

Chutzpah

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INTRODUCTION

Transparency, like sobriety and chastity, is a virtue easy to aspire to but difficult to practice.¹ The Administration of President Barack Obama has demonstrated this hard lesson repeatedly.

This article analyzes two examples of the gap between rhetoric and practice in transparent governance, Internet freedom and intellectual property negotiations, and argues that the Obama administration's lack of transparency results from structural features of the modern executive branch.² This largely explains the puzzling – and, to Obama supporters, disappointing – similarities between the current administration and its predecessor under President George W. Bush.³ The lesson is that when a presidential candidate promises to operate transparently, voters should expect disappointment.

Transparency, of course, is a relative concept.⁴ Descriptively, it is measured against previous examples, particularly the pattern of prior administrations. Normatively, transparency must be weighed against competing commitments, such as to efficiency, national security, or institutional allocation of power.⁵ Thus, how transparent the federal government ought to be depends on the balance of virtues transparency promotes, such as reducing corruption and encouraging participation, relative to the virtues it inhibits.⁶ Also, where a particular administration rates on that measure is driven significantly by how other ones have fared.

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1. See generally Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 74 U. PITT. L. REV. __ (forthcoming 2012).

2. See Ronald J. Krotoszynski, Jr., *Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance*, 65 U. MIAMI L. REV. 449 (2011).

3. Cf. Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 23, 2012, at A1 (describing similarities in use of executive branch authority under Presidents Obama and Bush).

4. See Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 393-396, 410-414 (2009).

5. Cf. Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1342-1343 (offering a framework to assess transparency's costs and benefits, and relationship to other normative commitments); Anita Bernstein, *Toward More Parsimony and Transparency in "The Essentials of Marriage,"* 2011 MICH. ST. L. REV. 83, 136 (2011) (defending transparency on normative grounds).

6. See generally Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006) (developing theory of transparency in governance).

The Obama administration seems, overall, to be more transparent than its immediate predecessor.⁷ Yet, the prevailing sentiment regarding Obama's track record is disappointment.⁸ Here, candidate Obama set expectations that President Obama has been unable to fulfill. He campaigned on pledges to increase transparency in both policymaking and implementation – indeed, one of his first official announcements was a promise to produce “the most open and transparent [administration] in history.”⁹ Yet, these pledges have largely been unfulfilled or simply abandoned.¹⁰

By contrast, President George W. Bush placed little weight on transparency as a goal.¹¹ Indeed, key figures in the Bush administration, such as Vice President Richard B. Cheney, were actively hostile to public disclosure and worked to thwart information sharing.¹² For example, Cheney refused to disclose the identities of the members of the Administration's energy task force (the National Energy Policy Development Group) even after being sued under the Freedom of Information Act by Judicial Watch and the Sierra Club.¹³

Ironically, the Bush administration's posture should have redounded to President Obama's benefit, since even a moderate level of transparency would appear significant by comparison. Yet, the Administration's transparency troubles are not only due to the gap between soaring rhetoric and pedestrian practice.¹⁴ Rather, the government has deliberately chosen to block public participation in, and scrutiny of, its policymaking in several areas. This article concentrates on

7. See, e.g., Emily Badger, *Assessing Obama's Record on Transparency*, INDEX ON CENSORSHIP (July 29, 2011), available at <http://www.indexoncensorship.org/2011/07/assessing-obamas-record-on-transparency/>; Peter Nicholas, *Obama's Transparency Record Appears Cloudy*, L.A. TIMES, Feb. 1, 2010, available at <http://articles.latimes.com/2010/feb/01/nation/la-na-transparency1-2010feb01>.

8. See, e.g., John Hudson, *Obama Administration Distorted its Transparency Record: Ex-DOJ Official*, THE ATLANTIC WIRE, Mar. 9, 2012, available at <http://www.theatlanticwire.com/politics/2012/03/foia-advocates-skeptical-about-obamas-claims-foia-progress/49668/> (noting that “the Obama administration has faced particularly disappointed advocates because he came into office promising to open government records”); Mike Masnick, *FBI Almost Entirely Arbitrary in Redacting Info on Freedom of Information Requests*, TECHDIRT, Dec. 10, 2010, <http://www.techdirt.com/articles/20101209/18050412224/fbi-almost-entirely-arbitrary-redacting-info-freedom-information-requests.shtml>.

9. Macon Philips, *Change Has Come to WhiteHouse.gov*, THE WHITE HOUSE (Jan. 20, 2009), http://www.whitehouse.gov/blog/change_has_come_to_whitehouse-gov.

10. See, e.g., Josh Gerstein, *President Obama's Muddy Transparency Record*, POLITICO, Mar. 5, 2012, <http://www.politico.com/news/stories/0312/73606.html>; Sharon Theimer, *Obama's Broken Promise: Federal Agencies Not More Transparent Under Obama Administration*, ASSOC. PRESS, Mar. 17, 2010, available at http://www.huffingtonpost.com/2010/03/16/obamas-broken-promise-fed_n_500526.html.

11. See Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81 (2011).

12. See, e.g., Scott Shane, *U.S. Reclassifies Many Documents in Secret Review*, N.Y. TIMES, Feb. 21, 2006, at A1.

13. *Judicial Watch v. U.S. Dep't of Energy*, 412 F.3d 125 (D.C. Cir. 2005).

