

Marvin Anderson Lecture

Transparency, 2009

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I am honored to be with you today to present, under the auspices of the Hastings 1066 Foundation, the 2009 Anderson Lecture. My topic is Transparency, 2009.

Transparency has become something of a buzzword in current discourse in many contexts. It is typically associated with governmental action of one kind or another, although it certainly applies as well to international organizations, nongovernmental organizations, and commercial entities. Quite what the word means remains a subject of dispute, although it is tempting to say of it what Justice Stewart said of hard-core pornography, “I know it when I see it.”¹ I do not think it means knowing who got what bonuses from A.I.G., but I do think it means knowing who did what, when, in the related legislative process.

In my remarks today I would like to survey some current developments in the field and to suggest that this will prove to be one of the key themes of democratic society for our generation and those that will follow.

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1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). For where the phrase came from, see Posting of Peter Lattman to WSJ Law Blog, *The Origins of Justice Stewart’s “I Know It When I See It,”* <http://blogs.wsj.com/law/2007/09/27/the-origins-of-justice-stewarts-i-know-it-when-i-see-it> (Sept. 27, 2007, 17:00 EST).

I

John D. Podesta cochaired the Obama-Biden Transition Project. On December 5, 2008, he issued a brief memorandum announcing a “Seat at the Table” Transparency Policy.² Under it, all policy documents and written policy recommendations from official meetings with outside organizations were to be posted on the Transition website, along with the dates of and organizations represented at official meetings conducted in either the Transition headquarters or agency offices, along with any documents presented at those meetings.³ The only exceptions were for “non-public” or classified information acquired from the agency review process and internal memoranda.⁴ Covered meetings were defined as those with three or more participants from “outside” (meaning nongovernmental) organizations.⁵

I will not dwell on the fact that the Transition Project redacted the name of the staffer to whom transparency-related documents were required to be e-mailed for uploading to the website.⁶ Nor did the definitions close the door to unofficial, but equally permissible, meetings involving fewer individuals. Nobody’s perfect, and the 2008 Transition deserves credit for having regularized a process that was, in the past, both more chaotic and more opaque. The Transition is already receding in public memory as the new administration grapples with the incessant, urgent, and competing demands of actually governing. Nonetheless, it is worth pausing long enough to acknowledge that Mr. Podesta’s memorandum was important. It foreshadowed by a few weeks one of the first steps taken by the new President.

On January 21, 2009, one day after he took office, President Obama issued two related memoranda to heads of Executive Departments and federal agencies.⁷ The first ordered that the Freedom of Information Act (FOIA)⁸ “be administered with a clear presumption: In the face of doubt, openness prevails.”⁹ The second, on “Transparency and Open Government,” announced that the federal government should be transparent, participatory, and collaborative.¹⁰ “Transparency,” the President explained,

2. Memorandum from John Podesta to All Obama Transition Project Staff (Dec. 5, 2008), available at http://change.gov/page/-/open%20government/yourseatatthetable/SeatAtTheTable_memo.pdf.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Memorandum on Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009); Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009).

8. 5 U.S.C. § 552 (2006), amended by Pub. L. No. 110-175, 121 Stat. 2524 (2007).

9. Memorandum on Freedom of Information Act, 74 Fed. Reg. at 4683.

10. Memorandum on Transparency and Open Government, 74 Fed. Reg. at 4685.

promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.¹¹

The President also ordered the preparation of an Open Government Directive instructing agencies and departments “to take specific actions implementing the principles set forth in [the transparency] memorandum.”¹²

With the attention of the nation and the world necessarily focused on other, more pressing matters such as the economy, wars in Iraq and Afghanistan, and the fate of those detained at Guantanamo Bay, it is not surprising that the transparency memorandum received only the briefest flurry of attention, and it will be months before we see the promised Open Government Directive.¹³ Nonetheless, I would like to suggest that the memorandum itself is a logical outgrowth of the impulse that led to Mr. Podesta’s earlier memorandum, and highly significant in itself. How it is implemented may say more about our core ideas of government in this still-new twenty-first century than will how we address the grave immediate crises facing our country.

