

**ADDRESSING TRANSPARENCY IN THE FEDERAL
BUREAUCRACY: MOVING TOWARD A MORE
OPEN GOVERNMENT**

HEARING

BEFORE THE

**COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM**

HOUSE OF REPRESENTATIVES

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ADDRESSING TRANSPARENCY IN THE FEDERAL BUREAUCRACY: MOVING TOWARD A MORE OPEN GOVERNMENT

Wednesday, March 13, 2013,

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT, AND GOVERNMENT REFORM,
Washington, D.C.

The committee met, pursuant to call, at 10:02 a.m., in Room 2154, Rayburn House Office Building, Hon. Darrell E. Issa [chairman of the committee] presiding.

Present: Representatives Issa, Mica, Turner, Duncan, McHenry, Walberg, Amash, DesJarlais, Gowdy, Farenthold, Woodall, Massie, Meadows, DeSantis, Cummings, Maloney, Clay, Connolly, Speier, Duckworth, and Davis.

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Chairman ISSA. Good morning. The committee will come to order.

The Oversight Committee exists to secure two fundamental principles: first, Americans have a right to know that the money Washington takes from them is well spent; and, second, Americans deserve an efficient, effective Government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold Government accountable to taxpayers, because taxpayers have a right to know what they get from their Government. It is our job to work tirelessly in partnership with citizen watchdogs to deliver the facts

to the American people and bring genuine reform to the Federal bureaucracy.

Before I begin this hearing today, as our staffs have discussed, I am moving to add a majority and a minority seat to the Subcommittee on Energy Policy, Health Care and Entitlements. Dr. Gosar is to be added to the subcommittee on the majority side and I would now yield to the ranking member if he is prepared to designate a minority member.

Mr. CUMMINGS. Mr. Chairman, by the end of the day we will do that.

Chairman ISSA. Without objection, so ordered.

I will now recognize myself for a short opening statement.

It is partisan to say that President Obama took office guaranteeing us or assuring us of the most transparent presidency in history. But it is not partisan to say we can do better. We can do better in this day and age than we did in the previous administration. Together, that is our challenge.

So four years later, am I going to be the person who says, hurray, we are more transparent? No, just the opposite. With the ranking member, our goal is to change transparency by legislation and by oversight.

Today, as we discuss the Freedom of Information Act and our intent to take it to the next step, I believe that we, this committee, have an obligation and an opportunity to create more transparency not with any one administration, not with a president well intended and perhaps a cabinet, off and on, different positions, well intended, but as a matter of the people's right.

The truth is all administrations have a tendency to want to keep private their failures and make public their accomplishments. That is a natural state and it is one that we will not change here by asking for it to change. The only way that can happen is if rhetoric is also matched by law, if in fact law is enforced and overseen.

The Sunlight Foundation has done extensive work on the accuracy of data posted by not just this administration, but administrations before. Their work shows that, in fact, we can do better. This hearing today is not about one agency or about one administration, but, in fact, the fact that administrations have been struggling with posting records accurately.

Seventeen years after the legal requirement to do so was signed into law, the system is still broken and it needs immediate reform. The committee has worked on a bipartisan basis to improve transparency by providing greater access to information, but this isn't enough. In the last Congress, we passed out of this committee and out of the Congress on a voice vote the DATA Act, we passed the Grant Act and a draft FOIA reform bill that was crafted by the ranking member. All of this is high on our priority in this Congress.

The legacy of the ranking member and myself is, in fact, not about what we do during our time, but in fact what happens after we leave this office. Have we put in place systems and laws and an oversight practice that, for generations to come, can be meaningfully better than the generations before us? That is our goal here today. It is the reason that I am thrilled at this hearing and

I am looking forward to a markup in just a few days that is intended to begin that down payment on system changes.

With that, I recognize the ranking member for his opening statement.

Mr. CUMMINGS. Thank you very much, Mr. Chairman, for holding this hearing today. This is Sunshine Week, when we celebrate the importance of transparency and openness in government. Sunshine Week is also an appropriate time to conduct oversight and evaluate the state of transparency in our Government.

On his first day in office, President Obama made clear that open government would be a priority in his administration. The President issued a memo on transparency that formed the basis for the open government initiative, a comprehensive set of efforts to increase public access to government information. Also on his first day in office the President issued a memo on the Freedom of Information Act, reversing the Bush administration's presumption against disclosure and instituting a presumption in favor of disclosure and the attorney general issued a memo informing agencies that the Justice Department would not defend FOIA denials in court unless agencies have a reasonable belief that there will be foreseeable harm from disclosure.

I think it is fair to say that the President jump-started transparency efforts in the executive branch. There have been significant successes in the last four years; however, there are still areas in need of improvement, and we can always do better and I certainly agree with the chairman on that note.

I ask unanimous consent to place in the record a report this week by the Center for Effective Government entitled Delivering on Open Government: The Obama Administration's Unfinished Legacy.

Chairman ISSA. Without objection, so ordered.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

This report finds as follows: "To secure its legacy as a champion of transparency, the Administration will need to do more to ensure that agencies actually implement the transparency policies it established, address gaps left in its policy reforms, and improve its records on national security related secrecy."

In addition, one of the criticisms in the report is aimed at Congress. The report finds that the "slow pace of secrecy reform within the executive branch has been aided and abetted by lack of robust oversight from Congress."

I agree that bipartisan oversight is critical to holding agencies accountable. That is why Chairman Issa and I recently worked together to send a letter to the Justice Department asking for information about several issues regarding FOIA implementation. In addition, Congress can make it easier for the American people to obtain access to government records.