14. See David Kravets, *It's Sunshine Week, But Obama's Transparency Record Is Cloudy*, WIRED (Mar. 14, 2011), available at <http://www.wired.com/threatlevel/2011/03/obama-transparency-clouded/>; Kathleen Clark, “A New Era of Openness?”: *Disclosing Intelligence to Congress Under Obama*, 26 CONST. COMMENT. 313 (2010).

two: Internet freedom and IP negotiations.¹⁵ While both areas present important policy questions, they are helpfully peripheral. If the Obama administration will not open its books on topics that are relatively low-stakes and nonpartisan, it is not likely to do so on weightier matters. Information law issues are thus a weathervane for transparency: they demonstrate that, while President Obama's administration claims the mantle of transparency, its actions point towards opacity. This is chutzpah.

I. INTERNET FREEDOM

Internet freedom is one of the areas in which the Obama administration's rhetoric clashes with its practices. President Obama emphasized information technology policy during his campaign, and his presidency began with a firm commitment to open Internet communication, both in the United States and abroad.¹⁶ Domestically, the Federal Communications Commission (FCC), under Chairman Julius Genachowski, implemented network neutrality regulations designed to prevent Internet service providers (ISPs) from discriminating against content on their networks based on origin, destination, or application type.¹⁷ The FCC attempted to implement these rules initially via an order enjoining Comcast Corporation from slowing peer-to-peer traffic on its network.¹⁸ Even after the U.S. Court of Appeals for the District of Columbia Circuit voided the order, ruling that the FCC lacked ancillary authority over the practices, the Commission persisted.¹⁹ The FCC issued rules codifying three principles – transparency, a ban on blocking lawful traffic, and a ban on unreasonable discrimination – and defending its statutory authority for this action.²⁰ Initially, President Obama's government both enshrined transparency as a touchstone of Internet policy and moved to implement the principle through regulation, even in the teeth of determined industry opposition.²¹

Similarly, Secretary of State Hillary Clinton made Internet freedom a core theme of the Administration's international agenda.²² She delivered two major

15. See, e.g., David S. Levine, *Transparency Soup: The ACTA Negotiating Process and "Black Box" Lawmaking*, 26 AM. U. INT'L L. REV. 811 (2011).

16. Hiawatha Bray, *Obama Preparing Comprehensive Technology Policy*, N.Y. TIMES, Nov. 12, 2008, available at http://www.nytimes.com/2008/11/12/technology/12iht-otech.4.17766126.html?_r=1.

17. See Brad Reed, *FCC's Genachowski Gives Strong Net Neutrality Endorsement*, NETWORK WORLD, Sept. 21, 2009, <http://www.networkworld.com/news/2009/092109-genachowski-net-neutrality-speech.html>.

18. *In re Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008).

19. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

20. *Preserving the Open Internet*, 76 Fed. Reg. 59,192 (Sept. 23, 2011) (to be codified at 47 C.F.R. pts. 0 and 8).

21. See Maisie Ramsay, *Verizon, MetroPCS Net Neutrality Suit to Proceed*, WIRELESS WEEK, Mar. 2, 2012, <http://www.cedmagazine.com/news/2012/03/verizon-metropcs-net-neutrality-suit-to-proceed>.

22. See generally Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 898 (2012).

speeches on the topic – one in January 2010²³ and another in February 2011²⁴ – and paid homage to the role of Internet communication, including social media, in the Arab Spring revolutions of 2011.²⁵ Agencies such as the State Department and the Department of Defense have sought to translate this commitment into action. The State Department funds the New America Foundation’s Commotion Wireless Project, which seeks to offer activists “Internet in a suitcase” technology, designed to help users bypass restrictions by forming ad hoc wireless networks.²⁶ Additionally, the State Department awarded \$1.5 million to the Global Internet Freedom Consortium, which helps develop the FreeGate and UltraSurf circumvention tools that bypass online censorship.²⁷ The U.S. Navy designed²⁸ and patented²⁹ the first generation Onion Router, which has been developed into the TOR networking tool.³⁰ TOR uses a series of encrypted connections to hide traffic, including origin and destination, from network monitors.

The Administration’s commitment to Internet freedom, however, is belied by its extensive efforts to control and interdict online content, both within the United States and abroad.³¹ Most prominently, the Department of Homeland Security and the Department of Justice have worked in concert to seize over 750 domain names of sites they believe offer unlawful content – primarily, material that infringes U.S. copyright law.³² Some of these sites are plainly illegal,³³ while others, such as the Spanish website, Rojadirecta, have been

23. Hillary Rodham Clinton, U.S. Sec’y of State, Remarks on Internet Freedom, (Jan. 21, 2010), available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

24. Hillary Rodham Clinton, U.S. Sec’y of State, Internet Rights and Wrongs: Choices & Challenges in a Networked World, (Feb. 15, 2011), available at <http://www.state.gov/secretary/rm/2011/02/156619.htm>.