No one should anticipate that President Obama’s transparency memorandum will be a cure all. It may have an indirect effect on other branches in the sense of setting an example or, as Professor Noah Feldman put it, “chang[ing] the background tone of government.”¹⁴ In addition, the Executive Branch is not without influence over policymaking by Congress and the federal courts. Issues of transparency abound in our legal system, and in important respects lie beyond the direct reach of the White House. The question is the extent to which the current interest in transparency will translate into change across the entire spectrum of government activity.¹⁵ To answer it requires a sense of

11. *Id.*

12. *Id.*

13. The Open Government Directive was issued on December 8, 2009. See Memorandum from Peter R. Orszag, Director, Office of Mgmt. & Budget, to Heads of Executive Dep’ts & Agencies (Dec. 8, 2009), available at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

14. Noah Feldman, *In Defense of Secrecy*, N.Y. TIMES, Feb. 15, 2009 (Magazine), at 11, 12.

15. The key roles under President Obama’s transparency memorandum are played by the Chief Technology Officer and the Director of the Office of Management and Budget. See Memorandum on Transparency and Open Government, 74 Fed. Reg. at 4685. One wonders whether the title of the Chief Technology Officer should be changed to Chief Transparency Officer, as some have suggested. See, e.g., Outragedmoderates.org, Obama Should Appoint a Government Transparency Officer, <http://www.outragedmoderates.org/2009/01/obama-should-appoint-government.html> (Mar. 16, 2009, 12:22

the kinds of transparency skirmishes that have occurred in recent years and are occurring right now.

2

I'll begin with one that hits close to home for me. In 2003, in my capacity as head of the National Institute of Military Justice, a nongovernmental organization, I sent the Pentagon what I thought would be an inconsequential FOIA request. I had read that Secretary of Defense Donald H. Rumsfeld had consulted a variety of old Washington hands concerning the military commissions President Bush had authorized in a Military Order issued on November 13, 2001.¹⁶ My request sought all communications to or from persons other than officials of the government concerning the military commissions and implementing rules. I had drafted the letter precisely to step around the FOIA exemption for inter- and intra-agency communications.¹⁷

We wound up having to sue. Only then did the Defense Department conduct a serious search and the documents start to flow. But the government resisted release of communications between the Pentagon and the outsiders Mr. Rumsfeld had consulted.¹⁸

Some of the documents released were quite interesting. For example, we learned that members of the review board set up as an appellate body for the military commissions participated in a briefing regarding prosecution strategy—without the presence of any defense counsel.¹⁹ This later became an issue in efforts to disqualify the review board members, although enactment of the Military Commissions Act of 2006²⁰ mooted the matter by establishing a statutory Court of Military Commission Review.²¹

EST); posting of Mukesh Chatter to Money Aisle Blog, Barack Obama Needs a CTO-Chief Transparency Officer, <http://blog.moneyaisle.com/2008/11/barack-obama-needs-cto-chief.html> (Nov. 18, 2008, 13:04 EST). Perhaps there should be a separate portfolio with that title, because, although the field of transparency overlaps with technology, the two are far from identical.

16. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

17. 5 U.S.C. § 552(b)(5) (2006), amended by Pub. L. No. 110-175, 121 Stat. 2524 (2007).

18. It also refused to release correspondence with the Attorney General of the United Kingdom, Lord Goldsmith. This refusal was permissible under 10 U.S.C. § 130c (2006 & Supp. I 2007), once the Secretary personally signed the requisite determination, which Mr. Rumsfeld eventually did. I assume Lord Goldsmith's correspondence would have embarrassed our government.

19. Memorandum of Points & Authorities in Support of Defendant's Motion for Summary Judgment, Exhibit 11–Vaughn Index (Second Index of Documents Withheld), at 48–50, Nat'l Inst. of Military Justice v. Dep't of Def., 404 F. Supp. 2d 325 (D.D.C. 2005) (No. 04-312) (describing document titled "MEETING NOTES: DEP SEC DEF and GENERAL COUNSEL ADVISORY MEETING 7/30/03"). The Defense Department released only the first page of this document, which listed the individuals who were present.

20. 10 U.S.C. §§ 948–950w (2006 & Supp. I 2007).

21. *Id.* § 950f(a).

At length, Judge Walton granted summary judgment for the government, finding that Mr. Rumsfeld's friends fell within a judge-made "deliberative process" exception to the FOIA.²² On appeal, a panel of the District of Columbia Circuit affirmed,²³ over a dissent by Judge Tatel.²⁴ In his view, the government's position was contrary to the Supreme Court's decision in *Department of the Interior v. Klamath Water Users Protective Ass'n*.²⁵ The Court of Appeals denied rehearing en banc,²⁶ and the Supreme Court denied certiorari.²⁷

This decision means that any federal official can have secret consultations with countless outsiders (or should I say "outside 'insiders'") and affected parties, and the general public will never even know unless the official elects to disclose that fact, as Mr. Rumsfeld did, or disclosure is required by some other statute. It matters not that such "consultants" have not qualified as "special government employees," a status that affords a modicum of protection against conflicts of interest. Seemingly all that is required to gain the benefit of this rule of nondisclosure is that the consulted persons be asked by a government official for their advice and have no personal stake in the outcome. Note that such an individual could achieve the protected status by tipping off the official that he or she was available to opine, in effect fishing for an invitation. In this fashion, an "outside 'insider'" and an official could easily collude to avoid public scrutiny.

