has implications for accountability.

The issue of accountability becomes particularly focused, however, in cases where evidence of government wrongdoing has emerged. In such cases, the need for accountability – whether through lawsuits, congressional investigations, or other means – is acute; without it, the misconduct is far more likely to continue or recur. And, of course, the most powerful tool for avoiding accountability is the withholding of information. Using this tool, the Bush administration resisted and often prevented full inquiries into its abuses of power in the area of counter-terrorism.

The Obama administration has thus far continued the practice of resisting efforts to hold the Bush administration accountable for its actions. In doing so, it is preventing the public from learning the full truth about what the previous administration's counter-terrorism policies and practices were – information that is critical for both Congress and the people to make informed choices about these policies going forward. Moreover, when a President resists efforts to hold a previous administration accountable, it begs the question: how receptive will he be to calls for transparency and accountability when his own policies are challenged?

### 12. Overbroad assertions of the state secrets privilege

The state secrets privilege, used correctly, prevents disclosure of evidence in litigation when the government can prove to the court that such disclosure would harm national security. It has been used in that manner for decades, including during the height of the Cold War. The Bush administration, however, conceived the privilege more broadly. It frequently argued that cases must be dismissed at their outset – before the relevant evidence had even been identified, let alone reviewed by the court to see if it was privileged – because the very subject matter of the case was a state secret.

Many lower court judges, reluctant to delve into the thorny issues presented by these cases, accepted the government's "subject matter privilege" argument and dismissed the lawsuits. In this manner, lawsuits challenging the government's warrantless wiretapping program and the practice of "extraordinary rendition" (capturing people and sending them to other countries to be tortured) were shut down.

During his presidential campaign, Obama [criticized the Bush administration](#) for "invok[ing] a legal tool known as the 'state secrets' privilege more than any other previous administration to get cases thrown out of civil court." In February of this year, the Justice Department [announced](#) that it would conduct a review of ongoing cases in which President Bush had asserted the privilege "to ensure it is being invoked only in legally appropriate situations." Many hoped that this announcement signaled a new approach to claiming the state secrets privilege. But the administration's actions in three cases strongly suggest that the new approach is the same as the old.

In [the first case](#), the plaintiffs had sued an airline for its role in delivering them to other countries to be tortured. The Bush administration intervened in the lawsuit and asked that the case be dismissed because the very subject of "extraordinary rendition" is a state secret. [The trial court judge agreed](#), going so far as to suggest that the CIA is immune to civil lawsuits for their actions overseas. Given the sweeping nature of the holding, it was widely assumed that the Obama administration would not try to defend it on appeal. Instead, the Justice Department surprised even the panel of appeals court judges by asserting that its position in the litigation was identical to that of the Bush administration.

In [the second case](#), a U.S.-based Muslim charity had sued the government for eavesdropping on its electronic communications without a warrant. The Bush Justice Department accidentally gave the plaintiff's lawyers a document proving that the surveillance had occurred. It demanded that the document be returned because it was a "state secret." The plaintiff's lawyers complied – and the Bush administration then argued that the plaintiff lacked standing to sue the government because it had no evidence the government had targeted it.

In January, [the trial court judge ruled](#) that lawyers for the plaintiff who were granted security clearances by the FBI could view the document under strict security protections. The Obama administration filed an [emergency motion to stay the ruling](#) while the Justice Department appealed it. When the court denied the stay request, the Obama administration [informed the trial court judge](#) that, if he tried to grant the plaintiff's lawyers access to the document in question, the Justice Department would consider "withdraw[ing] that information from submission to the court." In other words, the Obama administration would short-circuit the judge's ruling on the privilege issue by simply removing that document from the judge's custody.

The [third case](#) also involved a challenge to the illegal warrantless wiretapping program. The case was filed late last year, and when President Obama took office, the government had not yet filed a brief stating its position. The Obama Justice Department requested and received an extension of time to consider what the government's position should be. On April 3, the Justice Department [moved to dismiss the lawsuit](#) because the subject matter it implicates is a "state secret."