25. Gloria Goodale, *Hillary Clinton Champions Internet Freedom, but Cautions on Wikileaks*, CHRISTIAN SCIENCE MONITOR, Feb. 15, 2011, <http://www.csmonitor.com/USA/Foreign-Policy/2011/0215/Hillary-Clinton-champions-Internet-freedom-but-cautions-on-WikiLeaks>.

26. New America Foundation, *Commotion Wireless*, http://oti.newamerica.net/commotion_wireless_0; John Markoff, *U.S. Underwrites Internet Detour Around Censors*, N.Y. TIMES, June 12, 2011, at A1.

27. Global Internet Freedom Consortium, *Our Solutions*, <http://www.internetfreedom.org/Products-and-Services>; John Pomfret, *U.S. Risks China’s Ire with Decision to Fund Software Maker Tied to Falun Gong*, WASH. POST, May 12, 2010, at A1.

28. See, e.g., Kim Zetter, *Tor Torches Online Tracking*, WIRED, May 17, 2005, available at <http://www.wired.com/politics/security/news/2005/05/67542?currentPage=all>.

29. Onion routing network for securely moving data through communication networks, U.S Pat. No. 6,266,704 (filed May 29, 1998) (issued July 24, 2001).

30. *Tor: Overview*, TOR, <https://www.torproject.org/about/overview.html.en>.

31. Bambauer, *supra* note 22.

32. Grant Gross, *Feds Seize More Domain Names of Sites Accused of Selling Counterfeits*, COMPUTER WORLD, Apr. 10, 2012, http://www.computerworld.com/s/article/9226045/Feds_seize_more_domain_names_of_sites_accused_of_selling_counterfeits?taxonomyId=71.

33. Press Release, U.S. Dep’t of Homeland Security, Joint DHS-DOJ “Operation Protect Our Children” Seizes Website Domains Involved in Advertising and Distributing Child Pornography (Feb. 15, 2011), available at http://www.dhs.gov/ynews/releases/pr_1297804574965.shtm.

judged to be operating lawfully by their domestic courts.³⁴ Furthermore, and critically, the government has repeatedly obfuscated and impeded efforts by website owners to challenge the seizures of their domain names. For example, Stanford law professor Mark Lemley, who works for Durie Tangri, the firm that represents Rojadirecta, had difficulty determining who in the federal government to contact regarding the seizure.³⁵ Federal officials repeatedly evaded his attempts to negotiate.³⁶ After eighteen months of litigation, federal prosecutors dropped their efforts to maintain the seizure without explanation.³⁷

Similarly, when the government seized the domain name for the hip-hop blog, Dajaz1, the site's attorney sought to secure its release.³⁸ The federal government refused to provide the attorney with copies of the seizure documents, refused to notify him of requests for extensions of the statutory deadline for commencing forfeiture proceedings, and filed extensions under seal.³⁹ When the government was finally forced to address the merits of the seizure, it simply dropped the case – after keeping Dajaz1 offline for a year.⁴⁰ The Obama administration is not only engaged in straightforward Internet censorship, it also wants that censorship to be as opaque and impervious to challenge as possible.⁴¹

Beyond direct measures such as domain name seizures, the federal government has used indirect means to interdict disfavored on-line information. The Obama administration deployed a set of formal and informal pressures against the WikiLeaks website after it published sensitive materials related to the conflicts in Iraq and Afghanistan, American diplomacy, and U.S. foreign policy.⁴² Formally, the government convened a grand jury to consider indictments against contributors to the site, such as WikiLeaks founder, Julian Assange.⁴³ Informally, State Department legal advisor Harold Hongju Koh sent a letter to

34. *Memorandum of Points and Authorities In Support of Puerto 80's Petition for Release of Seized Property and in Support of Request for Expedited Briefing and Hearing of Same 3*, Puerto 80 Projects v. United States, No. 1:2011-cv-03983 (S.D.N.Y. June 12, 2011).

35. *Id.* at 4-6.

36. *Id.*

37. Jennifer Martinez, *US Government Dismisses Piracy Case Against Rojadirecta Site*, THE HILL, Aug. 29, 2012, <http://thehill.com/blogs/hillcon-valley/technology/246529-us-government-dismisses-case-against-rojadirecta>.

38. Declan McCullagh, *DHS Abruptly Abandons Copyright Seizure of Hip-Hop Blog*, CNET NEWS, Dec. 8, 2011, http://news.cnet.com/8301-31921_3-57339569-281/dhs-abruptly-abandons-copyright-seizure-of-hip-hop-blog/.

39. Michael Masnick, *Breaking News: Feds Falsely Censor Popular Blog For Over A Year, Deny All Due Process, Hide All Details*, TECHDIRT, Dec. 8, 2011, <http://www.techdirt.com/articles/20111208/08225217010/breaking-news-feds-falsely-censor-popular-blog-over-year-deny-all-due-process-hide-all-details.shtml>.

40. *Id.*

41. Bambauer, *supra* note 22.

42. Derek E. Bambauer, *Consider the Censor*, 1 WAKE FOREST J.L. & POL'Y 31 (2011); Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C. L. L. REV. 311 (2011).

43. Ed Pilkington, *WikiLeaks: U.S. Opens Grand Jury Hearing*, THE GUARDIAN, May 11, 2011, <http://www.guardian.co.uk/media/2011/may/11/us-opens-wikileaks-grand-jury-hearing>.