This week, the chairman and I are releasing a draft bill called the FOIA Oversight and Implementation Act. In the spirit of transparency and bipartisanship, we have made it available on the committee's Web site and we welcome feedback before we formally introduce it. This bill would codify in law what the President has done administratively: it would establish a legal presumption under FOIA in favor of disclosure. It would also create a pilot

project to give FOIA requesters a single place to make requests and access records electronically.

I appreciate the chairman's bipartisan work on this bill and I hope we will take swift action to get it on its way to becoming law.

I am also pleased to be cosponsoring a bill with Representative Clay. He is introducing it this week to improve transparency and accountability of federal advisory committees.

I look forward to hearing from the witnesses here today about these proposals and any other ideas you might have for shining light on our government's observations.

With that, Mr. Chairman, I yield back.

Chairman ISSA. I thank the gentleman.

I now recognize the gentleman from Florida for one minute.

Mr. MICA. Well, thank you.

Very briefly, and I hope our subcommittee can look further at the lack of FOIA responsiveness from this administration, but everyone heard the President when he said my administration is committed to creating an unprecedented level of openness in government. Openness will strengthen our democracy and promote efficiency and effectiveness in government.

Then he went on with Attorney General Holder to issue memorandums urging agencies to adopt a presumption of disclosure when processing FOIA requests and not to withhold any document simply because they may legally do so.

Now, the facts are, in fact, our staff report shows that, only 37.5 percent of all FOIA requests received were actually responded to. Another report found that 62 of 99 agencies surveyed had not updated their regulations since the President's and attorney general's edict. So those are the facts.

Finally, not only is the public not getting information, but I would like to submit requests from last year, 2011, that I submitted from this committee and also from the Transportation Committee of agencies that did not respond to members of Congress.

Chairman ISSA. Without objection, those will be placed in the record.

Mr. MICA. So whether it is Fast and Furious we are still trying to get information on or requests for legitimate full committees of Congress, this Administration has been the least transparent and least responsive to the public and to the Congress, and I yield back.

Chairman ISSA. I thank the gentleman.

We now go to our distinguished panel of witnesses.

All members will have seven days in which to submit opening statements.

First up is Ms. Angela Canterbury. She is the Director of Public Policy at the Project on Government Oversight. Welcome.

Mr. Jim Harper is Director of Information Policy Studies at the Cato Institute.

Mr. Daniel Schuman is Policy Counsel of The Sunlight Foundation, previously mentioned in my opening statement.

And Ms. Celia Wexler is the Senior Washington Representative for the Union of Concerned Scientists.

Welcome, all.

Pursuant to the rules of the committee, would you please rise and raise your right hand to take the oath?

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

[Witnesses respond in the affirmative.]

Chairman ISSA. Please have a seat.

Let the record reflect affirmative answers by all.

You are all skilled Washington experts, so your entire statements will be placed in the record, and you know how the clocks work in front of you. Please stay as close to five minutes as possible to leave maximum opportunity for follow-up questions.

Ms. Canterbury.

WITNESS STATEMENTS

STATEMENT OF ANGELA CANTERBURY

Ms. CANTERBURY. Chairman Issa, Ranking Member Cummings, members of the committee, thank you for this honor and for your attention to government transparency and accountability. It is particularly a pleasure to be with you here again on Sunshine Week, though it is, unfortunately, not as sunny as we would like.

President Barack Obama recently said this is the most transparent administration in history, and I can document how that is the case. Really? Well, it depends on the documentation. The President has made progress on his major commitments to openness and, without question, there has been more proactive disclosures than ever before. Last week we issued a report with partners that highlight several of the best examples, such as agency posting staff directories and calendars online Ethics.Data.gov and Recovery.gov.

But in spite of this progress under Obama, there continues to be two American governments. One looks like a democracy and the other is a national security State where claims of national security usually trump openness and accountability. An illustration of this dichotomy is on whistleblowers. More than any other president, Obama has advanced protections for federal workers who blow the whistle on waste, fraud, and abuse. But at the same time this Administration has created a national security loophole that threatens the very reforms the President supported.

Likewise, his recent signing statement asserts limits to unclassified disclosures to Congress. You can't do oversight, and there won't be checks and balances, if the President is allowed to keep secrets from Congress. The Associated Press just found that claims of national security for withholding information under FOIA are at an all-time high for this Administration.

In addition, we have objected to attempts to plug leaks of classified information that actually threaten free speech. We have raised concerns repeatedly about the aggressive prosecutions of so-called leakers and the chilling effect on whistleblowers. There continues to be far too much over-classification of information, which undermines our legitimate secrets and makes them harder to keep. Then there are the secret legal opinions that, among other things, may justify the targeted killings of American citizens suspected of terrorism.

What should be of critical concern to all of us is that the national security state is growing. The more it grows, the more illegitimate secrecy threatens our basic rights and our democracy.

In the non-national security government, perhaps the greatest challenge is the lack of a proper entity with authority and an interest in making agencies improve their practices. Openness is mostly voluntary and without any real consequences for the agencies that fail. Generally, the Office of Information Policy at DOJ is thought to be the entity responsible for FOIA, since it issues guidance and plays a role in compliance.

But as you have so aptly pointed out, there is a significant disconnect between its actions and the President's orders. We share your concerns about outdated FOIA regulations, backlogs, outrageous fees, the overuse and abuse of exemptions. However, in the end, we cannot reasonably expect OIP to lead on FOIA because it has an inherent conflict of interest, a conflict of mission, really. DOJ defends the agencies when they withhold information under FOIA.

Clearly, it is time to consider a new model without such conflicts. Providing the FOIA ombudsmen, OGIS, with more independence and authority is one of several common sense next steps to improve FOIA in the very thoughtful legislation that Chairman Issa and Ranking Member Cummings have drafted. Mandating performance responsibilities, the creation of a chief FOIA officer's council, and the long overdue updates to FOIA regulations all will improve the status quo. Codifying the presumption of openness will ensure agencies run by future presidents cannot withhold information unless harm to an interest protected by the exemption can be identified.