The Obama administration has thus defended invoking the state secrets privilege to prohibit judicial consideration of entire subject matters and to deny attorneys with top-level security clearances access to documents they have already seen. And it has gone further, suggesting that judges' rulings on the privilege can be evaded by taking the documents away from them. While some have expressed hope that President Obama will use the privilege more sparingly in lawsuits challenging his own administration's conduct, that prospect seems counter-intuitive at best.

Grade: F

Recommendations for improving grade: File supplemental briefs withdrawing overbroad privilege claims; support legislation to regulate the privilege ([as advocated by the Brennan Center](#)), such as the [State Secrets Protection Act](#), which permits courts to dismiss lawsuits only after the allegedly privileged evidence has been identified and reviewed by the court.

### 13. Defense of immunity for telecommunications companies

After [the New York Times revealed](#) in 2005 that the government had been wiretapping Americans without warrants, several lawsuits were filed against both government officials and the telecommunications companies that assisted them. Because government actors can raise a variety of defenses to lawsuits, many believed that the suits against the telecom companies represented the best hope for shedding light on the illegal program and achieving accountability.

In 2008, however, members of Congress introduced legislation that would grant retroactive immunity to telecom companies upon certification by the Attorney General. Shutting down these lawsuits would help ensure that the details of the illegal program – such as how many Americans were wiretapped and the criteria for identifying targets – never come to light. Then-Senator Obama [spoke out against](#) immunity for telecom companies, but ultimately voted for a bill that contained the immunity provision. That bill became law, and Attorney General Michael Mukasey filed a [certification](#) to immunize the telecom companies.

Obama's supporters hoped that, once elected, he would try to legislatively undo the immunity provision or that his new Attorney General would withdraw the certification. In his confirmation hearings, however, [Attorney General Eric Holder indicated](#) that the Justice Department's duty was to defend legislation, and that the Justice Department was highly unlikely to "reverse course" on the issue of immunity for telecom companies. And on February 25, the Justice Department [filed a brief](#) in federal court defending the constitutionality of the immunity provision and arguing that the case against the telecom companies must be dismissed.

Of course, a statute can be constitutional and still be bad policy. It would thus be possible for the administration to defend the constitutionality of the immunity provision in court, while still seeking to undo immunity through legislation or through withdrawing the certification. But the signs are discouraging. The February brief contains language signaling

this administration’s approval of the policy behind the immunity provision, describing the statutory procedures for keeping the Attorney General’s certification secret as “a congressional endorsement of the Executive’s judgment that national security information concerning the allegations at issue . . . must be protected from public disclosure.”

Grade: D

Recommendations for improving grade: Promote and support legislation overriding the statutory immunity provision and/or withdraw Attorney General Mukasey’s certification.

#### **14. Response to proposal for a commission of inquiry**

We know that many of the Bush administration’s counter-terrorism policies veered badly off course. Indeed, there is evidence that some of these policies violated the law, as well as our nation’s shared values. The warrantless wiretapping program, for example, almost certainly violated both the Foreign Intelligence Surveillance Act and the privacy of law-abiding Americans. Waterboarding, inflicted on at least three detainees, is generally understood to be torture and thus illegal. The evidence is overwhelming that the U.S. captured people and sent them to be interrogated by countries known to practice torture.

Still, much – if not most – of the information about these policies remains secret. In order to achieve accountability for these transgressions, implement the changes needed to prevent any recurrence, and make informed choices about our counter-terrorism policies going forward, it is critical that we learn the full truth about what happened. To this end, the Chairmen of the [Senate](#) and [House](#) Judiciary Committees have proposed an independent, non-partisan commission of inquiry, along the lines [proposed by the Brennan Center](#) last year.

An independent commission is the best and perhaps only hope of obtaining the needed information. President Obama [has said](#) that the Justice Department will not prosecute those who relied on OLC opinions; and even if prosecutions were to occur, they would reveal only what happened in specific instances – not the full policies at issue, how they were created, their broader consequences, and what institutional reforms are necessary to prevent similar abuses in the future. Congressional inquiries can and should take place, but they too are unlikely to paint a full picture, given resource constraints, issues of committee jurisdiction, preoccupation with the economy, and the ever-widening partisan divide.