WikiLeaks accusing the site of violating the Espionage Act by distributing the materials.⁴⁴ The Administration also sent threatening warnings to federal employees and college students, advising them that viewing materials from WikiLeaks could result in termination (for employees) or the loss of job prospects (for students).⁴⁵ These efforts are notable in light of both the minimal deleterious consequences of the WikiLeaks documents – Secretary of Defense Robert Gates dismissed their effects on American national security⁴⁶ – and also the lack of sanctions targeted at established media outlets, such as *The New York Times*, that also participated in distributing information.⁴⁷ The Obama administration does not trifle with formal legal constraints in seeking to drive information offline.

Lastly, on the domestic front, the Administration has pressured U.S. ISPs to agree to a new copyright enforcement system that is largely designed by content providers, such as motion picture studios and recorded music distributors.⁴⁸ Although U.S. ISPs are shielded from copyright liability for their users' infringing activities under Title II of the Digital Millennium Copyright Act,⁴⁹ the Obama administration (along with then-New York State Attorney General Andrew Cuomo) pressured the providers to engage in voluntary policing of such infringement,⁵⁰ allegedly by threatening to push for legislation that would achieve the same ends, but in a less flexible fashion. The threats are entirely plausible in light of the Administration's efforts to pass legislation that would compel ISPs to retain data for eighteen months after informal negotiations with

44. Letter from Harold Hongju Koh, Legal Advisor, State Dep't, to Julian Assange and Jennifer Robinson (Nov. 27, 2010), available at <http://www.reuters.com/article/2010/11/28/us-wikileaks-usa-letter-idUSTRE6AR1E420101128>. The suspect constitutional status of the Act did not deter Koh, the former dean of Yale Law School; perhaps respect for free speech diminishes with distance from New Haven. See MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* 101 (2006) (criticizing Act's constitutionality).

45. *Some Columbia U. Students Warned About WikiLeaks*, FOX NEWS, Dec. 4, 2010, available at <http://www.foxnews.com/us/2010/12/04/columbia-u-students-warned-wikileaks/>; Howard LaFranchi, *US to Federal Workers: If You Read WikiLeaks, You're Breaking the Law*, CHRISTIAN SCIENCE MONITOR, Dec. 7, 2010, <http://www.csmonitor.com/USA/Foreign-Policy/2010/1207/US-to-federal-workers-If-you-read-WikiLeaks-you-re-breaking-the-law>.

46. Lewis Page, *Gates: Nothing Really New in Bradley Manning Leak Storm*, THE REGISTER, Dec. 2, 2010, http://www.theregister.co.uk/2010/12/02/gates_wikileaks_poohpoo/.

47. Benkler, *supra* note 42, at 327 (noting that "the Obama administration treated Wikileaks as though it were in a fundamentally different category than it did the newspapers").

48. Disclosure: the author represents Christopher Soghoian, a security researcher, in a Freedom of Information Act lawsuit against the Office of Management and Budget to obtain documents describing the scope of the Administration's involvement in the "Six Strikes" copyright enforcement plan. See *Soghoian v. Office of Mgmt. & Budget*, No. 1:11-CV-02203-ABJ (D.D.C. Dec. 12, 2012).

49. 17 U.S.C. §512 (2006).

50. Jason Mick, *Obama Conscripts ISPs as "Copyright Cops," Unveils "Six Strikes" Plan*, DAILYTECH, July 8, 2011, <http://www.dailytech.com/Obama+Conscripts+ISPs+as+Copyright+Cops+Unveils+Six+Strikes+Plan/article22107.htm>.

providers failed to produce an agreement for quasi-voluntary data retention.⁵¹ In both cases, the Administration has sought to create policy through non-public negotiations with, and pressure on, stakeholders.

In short, while the Obama administration has consistently lauded transparency in its rhetoric regarding Internet freedom, its actions reveal not only censorial tendencies, but also efforts to resist and evade scrutiny of them. The government's actions are impossible to reconcile with the lofty rhetoric of Secretary Clinton or the aspirations of candidate Obama.

II. INTELLECTUAL PROPERTY

As with Internet freedom, the Obama administration has strenuously resisted efforts to gain access to details of its policymaking on intellectual property (IP).⁵² This lack of transparency is important for two substantive reasons, in addition to the perspective it offers on the government's commitment to openness more generally. First, IP-related industries are critical components of America's economy, and they are becoming ever more so.⁵³ These economic sectors include everything from software, to fashion, to pharmaceuticals. Thus, IP matters. Second, as scholars such as Jessica Litman and William Patry have documented, IP policy suffers from significant public choice problems.⁵⁴ Entities seeking increased IP protections and enforcement have a concentrated pecuniary interest in the issue.⁵⁵ Moreover, they have accumulated considerable political power through donations and lobbying.⁵⁶ Entities that benefit from more limited protection, or from exceptions to protection such as fair use, generally have far lower or more diffuse financial stakes in the outcome of policy debates, and often lack incentives to form lobbying or advocacy organiza-

51. Declan McCullagh, *DOJ Wants Mandatory Data Retention*, CBS NEWS, Jan. 25, 2011, http://www.cbsnews.com/8301-501465_162-20029440-501465.html; H.R. 1981, *Protecting Children from Internet Pornographers Act of 2011*, <http://www.govtrack.us/congress/billtext.xpd?bill=h112-1981>.