The pilot for FOIA online you propose will help boost the number of agencies participating and increase its potential for success. FOIA online is envisioned as a one-stop shop so that one day there might be only one Web site for all FOIA requests. The extraordinary initiative of three agencies that created it deserves applause, and your bipartisan bill deserves strong support.

In addition, there are other bills from the last Congress we support, such as the DATA Act, which would dramatically improve the ability of the public to discover how their taxpayer dollars are spent. We urge you to work with the Senate to ensure the best reforms become law. We also like the grant transparency reforms, and we hope you will similarly advance transparency in contracting. Taken together, we outsource \$1 trillion every year.

Additionally, we support the five sensible reforms, including the ranking member's Transparency and Openness in Government Act from the last Congress, including the FACA reform bill that was mentioned. I am pleased to hear that will be reintroduced by Representative Clay. Naturally, government spending is of real concern in this economic environment, but we hope you will work with appropriators to ensure the proper implementation of the reforms you champion. OGIS needs additional resources. Also, investing in government watchdogs, such as the very effective Office of Special Counsel, pays dividends to taxpayers.

I also urge you to conduct vigilant oversight of the whistleblower and taxpayer protections you ushered into law, and to legislate to

preserve and strengthen these, including in the intelligence and national security communities. It may be necessary to explicitly clarify that there should be no restrictions on executive branch disclosures to Congress.

We need your leadership now to remain in the frivolous national security claims that are making huge swaths of our Government hidden and unaccountable, and I thank you very much.

[Prepared statement of Ms. Canterbury follows:]



**Testimony of Angela Canterbury, Director of Public Policy,
Project On Government Oversight,
before the House Committee on Oversight and Government Reform
on
March 13, 2013**

Chairman Issa, Ranking Member Cummings, and Members of the Committee: Thank you for inviting me to testify today and for your attention to the critical issues of government transparency and accountability. I am the Director of Public Policy at the Project On Government Oversight (POGO). Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. Therefore, POGO has a keen interest in achieving a more effective, accountable, open, and ethical federal government.

It is particularly a pleasure to be here again during “Sunshine Week” when we promote open government and celebrate “sunshine laws” such as the Freedom of Information Act (FOIA). Unfortunately, I cannot say that there has been tremendous progress on government openness since I last testified before you on this subject two years ago. The state of openness in our government is not simply put—it is complex and rife with contradictions. However, I will attempt to disentangle some of these issues for you today.

The Most Transparent Administration in History?

President Barack Obama recently said on a Google webcast, “This is the most transparent administration in history, and I can document how that is the case.”¹ True? It really depends upon how you measure it. That statement is true if the measure is putting information online, but that is only part of the picture.

On his first full day in office, President Obama called upon all federal executive departments and agencies to administer FOIA with a “clear presumption: In the face of doubt, openness prevails.”² The President also has advanced open government with two major government-wide initiatives: the Open Government Directive (OGD),³ also mandated on his first full day in office, and the Open Government Partnership (OGP),⁴ a multi-national initiative in which the U.S. has

¹ President Barack Obama, “President Obama Participates in a Fireside Hangout on Google+” YouTube video, 35:12, posted by “whitehouse,” February 14, 2013. https://www.youtube.com/watch?v=kp_zigxMS-Y&t=35m12s (Downloaded March 4, 2013) (Hereinafter President Obama Participates in Fireside Hangout)

² Memorandum from Barack Obama, President of the United States, to Heads of Executive Departments and Agencies, regarding Freedom of Information Act, January 21, 2009. <http://edocket.access.gpo.gov/2009/pdf/E9-1773.pdf> (Downloaded March 3, 2013)

³ Memorandum from Barack Obama, President of the United States, to Heads of Executive Departments and Agencies, regarding Transparency and Open Government, January 21, 2009. <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf> (Downloaded March 4, 2013)

⁴ Open Government Partnership, “Home Page,” www.opengovpartnership.org/ (Downloaded March 4, 2013)

been deeply engaged. The current U.S. National Action Plan for the OGP commits the Obama Administration to a wide range of reforms from whistleblower protections to declassification to federal spending transparency. As required by the OGP, the Administration has consulted with POGO and other civil society organizations on the plan and actions to meet these commitments. We also have been carefully monitoring results. Our coalition of government transparency groups, OpenTheGovernment.org, just released an assessment of the U.S. National Action Plan that shows that the government met the letter of the majority of the commitments within the first year—technically meeting 19 out of 25 with the remaining 6 in progress.⁵ For the most part, the commitments were commendable first steps, and we will look for greater progress in the next National Action Plan.

Without question, there has been an unprecedented amount of proactive disclosure under the President's leadership. Data.gov continues to expand and improve access to government information. The recent addition of Ethics.data.gov was especially welcome, as it brings together seven datasets for the public to search for undue influence, including campaign contributions, lobbying, travel records, and the White House visitor logs.

POGO's Sunshine Week release with partner organizations of *Highlighted Best Practices for Openness and Accountability* provides several examples of useful and innovative practices by federal agencies that we hope will be replicated.⁶ These highlights include practices such as posting staff directories and calendars online; the Consumer Financial Protection Bureau's excellent online credit card complaints database; public comments solicited on Open Government Plans, as well as on the plans in response to the President's Memorandum on Scientific Integrity; the unprecedented tracking of federal spending available on Recovery.gov; extensive training at DOE on properly classifying information; online posting of performance and accountability reports; and FOIAOnline.regulations.gov, a one stop shop for FOIA requests, tracking, disclosure, and management created voluntarily by enterprising agencies—and a feature of the FOIA reform legislation we'll discuss momentarily.