Even though he concluded that the law forbade withholding documents in the circumstances I've described, Judge Tatel thought it wiser as a matter of policy to permit the kind of secret consultation in which Mr. Rumsfeld had engaged.²⁸ With great respect, allowing this kind of off-the-record consultation detracts from public confidence in the conduct of government business. It is also unfair to those whose interests may be affected by the decisionmaker's actions.

In many instances, the kind of consultations in which Mr. Rumsfeld engaged would become known soon enough. Thus, if the agency action at issue is a rulemaking or adjudication subject to judicial review under the Administrative Procedure Act (APA),²⁹ pertinent documents would be made part of the administrative record and furnished to affected

22. *Nat'l Inst. of Military Justice v. U.S. Dep't of Def.*, 404 F. Supp. 2d 325, 347 (D.D.C. 2005).

23. *Nat'l Inst. of Military Justice v. U.S. Dep't of Def.*, 512 F.3d 677, 687 (D.C. Cir. 2008).

24. *Id.* at 687-96 (Tatel, J., dissenting).

25. *Id.* at 688 (citing *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001)).

26. *Nat'l Inst. of Military Justice v. Dep't of Def.*, No. 06-5242, 2008 WL 1990366, at *1 (D.C. Cir. Apr. 30, 2008) (per curiam).

27. *Nat'l Inst. of Military Justice v. Dep't of Def.*, 129 S. Ct. 775, 776 (2008).

28. *Nat'l Inst. of Military Justice*, 512 F.3d at 687-88 (Tatel, J., dissenting).

29. 5 U.S.C. § 706 (2006 & Supp. II 2008).

parties.³⁰ But in the case at hand, Mr. Rumsfeld's rulemaking lay outside the APA's strictures,³¹ so the normal prohibition on ex parte communications did not apply. Nor would it have been productive to contend that the friends he consulted were a de facto federal advisory committee and therefore subject to the transparency requirements of the Federal Advisory Committee Act.³² In the circumstances, therefore, FOIA was the only vehicle for affording some measure of transparency. I confess that I am disheartened by the prospect that officeholders may now engage in Mr. Rumsfeld's ploy without fear of judicial disapproval.

Fast forward to 2009. Faced with President Obama's transparency memorandum and undeterred by losing in every court to which the legal issue was presented, the National Institute of Military Justice (NIMJ) has asked the Defense Department to release the nineteen documents it was permitted to withhold in the NIMJ FOIA litigation.³³ Naturally, the matter cannot be relitigated; release of the documents is now a question addressed purely to the conscience and stated transparency policies of the new administration. What will it do?

3

A second case study in Executive Branch transparency concerns advice the government generates internally. We all watched over the last several years as various Bush-era opinions of the Office of Legal Counsel (OLC) have emerged.³⁴ Only recently, the Obama administration

30. *E.g.*, *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

31. 5 U.S.C. § 553(a)(1). *See generally* Eugene R. Fidell, *Military Commissions and Administrative Law*, 6 GREEN BAG 2d 379 (2003).

32. 5 U.S.C. app. § 2 (2006 & Supp. II 2008); *see* *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 914 (D.C. Cir. 1993).

33. Letter from Will Kammer, Chief, Dep't of Def., to Michelle M. Lindo McCluer, Nat'l Inst. of Military Justice (Mar. 26, 2009) (on file with the Hastings Law Journal).

34. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., to Dep't of Justice (Jan. 15, 2009), *available at* <http://www.usdoj.gov/olc/docs/memostatusolcopinions01152009.pdf> [hereinafter Jan. 15, 2009 Bradbury Memorandum]; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., to Dep't of Justice (Oct. 6, 2008), *available at* <http://www.usdoj.gov/olc/docs/memoolcopiniondomesticusemilitaryforce10062008.pdf>; Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Attorney Gen. (June 8, 2002), *available at* <http://www.usdoj.gov/olc/docs/memomilitarydetention06082002.pdf>; Memorandum from Jay S. Bybee, Assistant Attorney Gen., to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Mar. 13, 2002), *available at* <http://www.usdoj.gov/olc/docs/memorandum03132002.pdf>; Memorandum from Patrick Philbin, Deputy Assistant Attorney Gen., to Daniel J. Bryant, Assistant Attorney Gen. (Apr. 8, 2002), *available at* <http://www.usdoj.gov/olc/docs/memojusticeauthorizationact0482002.pdf>; Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to Daniel J. Bryant, Assistant Attorney Gen., Office of Legislative Affairs (June 27, 2002), *available at* <http://www.usdoj.gov/olc/docs/memodetentionuscitizenso6272002.pdf>; Memorandum from John C. Yoo, Deputy Assistant Attorney Gen. & Robert J. Delahunty, Special Counsel, to John Bellinger, III, Senior Assoc. Counsel to the President & Legal Advisor to the Nat'l Sec. Council (Nov. 15, 2001), *available at* <http://www.usdoj.gov/olc/docs/memoabmtreaty11152001.pdf>; Memorandum from John C. Yoo, Deputy Assistant Attorney Gen. & Robert J. Delahunty, Special Counsel, to Alberto Gonzales, Counsel to the President &

released another batch of OLC opinions concerning various aspects of the so-called “war on terror,”³⁵ including one, issued only five days before the 2009 Inauguration, disavowing important aspects of earlier Bush administration opinions.³⁶

The point here is not whether the memoranda by Judge (as he now is) Jay S. Bybee, Professor John C. Yoo, Patrick F. Philbin, and Robert J. Delahunty³⁷ were sound, but rather, whether they should have been released earlier. Evidently none of the opinions released this month were classified—they do not bear the usual markings. What is the standard for deciding whether and when an unclassified OLC opinion will be released? Given the pivotal role the Office plays in the conduct of Executive Branch affairs and the fact that these opinions are binding within the Executive Branch (if not on the President), is there any reason not to make them public upon completion, assuming they are unclassified?

But suppose an OLC memorandum *is* classified. As Louis Fisher has written:

Secret legal memos are particularly damaging to the rule of law when they build on untested theoretical definitions of presidential power. . . . The rule of law is further weakened when memos remain secret without the opportunity for colleagues to determine compliance with legal and constitutional standards. Secrecy makes vetting within the executive branch minimal.³⁸

On this score, the cause of transparency has gained some ground. In 2004, in reaction to some of the Bush-era OLC memos that had become public only through leaks, nineteen former OLC attorneys prepared a set of best practices, two of which speak to the question of publication.³⁹ According to one,

William J. Haynes, II, Gen. Counsel, Dep’t of Def. (Oct. 23, 2001), *available at* <http://www.usdoj.gov/olc/docs/memomilitaryforcecombatus10232001.pdf>; Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to David S. Kris, Assoc. Deputy Attorney Gen. (Sept. 25, 2001), *available at* <http://www.usdoj.gov/olc/docs/memoforeignsurveillanceact09252001.pdf>.

35. Press Release, Dep’t of Justice, Department of Justice Releases Nine Office of Legal Counsel Memoranda and Opinions (Mar. 2, 2009), *available at* <http://www.usdoj.gov/opa/pr/2009/March/09-ag-181.html>; see Neil A. Lewis, *Memos Reveal Scope of Power Bush Sought in Fighting Terror*, N.Y. TIMES, Mar. 3, 2009, at A1; Charlie Savage & Neil A. Lewis, *Release of Memos Fuels Push for Inquiry into Bush’s Terror-Fighting Policies*, N.Y. TIMES, Mar. 4, 2009, at A18.

36. See Jan. 15, 2009 Bradbury Memorandum, *supra* note 34.

37. See *supra* note 34.

38. Louis Fisher, *Why Classify Legal Memos?*, NAT’L L.J., July 14, 2008, at 22, *available at* <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202422864198&slreturn=1&hbxlogin=1>.

39. Walter E. Dellinger et al., *Guidelines for the President’s Legal Advisors*, 81 IND. L.J. 1348, 1348, 1354 (2006). The published version appeared with an introduction by Professor Dawn E. Johnson, President Obama’s choice to head the Office of Legal Counsel. See Dawn E. Johnson, *Introduction to Dellinger et al.*, *supra*, at 1345.

On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.