52. Ironically, the Administration's IP enforcement coordinator issued a report stating that she "continues to encourage improved transparency in intellectual property policy making." *2011 U.S. Intellectual Property Enforcement Coordinator Annual Report on Intellectual Property Enforcement* 8 (Mar. 2012), available at http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_mar2012.pdf.

53. Economics and Statistics Admin. & U.S. Patent and Trademark Office, *Intellectual Property and the U.S. Economy: Industries in Focus* vi-vii (Mar. 2012), available at http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf (stating that IP-intensive industries accounted for 18.8% of jobs in the American economy, and 34.8% of GDP, in 2010).

54. See JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001); WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (2009).

55. See, e.g., Jolie O'Dell, *Here's What Hollywood and Silicon Valley are Spending on SOPA*, VENTUREBEAT, Dec. 19, 2011, <http://venturebeat.com/2011/12/19/sopa-lobbying/> (finding that 80% of the \$2.5 million spent on lobbying about the Stop Online Piracy Act was from content industries).

56. This political power does not always reflect economic importance. The motion picture and recorded music industries hold considerably more sway than the video game industry does, though games are far larger in economic terms.

tions.⁵⁷ The table is tilted towards greater IP protection. This pattern holds across time, and across presidential administrations of both political parties. The Obama administration is no exception.

The Administration's IP policymaking, however, is notably opaque, as two examples demonstrate. First, the Administration has taken the lead in negotiating a new international regime for IP enforcement: the Anti-Counterfeiting Trade Agreement (ACTA).⁵⁸ The ACTA would create a multi-lateral legal framework that sets standards for dealing with IP violations, such as on-line copyright infringement, counterfeit pharmaceuticals, and goods that infringe trademarks.⁵⁹ Adoption of the ACTA, and its subsequent transposition into federal law, would have wide-ranging consequences. The treaty augments existing criminal provisions in IP law;⁶⁰ increases border enforcement;⁶¹ and implements a more generous measure of damages for IP violations.⁶² Negotiations over the ACTA's text resulted in significant changes. For example, the treaty initially envisioned a graduated response system that would have mandated ISPs to disconnect users accused of multiple instances of copyright infringement, but that provision was dropped after objections by the European Union Parliament, among others.⁶³

The Administration, however, strenuously resisted scrutiny of, or input into, the negotiations. Indeed, the Office of the U.S. Trade Representative (USTR) denied a Freedom of Information Act request for copies of the ACTA negotiations and drafts by Knowledge Ecology International. The USTR stated that the documents were "information that is properly classified in the interest of national security."⁶⁴ Classifying an IP treaty as related to national security borders on ludicrous; al Qaeda has not gone into the business of selling counterfeit National Football League jerseys.⁶⁵ The Administration did, however, make the text of the draft treaty available to select stakeholders, provided they signed non-disclosure agreements. This select audience was limited to IP

57. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 405-412 (2003).

58. See Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011).

59. Office of the U.S. Trade Representative, *Anti-Counterfeiting Trade Agreement (ACTA)*, <http://www.ustr.gov/acta>.

60. Anti-Counterfeiting Trade Agreement, art. 23.1, Oct. 1, 2011, available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

61. *Id.*, art. 16.

62. *Id.*, art. 9.1.

63. David Kravets, *ACTA Backs Away from 3 Strikes*, WIRED, Apr. 21, 2010, available at <http://www.wired.com/threatlevel/2010/04/acta-treaty/>; Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT'L L. REV. 558 (2011).

64. Letter from Carmen Suro-Bredie to James Love (Mar. 10, 2009), available at http://www.keionline.org/misc-docs/3/ustr_foia_denial.pdf; David Kravets, *Obama Administration Declares Proposed IP Treaty A "National Security" Secret*, WIRED, Mar. 12, 2009, available at <http://www.wired.com/threatlevel/2009/03/obama-declares/>.

65. Mike Masnick, *ICE Seized 20 Domain Names for the NFL over the Weekend*, TECHDIRT, Oct. 25, 2011, available at <http://www.techdirt.com/articles/20111024/10293116490/ice-seized-20-domain-names-nfl-over-weekend.shtml>.

rights holders and lobbying organizations, such as the Business Software Alliance, Time Warner, eBay, and Google.⁶⁶ With the exception of Public Knowledge, organizations that represented IP consumers, or that tended to press for looser legal regulation of intellectual property, were excluded from the process.⁶⁷

Moreover, the Obama administration takes the position that the ACTA would be a “sole executive agreement” that requires approval only from the President.⁶⁸ This bypass mechanism removes the chance for Congress to debate the ACTA’s merits, and for interested parties to provide testimony, information, and perspective on the treaty during those deliberations.⁶⁹ The notion that the ACTA is a sole executive agreement is not only dubious constitutionally, as Jack Goldsmith and Lawrence Lessig have argued, it is problematic from the perspective of democratic governance theory.⁷⁰