But first, it is important to address the fact that in spite of these achievements, secrecy has escalated in some areas of the government. The President recently admitted, "There are a handful of issues, mostly around national security, where people have legitimate questions where they're still concerned about whether or not we have all the information we need."⁷ We are indeed concerned, Mr. President.

Two American Governments

There seems to be two Obama Administrations—two American governments, really. One looks like a democracy in which an open government accountable to the people is an ideal and a priority; and the other is a national security state, where claims of national security often trump

⁵ Openthegovernment.org, *Civil Society Report on Implementation of the First U.S. National Action Plan*, March 2013.

⁶ Project On Government Oversight with contributions from the American Association of Law Libraries, Bauman Foundation, Brennan Center, Center for Effective Government, OpenTheGovernment.org, Sunlight Foundation, and the Union of Concerned Scientists, *Highlighted Best Practices for Open and Accountable Government*, March 2013. <http://www.pogo.org/our-work/resources/2013/best-practices-for-open-and-accountable-government.html>

⁷ President Obama Participates in Fireside Hangout

democratic principles such as the people's right to know, civil liberties, freedom of speech, and whistleblower protections. Of course, this is not an approach exclusive to this President. But the unchecked secrecy of Obama's national security state is at cross-purposes with many of his Administration's openness objectives, and it raises doubts about the President's commitments and declarations about transparency.

One case in point is on whistleblower protections—a foundational transparency and accountability policy. More than any other president, Obama has advanced legislation and policies to protect federal workers who blow the whistle on waste, fraud, and abuse. Most presidents have been outright hostile and have opposed strengthening whistleblower protections.

President Obama was the first to strongly support the Whistleblower Protection Enhancement Act (WPEA)—a bill championed by Chairman Issa, Ranking Member Cummings, and then-Committee members Representatives Platts and Van Hollen. He signed it into law in November 2012—the culmination of a hard-fought 13-year campaign by POGO and our partners. President Obama also issued Presidential Policy Directive 19 (PPD-19), using executive action to extend some protections to intelligence and national security community personnel that were left out of the final version of the WPEA.

But at the same time the Administration created a national security loophole for whistleblowers that undermines both the WPEA and the PPD. The Administration's appeal in *Berry v. Conyers and Northover*⁸ resulted in a decision that allows agencies to label job positions arbitrarily as "sensitive" for national security and remove employees from those positions—even if it is in retaliation for blowing the whistle on waste, fraud, and abuse. Additionally, the President has ordered the Director of National Intelligence to join rulemaking⁹ that we anticipate will affirm that loophole by substantially replacing the rights Congress enacted for civil servants and whistleblowers with an alternative national security system. Employees with security clearances and access to classified information have long had different rights. However, the employees with so-called sensitive national security positions do not have access to classified information and, until the *Conyers* decision, had the same rights as other civil servants. Thus, we are deeply concerned that the *Conyers* decision and the DNI rulemaking will greatly expand the boundaries of the national security state, dramatically increasing secrecy and decreasing oversight and accountability.¹⁰

⁸ John Berry, Director Office of Personnel Management v. Rhonda K. Conyers, Devon Haughton Northover and Merit Systems Protection Board (Fed. Cir. 2012) <http://www.ca9.uscourts.gov/images/stories/opinions-orders/11-3207.pdf> (Downloaded March 5, 2013)

⁹ The White House, Office of the Press Secretary, "Presidential Memorandum—Rulemaking Concerning the Standards for Designating Positions in the Competitive Service as National Security Sensitive and Related Matters," January 25, 2013. <http://www.whitehouse.gov/the-press-office/2013/01/25/presidential-memorandum-rulemaking-concerning-standards-designating-positions> (Downloaded March 5, 2013)

¹⁰ Margaret Talev, "Obama Memo on 'Sensitive' Jobs Stirs Whistle-Blower Fears," Bloomberg.com <http://www.bloomberg.com/news/2013-02-27/obama-memo-on-sensitive-jobs-stirs-whistle-blower-fears.html> (Downloaded March 4, 2013)

Additionally, I know you share our concerns about a recent signing statement¹¹ by the President that seeks to limit disclosures of unclassified information to Congress.¹² He said the new protections for contractor and grantee employees “threaten to interfere with my constitutional duty to supervise the executive branch.” President Bush made a similar claim, but what makes this signing statement more alarming is that it specifically objects to disclosures to Congress. What’s more, President Obama isn’t just trying to block classified information, but instead is seeking to withhold information he ambiguously refers to as “otherwise confidential.” You can’t do your jobs and there won’t be checks and balances if the President is allowed to keep secrets from Congress.¹³

There are a host of other examples of extreme secrecy in the name of national security that require your attention, but can’t be adequately addressed at this hearing. But allow me to just mention a few more issues of critical concern. We have objected to administrative action¹⁴ and proposed legislation¹⁵ to plug leaks of classified information that threaten free speech, freedom of the press, civil liberties, and whistleblowers.¹⁶ We also have raised concerns repeatedly about the aggressive prosecutions of so-called leakers. There have been more prosecutions for disclosures of alleged wrongdoing under the Espionage Act under this Administration than all others combined.¹⁷ We believe these prosecutions have a chilling effect that silence would-be whistleblowers. There continues to be far too much over-classification of information, which undermines our legitimate secrets and makes them harder to keep. Then there are the secret legal opinions that among other things justify the targeted killings of American citizens suspected of terrorism. Constitutional law expert Lou Fisher says, “No plausible case can be made for withholding legal reasoning. With secret legal memos, government functions by fiat. The dominant force is not law but executive will over democracy and the constitutional system of checks and balances.”¹⁸