President Obama’s support for the commission proposal is critical to its success. His initial response to the commission idea, however, was decidedly lukewarm. When asked about it at a February press conference, [he responded](#): “[N]obody’s above the law and, if there are clear instances of wrongdoing . . . people should be prosecuted just like any ordinary citizen. But . . . generally speaking, I’m more interested in looking forward than I am in looking backwards.”

Following the release of OLC memos detailing the interrogation techniques used by the CIA, the President’s tone and posture toward the commission proposal appeared to

shift. Without going so far as to endorse a commission, the President [told reporters](#) that “if and when there needs to be a fuller accounting of what took place during this period,” a congressionally-created bi-partisan commission would be the best approach. He also emphasized that any inquiry must avoid partisan political goals and instead seek “to learn some lessons so that we move forward in an effective way” – a statement that appeared to acknowledge the forward-looking benefits of a commission.

Within days, however, the President’s position appeared to shift again. The *New York Times* [reported](#) that the President told Democratic congressional leaders he did not want such an inquiry to take place. He reportedly expressed concern that a commission “would potentially steal time and energy from his ambitious policy priorities, and could mushroom into a wider distraction by looking back at other aspects of the Bush years.”

President Obama’s concern for his policy agenda is understandable. But on many occasions, he has cited restoring the rule of law as one of the most important items on that agenda. That goal simply cannot be achieved while the full facts about what went wrong with our nation’s counter-terrorism policies remain buried. While President Obama has stated that he will not be an “obstacle” to Congress creating a commission, his public opposition to the idea is itself an obstacle, as well as a blow to the principle that this country should learn from its mistakes instead of sweeping them under the rug.

Grade: C-/D+

Recommendation for improving grade: Support the commission proposal and use the influence of the Office of the President to gain support in Congress and the public.

## **15. Statement of authority to limit disclosure of information to Congress**

In signing a \$410 billion omnibus spending bill into law in March, President Obama issued his first [signing statement](#). The statement could have a chilling effect on government employees who have discovered misconduct in the executive branch and seek to “blow the whistle” by telling Congress what they know, thus facilitating accountability through congressional oversight.

The statutory provision addressed by the signing statement would prohibit executive officials from interfering with or punishing communications to Congress by other government employees, whether those communications are initiated by the employees or solicited by Congress. President Obama’s signing statement asserts: “I do not interpret this provision to detract from my authority to direct the heads of executive departments to supervise, control, and correct employees’ communications with the Congress in cases where such communications would be unlawful or would reveal information that is properly privileged or otherwise confidential.” The statement is similar to signing statements issued by President Bush in response to versions of this provision contained in previous years’ appropriations bills.

President Obama's signing statement is a strike against transparency in two ways. First, there is no way to "interpret" a flat prohibition on limiting communications with Congress as permitting the heads of executive agencies to control those communications. Referring to his objection as an "interpretation" obscures the fact that President Obama is asserting the authority to violate the terms of the statute.

Second, the assertion of control over federal employees' communications, in this context, raises red flags. It is true that, as a general matter, the President should be able to regulate the means by which information generated in the executive branch is disseminated. The statutory provision at issue, however – while worded generally – was intended to address a particular circumstance: the exposure by whistleblowers of government misconduct. In such cases, allowing the heads of executive branch to "control" the employees' communications defeats the very purpose of the communications, and prevents effective congressional oversight and accountability.

President Obama's statement includes the caveat that control over employees' communications is contemplated only where those communications "would be unlawful or would reveal information that is properly privileged or otherwise confidential." This limitation is analogous to language President Bush used in his signing statements; for example, a 2004 [signing statement](#) on the whistleblower provision stated that Bush would construe it "in a manner consistent with the President's constitutional authority to withhold information that could impair foreign relations, national security, the deliberative process of the Executive, or the performance of the Executive's constitutional duties." In both cases, the limitations contain catch-all provisions ("otherwise confidential" information or information that could impair "the performance of the Executive's constitutional duties") that leave the executive branch with a great deal of room to control communications.

Of course, claiming the authority to control employees' communications is not the same as doing so. As a lawyer, a senator, a presidential candidate, and the president-elect, Obama's record on the protection of whistleblowers has been commendable. As part of his [ethics agenda](#) articulated during the transition, he recognized that "[o]ften the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance."