Recent negotiations over a similar treaty, the Trans-Pacific Partnership (TPP), reveal that the lack of transparency displayed with the ACTA is the rule, not the exception. The TPP is a multilateral trade agreement negotiated among nine countries and it includes provisions on IP rules.⁷¹ The negotiations take place in secret.⁷² The text is secret.⁷³ Participation by the public and civil society groups has been limited to short stakeholder sessions where the negotiators refused to reveal the text of the proposed agreement or comment on leaked text.⁷⁴ Even members of Congress have been refused access to the negotiations.⁷⁵ As with the ACTA, the TPP has been roundly criticized for its lack of transparency.⁷⁶ Also, as with the ACTA, the Obama administration (via the U.S. Trade Representen-

66. James Love, *White House Shares the ACTA Internet Text with 42 Washington Insiders, Under Non-Disclosure Agreements*, KNOWLEDGE ECOLOGY INT’L, Oct. 13, 2009, available at <http://keionline.org/node/660>; David M. Quinn, *A Critical Look at the Anti-Counterfeiting Trade Agreement*, XVII RICH. J.L. & TECH. 16, 20-22 (2011).

67. Love, *supra* note 66.

68. Sean Flynn, *ACTA’s Constitutional Problem: The Treaty Is Not a Treaty*, 26 AM. U. INT’L L. REV. 903 (2011).

69. *Id.* at 926.

70. Jack Goldsmith & Lawrence Lessig, *Anti-counterfeiting Agreement Raises Constitutional Concerns*, WASH. POST, Mar. 26, 2010, at A23.

71. Office of the U.S. Trade Representative, *Outlines of the Trans-Pacific Partnership Agreement*, Nov. 12, 2011, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

72. Mike Masnick, *This Is Not Transparency: TPP Delegates Refuse To Reveal Text, Refuse To Discuss Leaked Text*, TECHDIRT, Sept. 17, 2012, <http://www.techdirt.com/articles/20120916/23445720397/this-is-not-transparency-tpp-delegates-refuses-to-reveal-text-refuse-to-discuss-leaked-text.shtml>.

73. *Id.*

74. *Id.*; Maira Sutton, *TPP Trade Delegates Shut Out Internet Users’ Concerns as They Continue to Meet Behind Closed Doors*, EFF, Sept. 14, 2012, <https://www.eff.org/deeplinks/2012/09/tpp-trade-delegates-shut-out-internet-users>.

75. Mike Masnick, *USTR Rejects Rep. Issa’s Request to Observe TPP Negotiations*, TECHDIRT (June 29, 2012), <http://www.techdirt.com/articles/20120629/13095119537/ustr-rejects-rep-issas-request-to-observe-tpp-negotiations.shtml>.

76. See, e.g., Sean Flynn, *Law Professors Call for Trans-Pacific Partnership Transparency*, INFOJUSTICE, May 9, 2012, <http://infojustice.org/archives/21137>; Drew Wilson, *An Analysis of the TPP’s*

tative, Ambassador Ron Kirk) has boasted of its transparency. Ambassador Kirk stated that he “has conducted the most, active outreach to all stakeholders relative to the TPP than in any FTA [Free Trade Agreement] previously,” and that he was “strongly offended by the assertion that our process has been non-transparent and lacked public participation.”⁷⁷ Kirk lauded the “extraordinary efforts our staff has engaged in relative to drafting our proposed texts for the TPP.”⁷⁸ Kirk’s response exemplifies the chutzpah this article describes.

In short, the Obama administration has engaged in classic policy laundering: it is hiding an increase in IP enforcement under the cloak of national security concerns and avoiding scrutiny of its efforts by casting the ACTA as beyond congressional ratification.⁷⁹

Another example of the opacity in the Administration’s IP policy-making shows that the Administration has effectively outsourced certain policy decisions to IP rights holders, without input from other affected stakeholders. The USTR recently issued its second Out-Of-Cycle Review of Notorious Markets, which lists Web sites and physical markets that allegedly engage in or enable IP infringement.⁸⁰ While the USTR issued a formal request for submissions for the list of markets,⁸¹ its final elements were drawn heavily from comments from IP owners, such as the Motion Picture Association of America (MPAA),⁸² and their trade organizations, such as the International Intellectual Property Alliance.⁸³ As with the inclusion of Public Knowledge in the ACTA discussions, the USTR’s solicitation of comments is pretense: the Obama administration pays heed to content owners first and foremost.

In addition, the Departments of Justice and Homeland Security rely heavily on MPAA and Recording Industry Association of America (RIAA) allegations and data when determining which domain names to seize for allegedly enabling IP infringement.⁸⁴ The Departments’ documentation, which they submit to

Infamous Intellectual Property Draft Chapter, ZEROPAID, June 27, 2012, <http://www.zeropaid.com/news/101412/an-analysis-tpps-infamous-intellectual-property-draft-chapter/>.

77. Sean Flynn, *Kirk Responds to TPP Transparency Demands*, INFOJUSTICE, May 10, 2012, <http://infojustice.org/archives/21385>.

78. *Id.*

79. The Obama administration has engaged in similar behavior regarding the Trans-Pacific Partnership agreement, including the remarkable claim by U.S. Trade Representative Ron Kirk that his staff had made “extraordinary efforts” to ensure transparency. *See* Flynn, *supra* note 76.