¹¹ The White House, Office of the Press Secretary, “Statement by the the [sic] President on H.R. 4310,” January 3, 2013. <http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310> (Downloaded March 4, 2013)

¹² Letter from Senators Darrell E. Issa, Clair McCaskill, Elijah E. Cummings, and Charles E. Grassley to President Barack Obama, regarding concerns about limiting disclosures of unclassified information to Congress, January 17, 2013. <http://pogoarchives.org/m/ns/dei-mccaskill-ec-grassley-to-president-wpea-ndaa-20130117.PDF>

¹³ Angela Canterbury, “Obama, Bush and the imbalance of power,” *The Hill*, January 18, 2013. <http://thehill.com/blogs/congress-blog/politics/278047-obama-bush-and-the-imbalance-of-power> (Downloaded March 4, 2013)

¹⁴ Memorandum from Jacob J. Lew, Director of the Office of Management and Budget, to the Heads of Executive Departments and Agencies, regarding Initial Assessments of Safeguarding and Counterintelligence Postures for Classified National Security Information in Automated Systems, January 3, 2011. www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-08.pdf (Downloaded March 4, 2013)

¹⁵ Ron Wyden—Senator for Oregon, “Wyden Places Hold on Intelligence Authorization Bill,” November 14, 2012. <http://www.wyden.senate.gov/news/press-releases/wyden-places-hold-on-intelligence-authorization-bill-> (Downloaded March 4, 2013)

¹⁶ Suzie Dershowitz and Angela Canterbury, “Wyden Pumps the Brakes on Anti-Leaks Legislation,” *The (POGO) Blog*, November 19, 2012. <http://www.pogo.org/blog/2012/11/wyden-pumps-the-brakes-on-anti-leaks-legislation.html>

¹⁷ Phil Mattingly and Hans Nichols, “Obama Pursuing Leakers Sends Warning to Whistle-Blowers,” *Bloomberg.com*, October 17, 2012. <http://www.bloomberg.com/news/2012-10-18/obama-pursuing-leakers-sends-warning-to-whistle-blowers.html> (Downloaded March 4, 2013)

¹⁸ Louis Fisher, “What grounds for secrecy?” *The National Law Journal: Opinion*, January 21, 2013. <http://www.constitutionproject.org/documents/what-grounds-for-secrecy/> (Downloaded March 4, 2013)

Each of these encroachments deserves more scrutiny. What should be of critical concern for all of us—and especially this Committee—is that the lack of transparency and accountability for the national security state is growing. The more it grows, the more illegitimate secrecy threatens our basic rights and our democracy.

Egregious Problems at Certain Agencies

Another serious problem we've encountered is agencies actively engaged in cover-ups to evade accountability. The Department of Defense (DoD) has repeatedly withheld records to hide the extent of the water contamination at Camp Lejeune that poisoned an estimated million Marines, family members, and civilians for 34 years.¹⁹ The Food and Drug Administration (FDA) has spied on whistleblowers,²⁰ prompting the Office of Special Counsel to issue a reminder to all agencies not to violate the rights of whistleblowers to make disclosures without retaliation.²¹

However, there are other instances where perhaps the reasons for the secrecy are not nefarious, but the results are. The Department of Agriculture and the Fish and Wildlife Service are among the agencies that have been called out recently for having “made it difficult for scientists to communicate their findings and views directly to the media and the public.”²² FOIA requesters have to wait an average 926 days to receive a response to an expedited request²³ from the Department of State. POGO discovered this when we closely examined the *Summary of Agency Chief FOIA Officer Reports for 2012*²⁴ and the *Summary of Annual FOIA Reports for FY 2011*.²⁵ We also found that State and USAID have an average response rate to simple requests of more

¹⁹ Martha Waggoner, “U.S. Senate panel hears about Camp Lejeune water,” *Star News Online*, March 13, 2012. <http://www.starnewsonline.com/article/20120313/ARTICLES/120319920> (Downloaded March 4, 2013)

²⁰ Ellen Nakashima and Lisa Rein, “FDA lawyers authorized spying on agency’s employees, senator says,” *The Washington Post*, July 16, 2012. http://articles.washingtonpost.com/2012-07-16/politics/35489846_1_ericajefferson-fda-contractor-computer-surveillance (Downloaded March 4, 2013)

²¹ Memorandum from Steven VanRoekel, Federal Chief Information Officer and Boris Bershteyn, General Counsel, to the Chief Information Officers and General Counsels, regarding Office of Special Counsel Memo on Agency Monitoring Policies and Confidential Whistleblower Disclosures, June 20, 2012. <http://www.whistleblowers.org/storage/whistleblowers/documents/ombandosc.monitoringmemo.pdf> (Downloaded March 4, 2013)

²² Celia Viggo Wexler, “From ‘The Daily Show’ to the daily news, federal scientists often face obstacles sharing their knowledge,” *Sunshine Week*, February 27, 2013. <http://sunshineweek.rcfp.org/from-the-daily-show-to-the-daily-news-federal-scientists-often-face-obstacles-sharing-their-knowledge/> (Downloaded March 4, 2013)

²³ According to the guidelines, FOIA processing should be expedited when an individual’s life or safety would be jeopardized or if substantial due process rights of the requester would be impaired by the failure to process a request immediately. Department of Justice, “When to Expedite FOIA Requests,” FOIA Update Vol. IV, No. 2, 1983. http://www.justice.gov/oip/foia_updates/Vol_IV_3/page3.htm (Downloaded March 4, 2013)