... The need for transparency regarding interbranch disagreements . . . should be beyond dispute. At a bare minimum, OLC advice should fully address applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action.⁴⁰

The proposed principles go on to address publication more broadly:

OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning—in the courts as well as among academics, other commentators, and the public more generally—and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.⁴¹

40. Dellinger et al., *supra* note 39, at 1351. The discussion also noted that “federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.” *Id.*

41. *Id.* at 1351–52. In a similar vein, President Obama has undertaken to ensure that signing statements “identify [his] constitutional concerns about a statutory provision with sufficient specificity

The proposed principles correctly recognize that some advice may well be classified. But classifying a document has the practical effect not only of making it inaccessible by the public, but also of reducing its transparency within the government itself, thus depriving decisionmakers of the benefit of robust exchange of views. This seems to have been why some of the OLC memoranda were not made available even to some officials with a clear need to know.⁴² “Internal” or “intramural” transparency deserves close study because other checks and balances, such as judicial review or meaningful legislative oversight, may be unavailable.⁴³

4

The Executive Branch is not alone in having to deal with issues of transparency.⁴⁴ In this city particularly, which is well on its way to becoming “ground zero” for state secrets litigation, I need hardly dwell on the controversy that has emerged in the *Al-Haramain* litigation.⁴⁵ My prediction is that when the dust settles either at the Supreme Court or, more likely, in Congress, an Executive Branch state-secrets claim will be subject to some review by the courts. But that’s a high-profile controversy. Let me mention some others that may not yet have made it onto your screens.

One interesting development has been the use of secret dockets by the federal courts. These are cases in which, for one reason or another, the very existence of the case is hidden from the public. The Reporters Committee for Freedom of the Press has done outstanding work in calling attention to this disturbing practice, given the core principle that

to make clear the nature and basis of the constitutional objection.” Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 10,669 (Mar. 11, 2009); see also, e.g., Charlie Savage, *Obama Says He Can Ignore Some Parts of Spending Bill*, N.Y. TIMES, Mar. 12, 2009, at A18. One can agree or disagree with the merits of any particular objection in a signing statement, or whether a president may sign a measure and yet not enforce parts of it, see CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 241–49 (2007), but the mere act of disclosing objections is both proper and useful. Taken together, signing statements provide a kind of MRI for an administration’s reading of the Constitution.

42. See JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 181–82 (2007).

43. Such intragovernmental disclosures are distinct from disclosures to the public. For a perceptive analysis of the ethical dimension of unauthorized disclosures to the public by government attorneys, see Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033 (2007).

44. Transparency issues also abound in the judiciary. Professor Arthur Hellman, for example, has closely—and critically—studied the system for policing judicial ethics in the federal courts. See Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189 (2007).

45. E.g., *Al-Haramain Islamic Found. v. Obama*, No. 09-15266, 2009 U.S. App. LEXIS 13169, at *2 (9th Cir. Feb. 27, 2009) (dismissing government appeal for lack of jurisdiction and denying motion for stay).

courts are open.⁴⁶ Probably the best known of these cases was one from Florida in which an error on the part of the Eleventh Circuit blew the courts' cover.⁴⁷ In other instances, only when someone happened to notice that docket numbers in the courts' public files had gaps, did the light go on—sorry for the imagery—that there were cases about which no one knew.⁴⁸

In March 2007, the Judicial Conference responded by strongly urging the federal courts “to ensure that, in response to queries about sealed cases, the [computerized] message reads ‘case under seal’ rather than ‘case does not exist.’”⁴⁹

The military justice system is another area in which docket access issues have been raised. The system is not part of the administrative apparatus of the federal courts, but it is still astounding that the Judge Advocates General of the Army, Navy, and Air Force, as well as the senior uniformed lawyer in the Marine Corps, all resisted efforts to make public the basic docketing information from which a journalist or member of the public might be able to learn who was being tried for what, when, and where.⁵⁰ In this digital era, there is no excuse for not having this kind of information readily available, and I am happy to report that my own old branch, the U.S. Coast Guard, under the leadership of Rear Admiral William D. Baumgartner, has broken ranks on this.⁵¹ I should also mention that the Canadian Forces are way ahead

46. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

47. See generally Warren Richey, *Supreme Court Decision May Limit Access to Terror Cases*, CHRISTIAN SCI. MONITOR, Feb. 24, 2004, at 4 (noting discovery of case, through clerk's error, by *Miami Daily Business Review* reporter); see also *M. K. B. v. Warden*, 540 U.S. 804, 804 (2003) (“Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.”).

48. See generally Kirsten B. Mitchell & Susan Burgess, *Disappearing Dockets: When Public Dockets Have Holes, the Public's Right to Open Judicial Proceedings Is Jeopardized*, 30 NEWS MEDIA & L., Winter 2006, at 4; Kirsten B. Mitchell, *Partial Fix: D.C. Federal Court Acknowledges Existence of Sealed Cases, but Finding Them Requires Search for Gaps in Docket*, 30 NEWS MEDIA & L., Spring 2006, at 10.

49. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2007), available at <http://www.uscourts.gov/judconf/07MarchProceedings.pdf>, noted in Tony Mauro, *Judicial Conference Urges End to 'Secret' Dockets*, NAT'L L.J., Mar. 19, 2007, at 3.

50. Letter from Maj. Gen. Scott C. Black, Judge Advocate Gen. of the Army, et al., to Kathleen A. Duignan, Executive Dir., Nat'l Inst. of Military Justice (Nov. 6, 2006) (on file with the Hastings Law Journal), noted in Nathan Winegard, *Open to Those in the Know*, 31 NEWS MEDIA & L., Summer 2007, at 21; REPORTERS COMM. FOR FREEDOM OF THE PRESS, *MILITARY DOCKETS: EXAMINING THE PUBLIC'S RIGHT OF ACCESS TO THE WORKINGS OF MILITARY JUSTICE* 9 (Lucy A. Dalglish et al. eds., 2008), available at <http://www.rcfp.org/militarydockets/whitepaper.pdf>).

51. Rory Eastburg, *News Media Update, Coast Guard Pledges to Post Court-Martial Dockets Online* (Dec. 4, 2008), <http://www.rcfp.org/newsitems/index.php?i=7243&fmt>. The Air Force now also publishes its courts-martial docket. See Office of the Judge Advocate Gen., Dep't of the Air Force Judge Advocate Gen.'s Corps, *Air Force Publishes Courts-Martial Docket*, JAG NEWSWIRE, Sept. 2, 2009, <http://www.afjag.af.mil/news/story.asp?id=123166031>.

of us on this subject, having posted their court-martial docket on the web long before us.⁵²

The military services now seem to be moving in the right direction,⁵³ but their initial resistance was inexplicable. Equally inexplicable is the fact that access to decisions of at least one of the military's intermediate courts—the service Courts of Criminal Appeals—remains a hit-and-miss proposition, as a military justice blog has repeatedly demonstrated.⁵⁴ Cases seem to appear on the web at random times, and some seem never to do so.⁵⁵ Moreover, some of the most valuable sites are available only to active, reserve, or retired military lawyers, thus penalizing those accuseds who exercise their right to be represented by civilian attorneys at their own expense.

A report submitted in 2008 by Philip Alston, the UN's Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, referred to the “troublingly opaque character of the US military justice system.”⁵⁶ In it, Professor Alston points out both the serious consequences of the lack of transparency in military justice and the ease with which this can be remedied.⁵⁷ Referring to a 2007 incident in Afghanistan in which, after one Marine was wounded in a suicide attack, some nineteen persons

52. See CMJ—Court Martial Calendar, <http://www.jmc-cmj.forces.gc.ca/ccm-cmc/index-eng.asp> (last visited Nov. 17, 2009).

53. Office of the Judge Advocate Gen., *supra* note 51.

54. CAAFlog, <http://www.caaflog.com> (last visited Nov. 17, 2009) (“CAAF” stands for “U.S. Court of Appeals for the Armed Forces”), was pivotal in the endgame of *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), where, in counting jurisdictions on the death penalty for child rape, the Court and counsel overlooked a pertinent provision of the Uniform Code of Military Justice. See Linda Greenhouse, *Justice Department Admits Error in Failure to Brief Court*, N.Y. TIMES, July 3, 2008, at A15; Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, July 2, 2008, at A1. The Court wound up adhering to its decision. See *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008) (denying rehearing); Adam Liptak, *Justices' Ban on Executing Child Rapists Will Stand*, N.Y. TIMES, Oct. 2, 2008, at A21. As the CAAF blog notes, military decisions appear in the Westlaw “All Federal Cases” database and its Lexis counterpart (“Federal Cases, Combined”), contrary to the suggestion in Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 HARV. J.L. & TECH. 223, 224 (2008). See Posting of Dwight Sullivan to CAAFlog, Harvard Journal of Law & Technology Publishes Article with Obvious Mistake About Electronic Access to Military Justice Appellate Opinion, <http://caaflog.blogspot.com/2009/03/harvard-journal-of-law-technology.html> (Mar. 8, 2009, 20:41 EST). Whatever caused the *Kennedy* snafu, it was not a gap in electronic databases.

55. The military does not have a monopoly over tardy release of decisions. For example, the August 22, 2008 decision of the Foreign Intelligence Surveillance Court of Review in *In re Directives [Name Redacted by the Court] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 08-01, 2008 U.S. App. LEXIS 27439 (FISA Ct. Rev. Aug. 22, 2008), was not released until January 15, 2009. See James Risen & Eric Lichtblau, *Court Affirms Wiretapping Without Warrants*, N.Y. TIMES, Jan. 16, 2009, at A13. Even allowing for the need to redact classified information in what wound up as a relatively brief opinion, this delay seems excessive.