80. Office of the U.S. Trade Representative, *Out-of-Cycle Review of Notorious Markets* (Feb. 28, 2011), *available at* http://www.ustr.gov/webfm_send/2595.

81. 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments, 76 Fed. Reg. 58,854 (Sept. 22, 2011).

82. Letter from Michael P. O’Leary to Stan McCoy, Oct. 26, 2011, *available at* <http://www.regulations.gov/#!documentDetail;D=USTR-2011-0012-0016>.

83. Letter from Michael Schlesinger to Stanford K. McCoy, Oct. 26, 2011, *available at* <http://www.regulations.gov/#!documentDetail;D=USTR-2011-0012-0017>.

84. *See, e.g.*, Application and Affidavit for Seizure Warrant, No. 10-2822M, at 17 (C.D. Cal. Nov. 17, 2010), *available at* <http://documents.nytimes.com/request-to-seize-web-sites-for-piracy> (noting agent’s “discussion with MPAA and RIAA representatives” regarding rapgodfathers.com domain name); Darlene Storm, *ICE Domain Seizures Relied on Twisted Evidence and MPAA Say So*, COMPUTERWORLD,

federal magistrate judges who authorize warrants for the seizures, is drawn principally from RIAA investigators.⁸⁵ This system – where the government restrains Internet communication based on *ex parte* allegations from parties with a financial stake in the decision, and where that government then resists efforts to challenge its findings and decisions – is one with little transparency or accountability.⁸⁶

Intellectual property policy shapes America's economy in critical ways. Yet, IP regulation affects more than gross domestic product: it influences cultural production, communication, and values.⁸⁷ Every citizen has a stake in how IP functions. Yet, the Obama administration has deliberately chosen to exclude all but a handful of stakeholders from its IP decision-making – and those stakeholders share a common belief in the desirability of stronger and broader enforcement. Thus, the President's policymaking is biased towards protectionism, and his efforts to impede scrutiny of his program belie his rhetorical paeans to transparency.

III. DISAPPOINTMENT

President Obama entered the White House after a campaign based on hope and change.⁸⁸ Both premises were naïve. The structural features of the modern American presidency bend all administrations in similar ways.⁸⁹ Transparency in particular is impeded by these structural constraints.⁹⁰ Thus, even if his intentions were genuine, candidate Obama (along with the rest of the electorate) should have known that he promised more than he could deliver.

After World War II, with the looming threat of the Soviet Union and communism, the American executive branch developed in precisely the way that the country's founders feared.⁹¹ The Constitution seeks to check the executive in myriad ways: by limiting its powers,⁹² by giving the legislature control over taxation and spending,⁹³ by providing for impeachment,⁹⁴ and (later) by limiting the number of consecutive terms to which one person can be

Dec. 22, 2010, available at http://blogs.computerworld.com/17575/ice_domain_seizures_relied_on_twisted_evidence_and_mpaasay_so.

85. *Id.*; see also Mike Masnick, *RIAA Tries to Downplay its Role in the Feds' Unjustifiable Seizure of Dajaz1*, TECHDIRT, May 8, 2012, available at <http://www.techdirt.com/articles/20120507/16073718821/riaa-tries-to-downplay-its-role-feds-unjustifiable-censorship-dajaz1.shtml>.

86. See Bambauer, *supra* note 22.

87. See, e.g., Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

88. See, e.g., Jeff Mason, *Obama's Slogan: Looking for Hope and Change*, REUTERS, Feb. 18, 2012, <http://www.reuters.com/article/2012/02/18/us-usa-campaign-obama-slogan-idUSTRE81H06320120218>.

89. See, e.g., ARTHUR M. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (2004 ed.) (1973).

90. See Seth F. Kreimer, *Rays of Sunlight in a Shadow War*, 11 LEWIS & CLARK L. REV. 1141 (2007).

91. See PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009).

92. U.S. CONST. art. II, §§2, 3.

93. *Id.* art. I, §8.

94. *Id.* art. II, §4.

elected.⁹⁵ Yet, the presidency has developed into an increasingly powerful and less fettered office. This larger trend has been enhanced by the complexity of the administrative state and, of late, by fears of terrorism's threat to national security.⁹⁶

Additionally, external forces have shaped presidential policy-making. Two critical forces are the rapid fall in the costs of creating and disseminating information,⁹⁷ and the increased political partisanship of the federal government.⁹⁸ The first of these forces – driven by technology, and in particular by networked computing – is potentially quite helpful for transparency. However, combined with the second, it has counter intuitively made transparency more difficult for politicians. In effect, scrutiny of political actions, speech, and deal-making has increased. Journalists and voters can more easily track their elected representatives. Increased partisanship means that politicians who are seen as too moderate, or too willing to entertain compromise with their opponents, are at risk of not being re-elected (or even re-nominated).⁹⁹ Politicians are increasingly wary of taking positions, even during negotiations, that might harm their election prospects.

