RESTORING THE RULE OF LAW SCORECARD: President Obama's First 100 Days

This scorecard reflects key decisions taken by the Obama Administration that either help restore the Rule of Law or continue Bush Administration policies. Decisions favorable to the Rule of Law are assigned a PLUS 1; unfavorable decisions a MINUS 1; mixed decisions a PLUS or MINUS 0.5.

• Obama signs executive orders pledging to open government, close Guantanamo

Open government: On his first day in office President Obama announced that he was signing an executive order committing his Administration to "an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation and collaboration. Openness will strengthen our democracy" (Federal Register, January 26, 2009).
PLUS 1

Guantanamo: The President signed an executive order requiring the closure of Guantanamo no later than one year from the date of the order, ensuring that conditions at Guantanamo comply with the Geneva Conventions, halting the military commission proceedings for 120 days and establishing a review process of the cases of remaining detainees to determine whether they can be transferred to other countries or prosecuted – if so, how.
PLUS 1

Future detainee policy: Another executive order created a special task force under the attorney general and secretary of defense to review future detainee policy and submit a report to the President within 180 days.
PLUS 1

Interrogations: A fourth executive order revoked Bush Administration Executive Order 13440 and legal memoranda concerning interrogations issued under that Administration and requires all interrogations of detainees to follow the Army Field Manual interrogation guidelines. The order requires the CIA to close all its secret detention facilities and all federal agencies to give the International Committee of the Red Cross access to detainees. **There are two worrying loopholes:** a special task force is set up to determine whether additional guidance is necessary for CIA interrogation practices. It will also examine the practice of the transferring detainees to third countries with guarantees that they will not be subjected to torture, implying that the practice of rendition may continue to be used in the future.
PLUS 0.5

• Administration thanks UK for holding back information on detainee treatment

On February 4, the British High Court blocked the release of documentation about the extraordinary rendition and torture of Guantanamo detainee Binyam Mohamed - not on national security grounds, but because the Bush Administration had threatened that its release could endanger intelligence sharing between the US and UK. The Obama Administration thanked Britain "for its continued commitment to protect sensitive national security information" (McClatchey Washington Bureau, February 20).
MINUS 1

• Administration invokes 'state secrets privilege'

On February 9, the Administration told the Ninth Circuit Court of Appeals in an ACLU case involving the "extraordinary rendition" and torture of Binyam Mohamed and 4 other detainees that the court should throw out the case on "state secrets" grounds –the same argument used by the previous Administration. The court was told that allowing the case to go forward would put into jeopardy our national security by revealing things best kept secret. On April 29, the court ruled against the Administration and said the lawsuit could go on.
MINUS 1

• Administration stalls on release of legal memos on torture

On February 11, the Justice Department informed the ACLU that it needed more time to weigh "the legitimate confidentiality interests of the executive branch and the national security interests of the United States" before deciding whether to release legal memos justifying harsh interrogations that the ACLU had been seeking in federal court for 5 years (Miami Herald.com, February 11). It later **reduced the time** it had requested to review the memos from 90 days to 30 days.
MINUS 0.5

• Administration sides with Bush on Bagram

On February 20, in a two-sentence court filing, the Obama Administration declared that it adhered to the "previously articulated position" barring detainees in the Bagram prison in Afghanistan from being able to challenge their detention in US courts. Like the detainees in Guantanamo, many Bagram detainees had been picked up in countries far from the battlefield and are being held in legal limbo (AFP, February 20). In the words of ACLU attorney Jonathan Hafetz, "They've now embraced the Bush policy that you can create prisons outside the law" (KansasCity.com, February 20).

MINUS 1

• Administration invokes 'state secrets' in warrantless spying case

On February 20, the Justice Department filed an emergency motion in the Ninth Circuit Court of Appeals asking the court to block the release of documents relating to the Bush Administration's program of domestic warrantless wiretapping on the grounds that the program is a "state secret" and releasing information about it could endanger national security. On February 27, the Court denied the government's request, keeping alive the effort of the now defunct Al Haramain Islamic Foundation to demonstrate it was the target of illegal wiretapping. "I did not expect this from the Obama Justice Department," said Jon Eisenberg, a lawyer representing Al Haramain. "They're taking as hard a line as the Bush administration did on state secrets. If anything, they're being more aggressive about it" (*Washington Independent*, February 27). The Bush Administration invoked "state secrets privilege" 20 times in its first 6 years. The Obama Administration has used it twice in its first 60 days.