56. See Philip Alston, UN Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Press Statement (June 30, 2008), in Press Release, UN, UN Special Rapporteur Calls on the U.S. to Take Steps to Avoid Unlawful Killings (June 30, 2008), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/73409531EE29EEF8C12574780053EFC2?opendocument>.

57. *Id.*

were killed and many others wounded as the Marines withdrew, he wrote:

Unfortunately, this particular incident is only one of many in which the military justice system has failed to provide the appearance—and, perhaps, the reality—of justice. The system is opaque, making it remarkably difficult for the US public, victims, or even commanders to obtain up-to-date information on the status of cases, the schedule of upcoming hearings, or even judgments and pleadings which are theoretically public. This lack of transparency is, in part, a side-effect of the decentralized character of the system, in which commanders around the world are given the authority to conduct preliminary investigations and act as “convening authorities” to initiate courts-martial.

If there is the will to do so, this problem can be solved quickly and easily. Reporting requirements and a central office, or registry, could be added to the existing system at little cost, and this would markedly improve accountability and reduce the sense among Afghan and Iraqi civilians, and others around the world, that US forces operate with impunity.⁵⁸

It is my hope that reports such as this, as well as prodding by the National Institute of Military Justice and the Reporters Committee,⁵⁹ will lead military authorities to give higher priority to transparency. Doing so can only improve public confidence, here and abroad, in the administration of justice.

A fascinating recent judicial development concerns the PACER system. PACER stands for “Public Access to Court Electronic Records.” Lawyers and journalists who cover the federal courts know it well. It permits users to read and download—at a cost of eight cents a page—documents filed with the federal courts.⁶⁰ Recently, the federal courts arranged a pilot project making PACER documents available for free at seventeen libraries.⁶¹ An activist named Carl Malamud undertook to download everything possible and make it available for free.⁶² In response, the pilot program was shut down.⁶³ How this particular controversy unfolds at this point remains cloudy, but it suggests that there are untapped realms of information waiting to be mined, inevitably including information that ought not to be available under the 2007 rule changes adopted in accordance with the E-Government Act of 2002.⁶⁴

58. *Id.*

59. *See* REPORTERS COMM. FOR FREEDOM OF THE PRESS, *supra* note 50.

60. PACER Frequently Asked Questions, <http://pacer.psc.uscourts.gov/faq.htm#GP8> (last visited Nov. 17, 2009).

61. John Schwartz, *An Effort to Upgrade a Court Archive System to Free and Easy*, N.Y. TIMES, Feb. 13, 2009, at A16.

62. *Id.*

63. *Id.*

64. Pub. L. No. 107-347, § 205(c)(3), 116 Stat. 2899, 2914 (2002); e.g., FED. R. CIV. P. 5.2(a); FED. R. CRIM. P. 49.1(a); *see* Schwartz, *supra* note 61.

Mr. Malamud precipitated an enormous amount of work by court clerks and lawyers by demanding that incorrect filings be removed from the public PACER dockets and replaced by substitutes with the necessary redactions.⁶⁵ Apparently referring to Mr. Malamud's interest in joining the Obama administration, John Podesta observed that "[h]e would certainly shake things up."⁶⁶ Mr. Podesta laughed when he said that to the *Times*' reporter.⁶⁷ Query whether the court clerks and lawyers for whom Mr. Malamud caused so much work would join in the mirth.

5

Turning now to the Congress, there is good news and bad news. Of course, things like the "secret hold" or earmarks whose authorship is close to impossible to determine remain part of the scene,⁶⁸ but both seem at least to be falling into disfavor.⁶⁹ Secret sessions of the Senate and House of Representatives are permitted under the Constitution,⁷⁰ but these have become extremely rare. The most recent secret session of the Senate occurred on November 1, 2005, while the House met in secret only a year ago, on March 13, 2008.⁷¹

One interesting area of congressional practice concerns international agreements that are not subject to Senate ratification. In a forthcoming paper, Professor Hathaway considers the startling number and scope of these agreements, some of which are either never reported to Congress or, if they are, are reported too late for Congress to do anything about them.⁷² In part, she proposes an "administrative track" akin to the notice-and-comment model for making legislative rules⁷³ with

65. See Schwartz, *supra* note 61.

66. *Id.*

67. *Id.*

68. *E.g.*, Posting of Kate Phillips to The Caucus, Secret Hold Placed on Senate Disclosures, <http://thecaucus.blogs.nytimes.com/2007/04/18/secret-hold-placed-on-senate-disclosures/> (Apr. 18, 2007, 18:38 EST).