It is thus possible that President Obama does not intend to use the authority he claimed in his signing statement to interfere with communications by whistleblowers. Nonetheless, by objecting to a provision that was designed to prohibit retaliation against employees who reveal executive misconduct, President Obama's statement intentionally or unintentionally sends a message to employees: If you report misconduct to Congress against the will of the head of your agency, and if the agency considers that information "confidential," you may face retaliation. This could have a chilling effect on potential whistleblowers and hinder the public's ability to learn about government wrongdoing.

Grade: C –\*

Recommendations for improving grade: Publicly commit to prohibiting interference with, or retaliation for, government employees' efforts to disclose government waste, fraud, or abuse; support [legislation](#) to strengthen whistleblower protections.

## Conclusion

At the 100-day mark of his administration, there already have been several tests of President Obama's promise to make his administration one of the most transparent in history. This report card shows that the administration's performance on these tests has run the gamut from excellent to poor. The reality of the administration's conduct has on occasion matched the rhetoric, but on other occasions fallen far short.

The report card also reveals notable patterns. While the administration's performance has been varied overall, it has been quite consistent within each category of action. Thus, when it comes to open government (facilitating public access to records and participation in government), the administration's commitment has been admirably strong across the board, although much depends on future implementation. In the categories of presidential records/communications and secret law, too, the administration's actions to date warrant consistently high marks. But when it comes to transparency in situations where accountability is sought for governmental wrongdoing, the President's record has been weak in every instance.

Traditionally, a report card compiles the grades from all the tests and gives a total score. In tallying the total, however, the grader may wish to assign different weights to different tests – viewing some as “pop quizzes” and others as “mid-term exams.” In this case, we think it more appropriate to leave this process to the reader, as the total grade will vary greatly depending on what factors he or she considers most important. For example:

- Some readers might feel that more general steps in the direction of openness (such as re-establishing the presumption of disclosure under FOIA) are only weak indicators of what the Obama administration will do on national security matters. If one assigns heavier weight to those actions that relate specifically to national security information (release of Bush-era OLC opinions, overbroad claims of state secrets privilege, support for telecom company immunity, and opposition to a commission of inquiry), the total grade will be significantly lower than if equal weight is assigned to both categories.
- Other readers might feel that the most important distinction, for weighting purposes, is whether the action will reveal information in “real time” about this administration, or whether it opens the books on past administrations. These readers might be less interested in the administration's disclosure-friendly interpretation of the Presidential Records Act, the release of Bush-era OLC opinions, the attempts to shut down lawsuits regarding Bush-era practices, and the President's opposition to a commission of inquiry.
- Still other readers might discount actions, like the FOIA guidelines or the executive order on the Presidential Records Act, whose effect is largely dependent on future implementation – those actions that received an asterisk next to the grade. Giving less weight to these actions would lower the total grade. De-emphasizing those actions would lead to a slightly higher total grade.

Additional factors that might affect the analysis include what types of information the reader considers the most important for a well-functioning democracy and how immediate or widespread the effect of non-disclosure. Indeed, the number of different ways to weigh these acts is probably as great as the number of readers considering them.

A total grade seemed inappropriate for another reason. It suggests finality, when in fact many of the most important tests of President Obama's commitment to transparency are yet to come. Several of the actions listed on this report card are graded as "incomplete" or have an asterisk next to the grade because their effect will depend on future follow-up by the administration. Even more significant, several critical transparency issues are missing from this report card altogether because the administration has yet to take any action on them. For example, one of the greatest hurdles to transparency on national security matters is the problem of over-classification – a problem [noted by the Brennan Center](#) and acknowledged by experts and advocates of all political stripes. President Obama almost certainly will provide new guidance on classification. That guidance has the potential to affect transparency in national security matters more than any other action listed in this report card.

Which brings us to a final point: every grade listed in this report card is an interim grade, as President Obama could still change course on any of these matters. The purpose of interim grades is not to pass judgment, but to identify areas where improvement is needed with an eye toward achieving a better final result. We have attempted to identify those areas and make constructive recommendations for change. If the right improvements are made, history may yet regard the Obama administration as the most transparent in modern history – and our democracy will be better and stronger as a result.