²⁴ Department of Justice, *Summary of Agency Chief FOIA Officer Reports for 2012 and Assessment of Agency Progress in Implementing the President’s FOIA Memorandum and the Attorney General’s FOIA Guidelines With OIP Guidance for Further Improvement*, <http://www.justice.gov/oip/docs/sum-2012-chief-foia-officer-rpt.pdf> (Downloaded March 4, 2013)

²⁵ Office of Information Policy, Department of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2011*, <http://www.justice.gov/oip/foiapost/fy-2011-annual-report-summary.pdf> (Downloaded March 4, 2013)

than seven times the legal limit of 20 days.²⁶ Public Citizen has filed a petition objecting to FDA having routinely violated the letter and spirit of the Freedom of Information Act.²⁷

But some of the worst FOIA practices and policies have been by the very agency that issues guidance to other agencies on FOIA: the Department of Justice (DOJ). Last year, the National Security Archive even gave DOJ its annual Rosemary Award for worst open government performance.²⁸ As one of the contributing factors, the group cited Justice's "FOIA-as-usual mindset" that has failed to transform decades-old FOIA policies within its department, much less throughout the government.²⁹ When it did propose updating its FOIA regulations, we were alarmed by the ways in which FOIA would be undermined, including its proposal to lie to requesters, which was finally withdrawn after public pressure.²⁹ DOJ's proposed modifications to its FOIA system of records also drew fire from Senators Leahy and Cornyn who were concerned about repeated references to the Office of Information Policy (OIP) at DOJ as an ombudsman.³⁰ Their 2007 law specifically designates another entity as the FOIA Ombudsman—the Office of Government Information Systems (OGIS)—which was intended to create a neutral arbiter of FOIA, something that DOJ is not.

Unlimited Loopholes to FOIA

We continue to see overly broad exemptions to FOIA being sought by agencies—or by regulated entities. In addition to the nine permanent exemptions to FOIA, there are hundreds of statutory exemptions pursuant to FOIA's Exemption b(3), known as statutory exemptions or b(3)s.³¹ POGO has long been concerned about the proliferation and the scope of these statutory exemptions, as well as the lack of oversight. Any exemption to FOIA must be narrowly tailored and must carefully balance the public's right to know with other interests for withholding information.

With the help of Ranking Member Cummings and Senator Leahy, we were able to narrow an extremely broad exemption the DoD was seeking.³² But its implementation now needs oversight,

²⁶ Suzie Dershowitz, "Federal Agencies Lagging on FOIA Processing—What's the Hold Up?" *The (POGO) Blog*, September 20, 2012. <http://www.pogo.org/blog/2012/09/20120920-federal-agencies-lagging-on-foia.html>

²⁷ Public Citizen, "Petition to FDA to Revoke Deletions Policy for FOIA Processing," petition, September 19, 2012. <http://www.citizen.org/documents/Petition-to-FDA-to-Revoke-Deletions-Policy-for-FOIA-Processing.pdf> (Downloaded March 4, 2013)

²⁸ The National Security Archive, "Justice Department Wins Rosemary Award for Worst Open Government Performance in 2011." <http://www.gwu.edu/~nsarchiv/news/20120214/index.htm> (Downloaded March 4, 2013)

²⁹ Dana Liebelson, "Did Your FOIA Request Really Not Exist—Or is That Just What the DOJ Told You?" *The (POGO) Blog*, November 4, 2011. <http://www.pogo.org/blog/2011/11/did-your-foia-request-really-not-exist-or-is-that-just-what-the-doj-told-you.html>

³⁰ Patrick Leahy—United States Senator for Vermont, "Leahy, Cornyn Urge DOJ To Clarify Department's Position On FOIA Ombudsman," March 26, 2012. <http://www.leahy.senate.gov/press/leahy-cornyn-urge-doj-to-clarify-departments-position-on-foia-ombudsman> (Downloaded March 4, 2013)

³¹ 5 U.S.C. § 552(b)(3): specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

³² Letter from the Project On Government Oversight et al. to the Senators of the 111th Congress, regarding support for Leahy's amendment to the NDAA to fix FOIA exemptions, November 17, 2011. <http://www.pogo.org/our->

as does the use of the many others on the books. Sometimes unnecessary exemptions are moving too fast in legislation without a referral to this Committee, and it is almost impossible to prevent these loopholes to FOIA and accountability from becoming law. Other times, there are powerful interests and claims of national security seeking to withhold information that ought to be disclosed. All of the proposed cybersecurity legislation from the 112th Congress include overly broad or wholly unnecessary loopholes to the public's right to know,³³ as does the "CISPA" bill recently reintroduced in the House.³⁴

I urge you to not only study existing statutory exemptions to FOIA, but also to find a better way to review proposed exemptions before they become law to ensure each is narrowly targeted to a specific, compelling need to withhold information from the public. Unnecessary, overly broad, or abused statutory exemptions already in the law should be repealed.

Bureaucratic Foot-Dragging

Bureaucracy often gets in the way of open government. Delays are by far the most common complaint by FOIA requesters. Many agencies routinely violate the 20-day rule for responses to FOIA. In a FOIA project we conducted, only 8 out of 100 agencies responded with the requested records within the deadline.³⁵ Many claim that responding with a letter acknowledging receipt of the request within 20 days fulfills the requirement. We disagree, and so do our friends at Citizens for Responsibility and Ethics in Washington who have brought suit against the Federal Elections Commission for this claim.³⁶

Conflict of Mission

But perhaps the greatest challenge for implementation of the President's directives on openness is that there isn't a proper entity with authority and an interest in making the agencies improve their FOIA practices and increase their openness. It's mostly voluntary and without any real consequences for agencies that fail.