In the long run, transparency conduces to accountable government and sensible policymaking. In the short run, it leads to criticism.¹⁰⁰ President Obama felt this tension acutely during the protracted struggle to enact his health care reforms, when he shifted from a position of dramatic openness (during his campaign) to closed-door negotiations (during the final legislative maneuvering).¹⁰¹ There is a structural asymmetry to the politics of transparency. Costs accrue quickly. Benefits, by contrast, emerge slowly – possibly too slowly for electoral benefit and, perhaps, for politicians to be correctly identified with them.¹⁰² Transparency is thus a promise that appears more attractive during a political campaign than during the hard reality of governing.

95. *Id.* amend. XXII, §1.

96. See Sidney A. Shapiro & Rena I. Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 L. & CONTEMP. PROBS. 99 (2006).

97. YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 52 (2006); David S. Levine, *The Social Layer of Freedom of Information Law*, 90 N.C. L. REV. 1687 (2012).

98. See, e.g., NOLAN MCCARTY, KEITH T. POOLE, & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006).

99. See, e.g., Catalina Carnia, *Ex-Senators Specter, Bennett Reflect on Lugar's Loss*, USA TODAY, May 9, 2012, <http://content.usatoday.com/communities/onpolitics/post/2012/05/richard-lugar-defeated-mourdock-arlen-specter-1#.T7BBfJ9YvNU>.

100. See, e.g., *Negotiate Health Care Reform in Public Sessions Televised on C-SPAN*, TAMPA BAY TIMES, July 10, 2009, <http://www.politifact.com/truth-o-meter/promises/obameter/promise/517/health-care-reform-public-sessions-C-SPAN/>; Chip Reid, *Obama Reneges on Health Care Transparency*, CBS NEWS, Jan. 7, 2010, http://www.cbsnews.com/2100-18563_162-6064298.html.

101. *Id.*

102. See Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. __ (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028656.

The President operates under increased scrutiny and greater responsibility for policymaking than previously. This is true even in areas such as IP rules, which have historically been the province of the legislature.¹⁰³ In areas such as IP policy, where the political choice calculus ensures that pressure tilts heavily towards greater protection and enforcement, transparency only invites criticism. The Obama administration's failings are, first, to recognize this configuration quickly, and second, to cease pretending to transparency once it had done so. Naiveté can be forgiven, but in time, it transforms into duplicity. The similarities between the Obama administration and the Bush Administration, in terms of their transparency regarding policymaking, should not be surprising: both Presidents confronted similar structural realities that press towards inhibiting scrutiny.

CONCLUSION

The Obama administration is caught in a contradiction. Its public rhetoric favoring openness, in areas such as Internet communication and IP policymaking, is controverted by its calculated decision to minimize transparency in practice for each of these issues. If hypocrisy is the great American sin, then President Obama has much to repent.

At first, assessing Obama's transparency through the lens of information law issues seems parochial – these problems are, perhaps, of interest only to geeks and IP lawyers. Their importance pales in comparison to problems such as overly aggressive prosecution of whistleblowers,¹⁰⁴ surveillance of ordinary citizens,¹⁰⁵ and the abuse of the state secrets doctrine to shield unlawful behavior by the government.¹⁰⁶ Yet, this approach is helpful for at least two reasons. First, as events in Egypt, Iran, and Libya demonstrate, freedom of communication is of considerable importance, to states in turmoil and to those with democratic governments alike.¹⁰⁷ Second, even if IP and Internet issues are peripheral, they constitute a potent measure of transparency for precisely that reason. A president can summon profound arguments for limiting access to deliberations about military conflicts, to classified information, and to analysis

103. See, e.g., *Prioritizing Resources and Organization for Intellectual Property Act of 2008*, S.3325, 110th Cong., (2008) (creating the office of the IP Enforcement Coordinator in the executive branch and mandating various enforcement activities).

104. See, e.g., Peter Van Buren, *Obama's Unprecedented War on Whistleblowers*, SALON, Feb. 9, 2012, http://www.salon.com/2012/02/09/obamas_unprecedented_war_on_whistleblowers/; David Carr, *Blurred Line Between Espionage and Truth*, N.Y. TIMES, Feb. 27, 2012, at B1.

105. Pete Yost, *Administration Urges Terror Surveillance Renewal*, ASSOC. PRESS, Sept. 11, 2012, available at <http://bigstory.ap.org/article/administration-urges-terror-surveillance-renewal>.

106. John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 10, 2009, at A12; Ryan Devereaux, *Is Obama's Use of State Secrets Privilege the New Normal?*, THE NATION, Sept. 29, 2010, <http://www.thenation.com/article/155080/obamas-use-state-secrets-privilege-new-normal>.

107. See, e.g., Zeynep Tufekci & Christopher Wilson, *Social Media and the Decision to Participate in Political Protest: Observations from Tahrir Square*, 62 J. COMM'N 363 (2012).

of eavesdropping by intelligence services. Whatever importance one attaches to transparency, countervailing values carry significant weight for such topics.

In contrast, contending that national security requires keeping negotiations about counterfeiting secret – about cracking down on purveyors of fake Coach handbags – is laughable at best, and dishonest at worst. It is chutzpah. Intellectual property and Internet policymaking are leading indicators of an administration's implementation of its purported commitments to openness. For transparency, then, the Obama administration has plunged the country into a bear market.