## Authors

This report was prepared by the following members of the Brennan Center's Liberty and National Security Project:

Elizabeth Goitein  
Emily Berman  
Ari Melber  
Ellen Fisher

## Acknowledgments

The authors would like to thank Michael Waldman, David Udell, Frederick A.O. Schwarz, Jr., Sidney Rosdeitcher, Steven Aftergood, Meredith Fuchs, Kate Martin, and Becky Monroe for their advice and assistance. We are particularly indebted to Thaddeus Kromelis for creating the online version of this report card.

## Brennan Center for Justice | Transparency in the First 100 Days: A Report Card

Subject	Administration's Action	Recommendation	Grade
<b>Open Government</b>			
1. "Day One" emphasis on transparency	Signaled commitment to transparency by issuing transparency orders and statements on "Day One"	Back up the promises with action – particularly in matters pertaining to civil liberties and national security	A*
2. Freedom of Information Act guidelines	Issued order/memorandum restoring presumption of disclosure under FOIA; agreed to stay some cases, not others	Conduct thorough review of all pending cases; strictly apply presumption of disclosure to all requests	A-*
3. Public access to policy-making	Invited public input on transparency policy, but not on interrogation or Guantánamo task forces	Direct the task forces to inform the public about how they are operating and solicit public input on policy options	B
4. Media's right to report	Opened Dover Air Force Base to reporters; stated qualified support for media shield law	Support a carefully tailored national security exception to the media shield law	A-
<b>Presidential Records/Communications</b>			
5. Litigation over White House e-mails	Opened settlement talks on litigation regarding e-mails "lost" by Bush White House	Agree to a process for reconstructing and releasing the e-mails and ensuring proper retention of electronic records going forward	Incomplete
6. Litigation over congressional subpoenas for White House aides' testimony	Facilitated settlement allowing Congress to obtain information from Bush White House aides Karl Rove and Harriet Miers	Reject Bush's claim of absolute testimonial immunity; support the Brennan Center's forthcoming proposal for an Executive Privilege Codification Act	B
7. Executive order on Presidential Records Act	Issued executive order limiting former presidents' ability to block public access to records	Carefully assess privilege claims by former presidents and limit public access to presidential records only when strictly necessary	A*
8. Transparency of President's schedule	Has added private meetings and written read-outs of calls to public schedule	Develop and disclose criteria for placing items on public schedule; make schedule available on White House website	A-/B+

<b>Secret Law</b>			
9. Release of OLC opinions	Released several key Bush-era OLC opinions; others pending	Provide an exhaustive list of unreleased OLC memoranda and promptly release them, redacting only properly classified information	A-
10. Nomination of Dawn Johnsen	Nominated champion of OLC transparency to head the office	Strongly defend Johnsen's nomination	A
11. Transparency of signing statements	Identified statutory provisions and objections to those provisions with relative specificity	Specify every objectionable statutory provision ... or even better, cease reliance on this type of signing statement	B
<b>Accountability</b>			
12. Use of state secrets privilege	Invoked overbroad claims of privilege in three key cases	File supplemental briefs withdrawing overbroad privilege claims; support the State Secrets Protection Act	F
13. Defense of immunity for telecom companies	Is defending immunity for telecom companies that violated the Foreign Intelligence Surveillance Act by assisting in Bush's warrantless wiretapping program	Promote and support legislation overriding the statutory immunity provision and/or withdraw Attorney General Mukasey's certification	D
14. Position on independent commission of inquiry	Opposes a commission of inquiry to examine torture and other counter-terrorism abuses	Support the commission proposal and use the influence of the Office of the President to gain support in Congress and the public	C-/D+
15. Signing statement on whistleblower protection	Declared authority to disregard, in some instances, statutory provision designed to protect executive branch whistleblowers	Publicly commit to prohibiting interference with, or retaliation for, government employees' efforts to disclose government waste, fraud, or abuse; support legislation to strengthen whistleblower protections	C-*

BRENNAN  
CENTER  
FOR JUSTICE

*At New York University School of Law*

161 Avenue of the Americas  
12th Floor  
New York, NY 10013  
212-998-6730  
[www.brennancenter.org](http://www.brennancenter.org)