MINUS 1

• Administration releases legal memos

Declaring that "Americans deserve a government that operates with transparency and openness," Attorney General Holder on March 2 declassified nine Justice Department legal memos penned by John Yoo when he was deputy attorney general in the Bush Administration (*Kansas City Star*, March 2). They gave the Bush White House the power to override First Amendment freedoms (including the freedom of the press), allow the imposition for martial law, disregard a federal law banning torture, hand over prisoners to countries where they could be tortured, set up roadblocks, deploy high-tech surveillance against US citizens, and ignore the Fourth Amendment and Posse Comitatus Act and deploy the military within the US on "anti-terrorist operations," giving it the green light to attack apartment buildings and office complexes where terrorists were suspected to be. Five days before the end of the Bush Administration Stephen Bradbury, the then-principal deputy assistant attorney general, wrote that the memos "should not be treated as authoritative for any purpose." The memos were released after being sought in a lawsuit filed by lawyers for Jose Padilla, a US citizen held for years within the US as an "enemy combatant." On the same day, the Attorney General revealed that the CIA had destroyed 92 videotapes of interrogations.

PLUS 1

• Administration brings charges against 'enemy combatant'; refuses to give up the power to hold people indefinitely

On February 27, the Obama Administration **brought federal criminal charges** against Ali Saleh al-Marri, who has been held for five years on a naval brig in South Carolina as an "enemy combatant." The US Supreme Court had agreed last December to hear al-Marri's appeal against the Fourth Circuit Court's ruling that the government has the right to hold a lawful US resident in prison without charges indefinitely as long as the President designates him an "enemy combatant." While the ACLU asked for the Supreme Court to continue to hear al-Marri's habeas corpus petition and rule on the constitutionality of his military detention, the Obama Administration requested that it drop the case. In its legal filing the Administration **did not give up the power to designate American citizens and legal residents as enemy combatant**s and hold them indefinitely without charge (*Christian Science Monitor*, March 6). On March 6, the Supreme Court erased the Fourth Circuit Court ruling as the Obama Administration had urged, and dropped the Al-Marri case from its docket, leaving the constitutional issue undecided.

PLUS 0.5

• President Obama says Bush signing statements must be scrutinized

On March 9, the President told executive officials to consult with the Attorney General before relying on any of the Bush Administration's signing statements to bypass a law. He promised to use such statements only if Congress sent him legislation with provisions he decided were unconstitutional (*New York Times*, March 10).

PLUS 1

• Obama adds his first signing statement
On March 11, President Obama added a signing statement to a $410 billion spending bill saying he had the Constitutional authority to sidestep many of its oversight provisions. "At least some of those provisions which Obama declared invalid are, at worst, of arguable validity and, more accurately, grounded in strong judicial precedent regarding Congressional power" (Glenn Greenwald, Salon, March 15). Senator Charles Grassley, a Republican from Iowa, sent the President a letter condemning the signing statement as "overly broad" and saying it would "undoubtedly chill whistle-blowers who might otherwise come forward to report waste, fraud or abuse to Congress" (*New York Times*, March 17).
MINUS 1

• Justice Department refuses judge's request for information
On March 11, in response to a federal judge's request for information about how many people are being held at the US airbase at Bagram and what their countries of origin are, the Obama Justice Department submitted a heavily redacted document, very similar to the one its predecessor had submitted just two months before. Amnesty International declared, "This is not the transparency President Obama promised in the name of government accountability" (Press Release, March 12).
MINUS 1

• Administration tells Appeals Court detainees have no rights; federal judge disagrees
On March 13, the Obama Administration filed documents before the US Court of Appeals for the District of Columbia arguing that four former Guantanamo detainees who are British residents had no right to bring suit in US court over their alleged torture and harassment while exercising their religion. The documents seek to protect from prosecution military officers who might have engaged in torture (Associated Press, March 13). On April 7, Judge John Bates for the US District Court for the District of Columbia took issue with the Administration's position, and ruled that detainees being held a Bagram who were seized outside of Afghanistan are constitutionally entitled to have their imprisonment reviewed by a court (*Washington Post*, April 7).
MINUS 1

• Administration challenges Bagram ruling
The Obama Administration has filed an appeal with the US Court of Appeals for the DC Circuit challenging Judge Bates ruling that some Bagram detainees do have the right to habeas corpus hearings (Jurist, April 11). In an April 13 editorial headlined "The Next Guantanamo," *The New York Times* condemned the Administration's position, stating: "In the absence of a fair reveiw process that complies with international and military law, there is no reason to feel confident that everyone detained at Bagram deserves to be there. The administration should focus on putting such a process in place, instead of wasting its energies in an appeal that simply recycles extravagant claims of executive power and perpetuates the detention policies of the Bush Administration.
MINUS 1