Generally, the OIP at DOJ is thought of as the entity responsible for FOIA since it issues guidance to the agencies and plays an important role in compliance. But, as you so aptly pointed out in your letter last month to Melanie Pustay, Director of OIP, there is a significant disconnect

[work/letters/2011/gs-foia-20111117.html](http://www.foia.org/our-work/letters/2011/gs-foia-20111117.html); Patrick Leahy-United States Senator for Vermont, "Senate Adopts Leahy Amendment To Promote Transparency In Defense Auth. Bill," December 1, 2011. <http://www.leahy.senate.gov/press/senate-adopts-leahy-amendment-to-promote-transparency-in-defense-auth-bill> (Downloaded March 4, 2013)

³³ Letter from the Project On Government Oversight et al. to the Senators of the 112th Congress, regarding opposition to FOIA threats in cybersecurity bills, May 14, 2012. <http://www.pogo.org/our-work/letters/2012/gs-foia-20120514.html>

³⁴ 113th U.S. Congress, "Cyber Intelligence Sharing and Protection Act" (HR 624), introduced February 13, 2013, by Representative Mike Rogers.

³⁵ Andrew Wyner, "SUNSHINE WEEK: Many Agencies Violate FOIA's 20-Day Requirement," *The (POGO) Blog*, March 16, 2012. <http://www.pogo.org/blog/2012/03/sunshine-week-many-agencies-violate-foias-20-day-requirement.html>

³⁶ Citizens for Responsibility and Ethics in Washington (CREW), "CREW v. Federal Election Commission." <http://www.citizensforethics.org/lawsuits/entry/crew-v-federal-election-commission-commissioners-correspondence> (Downloaded March 4, 2013)

between OIP's actions and the President's orders.³⁷ We share your concerns about "outdated FOIA regulations, exorbitant and possibly illegal fee assessments, FOIA backlogs, the excessive use and abuse of exemptions, and dispute resolution services."³⁸ You raised several important questions that must be answered.

Naturally, OIP did not respond to the Committee's questions by the date requested.

In the end, we can never expect OIP to properly lead on FOIA compliance and ensure that the presumption of openness is employed because it has an inherent conflict of interest—a conflict of mission, really. DOJ is charged with defending the agencies when they withhold information under FOIA. This responsibility of serving as the agencies' lawyers means that they do not have a primary interest in promulgating a presumption of openness. One need look no further than DOJ's own proposed rulemaking on FOIA to see a defensive posture that undermines the public's right to know.³⁹ Clearly it is time to consider moving away from this dysfunctional model and centralizing FOIA authority at an independent entity without such conflicts.

Fixing and Modernizing FOIA

The proposed FOIA reform legislation by Chairman Issa and Ranking Member Cummings envisions a more modern FOIA and provides for some commonsense next steps.

POGO strongly supports the following reforms in this bill:

- Codifying the "foreseeable harm standard" which says that an agency "shall not deny a request for records unless the agency reasonably foresees that disclosure would harm an interest protected by one of the exemptions."
- Giving a boost to FOIAOnline⁴⁰ by increasing the number of agencies that use this one stop shop for requesters.
- Providing the Office of Government Information Services with more involvement in FOIA rulemaking and compliance to provide more balance with OIP's role.
- Encouraging more proactive disclosures.
- Making more of FOIA requests, processing, responses, and policy available in electronic format and online.
- Requiring agencies to review and update their FOIA regulations.
- Clarifying the responsibilities of the Chief FOIA Officers for improving FOIA practices at their agencies.

³⁷ Letter from House Committee on Oversight and Government Reform Chairman Darrell E. Issa and Ranking Member Elijah E. Cummings to Melanie Ann Pustay, Director Office of Information Policy, regarding the federal government's compliance with FOIA, February 4, 2013. <http://oversight.house.gov/wp-content/uploads/2013/02/2013-02-04-DEI-EEC-to-Pustay-re-FOIA.pdf> (Downloaded March 4, 2013)

³⁸ Suzie Dershowitz, "House Oversight Committee Takes a Stand on FOIA," *The (POGO) Blog*, February 20, 2013. <http://www.pogo.org/blog/2013/02/20130220-house-oversight-committee-takes-stand-on-foia.html>

³⁹ Department of Justice, "Proposed Rules: Freedom of Information Act Regulations," Federal Register Volume 76, Number 54, March 21, 2011. <http://www.gpo.gov/fdsys/pkg/FR-2011-03-21/html/2011-6473.htm> (Downloaded March 4, 2013)

⁴⁰ FOIAonline, "Home Page." <https://foiaonline.regulations.gov/foia/action/public/home> (Downloaded March 4, 2013)

- Creation of a Chief FOIA Officers Council to ensure interagency cooperation and public input in compliance and improved performance with FOIA.
- Studying ways to further improve compliance with FOIA and limit the over-use and abuse of exemptions.

All of these are important, commonsense next steps for fixing FOIA. The “foreseeable harm standard” means that agencies cannot withhold information unless harm to an interest protected by an exemption can be identified. Putting this into statute will prevent future presidents from abandoning the need to make this justification for withholding, and will increase disclosures under FOIA. Mandating performance responsibilities for the Chief FOIA Officers, creation of a Chief FOIA Officers Council, and updates to FOIA regulations will go a long way to bringing agencies in compliance with FOIA.

Modernizing FOIA also means mandating a migration away from last century’s approach towards one that harnesses today’s technology to make it simple for the public to access its own information held by the government.

I called out a few agencies as problem children earlier, but it is also extremely important to credit the extraordinary initiative and voluntary investments made by the three agencies that created FOIAOnline.regulations.gov: OGIS, the Department of Commerce, and the Environmental Protection Agency. In response to the President’s OGD, these agencies created a platform for FOIA requesters and administrators that facilitates FOIA processing with a non-proprietary system that can be used by any and all agencies. Their vision is that one day it will serve as a portal for all FOIA requests so that requesters would no longer need to know exactly which agency holds the information they seek—but that would mean that all federal departments and agencies would have to use the system. The pilot proposed by the legislation will help boost the agencies participating in FOIAOnline and increase its potential for success.