69. See 2 U.S.C. § 30b (2006) (establishing protocol for identification of a Senator who wishes to object to a proceeding); H.R. Res. 6, 110th Cong. (2007) (changing House Rule XXI to require the name of the member submitting an earmark request); see also WALTER J. OLESZEK, CONG. RESEARCH SERV., SENATE POLICY ON "HOLDS": ACTION IN THE 110TH CONGRESS (2008); SANDY STREETER, CONG. RESEARCH SERV., HOUSE AND SENATE PROCEDURAL RULES CONCERNING EARMARK DISCLOSURE (2009); Carl Hulse, *Senate May End Its Tradition of Blocking Bills in Secret*, N.Y. TIMES, Aug. 2, 2007, at A13; David D. Kirkpatrick, *House Tightens Disclosure Rules for Pet Projects*, N.Y. TIMES, Jan. 6, 2007, at A1, available at <http://www.nytimes.com/2007/01/06/washington/06cong.html>.

70. U.S. CONST. art. I, § 5.

71. MILDRED AMER, SECRET SESSIONS OF CONGRESS: A BRIEF HISTORICAL OVERVIEW 6 tbls. 1 & 2 (2008). Another area in which legislative transparency is at issue concerns the timeliness of Senate campaign financing disclosures. See John Fritze, 'Transparency' Fixes Seen in Congress' Future, USA TODAY, Jan. 2, 2009, at 5A.

72. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009).

73. *Id.* at 242-44.

which we all are familiar from Administrative Law, but tailored to the context of executive agreements negotiated under the President's sole authority and ex ante congressional executive agreements.⁷⁴ She also suggests that congressional notification of international agreements under the Case-Zablocki Act⁷⁵ should be made public upon submission, and the agreements themselves, if unclassified, be made public before they go into effect—a step that, in her words, “would allow public input into the process of international lawmaking.”⁷⁶ Professor Hathaway has kindly permitted me to mention her very exciting proposal, but because I am anxious not to steal her thunder or worse yet, misstate it, I will not go into it in greater detail here. I hope it gains traction, although my personal preference would be to find ways—if it is not too late—to reduce our addiction to nontreaty international agreements.⁷⁷

6

My remarks have focused on issues of transparency in the domestic arena, but it is important to keep in mind that these issues are also highly salient (and at least as challenging) in the international arena. This is so because the forces favoring transparency in that arena may have less power than in any domestic context and the need for consensus may skew organizational policy in the opposite direction.⁷⁸

Transparency is one of the overarching themes of our time. It reflects the public's rising—no, *risen*—expectations as to how official decisions will be made and explained. This is a hopeful sign for democracy and an important byproduct of the open government laws that were enacted in the last half of the twentieth century, the rise of civil-society NGOs, and the broad availability of information through the internet. Whatever the causes, transparency as such—as both law and policy—merits both advocacy and continuing study, including courses that focus on it specifically and in depth. Some law schools have already

74. *Id.*

75. 1 U.S.C. § 112b (2006).

76. Hathaway, *supra* note 72, at 245 & n.316.

77. This trend is reminiscent of our increasing willingness to engage in international hostilities without resort to the formal declaration of war contemplated by the Constitution. *See* U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . To declare War.”). In both instances, I see Congress as complicit in the erosion of its powers, although in the case of the treaty power, U.S. CONST. art. II, § 2, cl. 2, it is the Senate that is the institutional loser.

78. Recent studies include: David P. Forsythe, *The ICRC: A Unique Humanitarian Protagonist*, 89 INT'L REV. RED CROSS 63, 90 (2007); Alexandru Grigorescu, *Transparency of Intergovernmental Organizations: The Roles of Member States, International Bureaucracies and Nongovernmental Organizations*, 51 INT'L STUD. Q. 625 (2007); and Friedl Weiss, *Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison*, 30 FORDHAM INT'L L.J. 1545 (2007). The United States has played a positive role in encouraging greater transparency within the UN particularly. *See* UN Transparency and Accountability Initiative, http://usun.state.gov/about/un_reform/tran_acc_init/index.htm (last visited Nov. 17, 2009).

moved in this direction,⁷⁹ and I expect others to do so in the future. Our democracy will be the stronger for it.

79. For example, Stephen I. Vladeck and Daniel J. Metcalfe teach a seminar on “The Law of Secrecy” at American University, Washington College of Law. *See* Collaboration on Government Secrecy, <http://www.wcl.american.edu/lawandgov/cgs/about.cfm> (last visited Nov. 17, 2009).