• Although the term 'enemy combatant' is dropped, the power to detain indefinitely is not
On March 13, the Administration **dropped the term "enemy combatant"** and stated it would use international law as its basis for holding suspects at Guantanamo. It also said the President would **no longer rely on his authority as commander-in-chief** to detain suspects. Under the new policy, only those who had provided "substantial support" for al Qaeda or the Taliban would be detained. It did not specify that they had to be picked up on the battlefield. Critics like Jonathan Turley contend that this is at best a cosmetic change since the Obama Administration **has not given up "the right to hold people indefinitely when we believe that they fit the category that we are defining**…What does substantial assistance, for example, to the Taliban mean? They said, well, we can't define it at this time. We'll just do that case by case" (Rachel Madow Show, March 13).
PLUS 0.5

• Rules relaxed on release of records
The Attorney General has issued new guidelines which instruct federal agencies to release records to the public under the Freedom of Information Act unless foreseeable harm could result. According to an attorney for the Electronic Frontier Foundation, "If there is really a new presumption in favor of disclosure, one would expect to see the outright reversal of many Bush-era decisions to withhold information" (*Boston Globe*, March 20).
PLUS 1

• Administration asks court to block entry of leading Muslim scholar
On March 24, echoing the Bush Administration,

Assistant US Attorney David Jones told a panel of the US Court of Appeals for the Second Circuit that the court should uphold the decision to bar the well-known Muslim scholar, Tariq Ramadan, from entering the US on grounds that he "endorsed or espoused" terrorism. The ACLU argued that Ramadan, a Swiss citizen who has frequently denounced terrorism and extremism, has been excluded because of his outspoken opposition to the Iraq War.
MINUS 1

• Administration seeks to block accountability for law-breaking; claims broad new powers

After a federal appeals court judge refused in late February to throw out the al-Haramain charity case involving allegations of illegal warrantless wiretapping on "state secrets" grounds, the Obama Administration on April 3 filed a brief that again sought to have the case dismissed because it would compromise national security. Seeking to block the Ninth Circuit Court of Appeals from viewing documents relating to the warrantless wiretapping program of the National Security Agency, the Obama Justice Department has also been protecting not just the telecoms but the named defendants: Dick Cheney, his former chief of staff David Addington and Alberto Gonzales (therawstory, April 6). The Obama Justice Department went even further than its predecessor and argued that under the doctrine of "sovereign immunity," the government could *never* be sued for spying that violates federal surveillance statues. In the words of Glenn Greenwald, "What's being asserted here by the Obama DOJ is the virtually absolute power of presidential secrecy, the right to break the law with no consequences, and immunity from surveillance lawsuits so sweeping that one can hardly believe that it's being claimed with a straight face" (Salon, April 6). As a candidate, Barack Obama had promised to work for "full accountability" for "past offenses" in surveillance lawbreaking (Glenn Greenwald, Salon, April 7).
MINUS 1

• OBAMA RELEASES TORTURE MEMOS

On April 16, President Obama announced that his Administration would release four Justice Department memos drafted in 2002 and 2005 authorizing the CIA's use of "enhanced interrogation techniques" on "high value detainees," including waterboarding. The memos were made public in response to an ACLU Freedom of Information Act lawsuit. The release came after the publication in April of a report dated February 14, 2007 by the International Committee of the Red Cross that details US treatment of 14 detainees that "amounted to torture and/or cruel, inhuman or degrading treatment" (*New York Times*, April 6). CIA Director Leon Panetta had fought to block the release of the documents and argued that no CIA operative who acted on legal guidance from the Department of Justice "should be investigated, let alone punished."
PLUS 1

• OBAMA SAYS NO ONE SHOULD BE PROSECUTED FOR TORTURE

Stating that "nothing will be gained by spending our time and energy laying blame for the past," President Obama urged the nation to "move forward" and said CIA operatives would not be prosecuted for using interrogation techniques outlined in the Justice Department memos (*New York Times* blog, April 16). The Convention against Torture, which the US has ratified, requires the prosecution of those found responsible for torture.
MINUS 1

• ADMINISTRATION RELUCTANTLY LEAVES SOME ROOM FOR ACCOUNTABILITY

After the President rebuffed the call for a "truth commission" to investigate torture, his chief of staff, Rahm Emanuel, stated that the Administration opposes any effort to prosecute those responsible for the torture policy (*Washington Post*, April 20). But on April 21, during a press conference with King Abdullah of Jordan, the President said the decision of whether or not to investigate those responsible for torture should be left to the Justice Department.
PLUS 0.5

• PENTAGON TO RELEASE ABUSE PHOTOS

In response to an ACLU lawsuit, the Pentagon has agreed to release by May 28 at least 44, and possibly thousands, of images showing the alleged abuse of detainees in Iraq and Afghanistan by US forces.
PLUS 1

RULE OF LAW SCORECARD
TALLY TO DATE (April 29, 2009)
MINUS 1.5