We also support taking a closer look at the persistent structural problems manifested in delays, backlogs, and other issues; and practices that lead to more withholding than disclosing, such as the use of statutory exemptions. We support your proposal for OGIS to conduct the study, but also support the Faster FOIA Act, proposed by Senators Leahy and Cornyn, which creates an independent commission to study these issues. We want OGIS to have a greater role and more authority, but not without increased resources. It is already struggling to fulfill its mission with its slashed budget.

POGO strongly supports your efforts to improve FOIA. We look forward to helping you make these good reforms law.

Other Legislation for Government Reform

There are several other bills to increase government transparency and accountability that this Committee advanced in the last Congress, and in some cases were passed by the House but not enacted. We supported both the House and Senate versions of the Digital Accountability and

Transparency or DATA Act,⁴¹ both of which would dramatically improve the ability of the public to discover how their taxpayer dollars are spent.⁴² The myriad problems with the current system and inaccuracies of data at USAspending.gov are widely known.⁴³ We hope you will not only advance the DATA Act in the House, but also that you will work with the Senate to ensure the best reforms in both bills become law. We urge you to advance the following reforms mandating:

- Unique identifiers for recipients, obligations, and federal entities that also describe relationships (perhaps piggybacking on the Legal Entity Identifier or LEI).
- Date standardization government-wide on spending data, including interoperability and/or common data formats with tagging that allows for linkages (such as XML or XBRL).
- Treasury outlay data matching with obligations currently on USAspending.gov.
- All sub-recipient data reporting (not just first sub, but all sub-contractor and grantees all the way down the line).
- Real and frequent data quality assessments.
- Independent board that will have the necessary independence and motivation to ensure the DATA Act will be properly implemented, based on the Recovery Accountability and Transparency Board model.

We support more transparency and accountability in all federal spending, including in grant-making and contract-letting, which together exceeds an estimated \$1 trillion in taxpayer dollars.⁴⁴ The Grant Reform and New Transparency Act reported by the Committee last year was promising.⁴⁵ We appreciate your willingness to address some issues of concern raised by our colleagues at the Union of Concerned Scientists regarding protecting the identity of peer reviewers and intellectual property, just as we protect proprietary business information. We also hope that the Committee will similarly advance more transparency in contracting. For starters, both contracts and grants should be put online as they are in many cities and states.⁴⁶ Among other reasons, we need more transparency about the individuals and entities receiving federal funds to ensure that taxpayer money is going to experienced and reliant performers.

Another bill we also hope you will advance in this Congress is the Access to Congressionally Mandated Reports Act.⁴⁷ These reforms would allow the Administration, Congress, and the

⁴¹ 112th U.S. Congress, "DATA Act" (S. 1222), introduced June 16, 2011, by Senator Mark Warner; 112th U.S. Congress, "DATA Act" (H.R. 2146), introduced June 13, 2011, by Representative Darrell Issa.

⁴² Angela Canterbury, "New DATA Act Would Make Following the Money Easier," *The (POGO) Blog*, September 28, 2012. <http://www.pogo.org/blog/2012/09/new-data-act-make-tracking-government-spending-easier.html>

⁴³ Sunlight Foundation, "Clear Spending," <http://sunlightfoundation.com/clearspending/> (Downloaded March 5, 2013)

⁴⁴ In Fiscal Year 2012 the government spent \$516 billion on contracts and \$537 billion on grants, which exceeds \$1 trillion. USAspending.gov, "Prime Award Spending Data FY 2012," http://usaspending.gov/index.php?q=node%2F3&fiscal_year=2012&tab=By+Agency (Downloaded March 5, 2013)

⁴⁵ 112th U.S. Congress, "GRANT Act" (H.R. 3433), introduced November 16, 2011, by Representative James Lankford.

⁴⁶ U.S. Prig Education Fund, "Report: Through Transparency, Shaping a Government Accountable to the People," <http://www.usprigedfund.org/reports/usp/transparency-city-spending> (Downloaded March 5, 2013)

⁴⁷ 112th U.S. Congress, "Access to Congressionally Mandated Reports Act" (H.R. 1974), introduced May 24, 2011, by Representative Mike Quigley.

public to have easy access on a centralized website to reports Congress tells the agencies to produce.

Additionally, there are five noncontroversial transparency reforms included in Ranking Member Cummings' Transparency and Openness in Government Act⁴⁸ on which the Committee should quickly take action:

- Electronic Message Preservation Act
- Federal Advisory Committee Act Amendments⁴⁹
- Government Accountability Office Improvement Act⁵⁰
- Presidential Library Donation Reform Act
- Presidential Records Act Amendments

Lastly, we would like to urge the Committee to review our most recent report on the revolving door between the SEC and the industry it regulates.⁵¹ It illustrates a coziness between regulators and the regulated that is not exclusive to the SEC, and that causes potential conflicts of interest throughout government. We hope you will explore ways to increase transparency and limit the conflicts created by the revolving door.

Implementation of the Reforms You've Championed

Naturally, government spending is a real concern, especially as our economy continues to struggle. However, we hope this Committee will work with appropriators to ensure the proper implementation of the reforms you champion. The DATA Act, FOIA reforms, and whistleblower protections all require short-term investments to yield long-term savings to taxpayers. We strongly believe that investing in government watchdogs such as the Inspectors General, the Recovery Accountability and Transparency Board, the Government Accountability and Transparency Board, the Government Accountability Office, Office of Government Information Services, and the very effective Office of Special Counsel pays huge dividends to taxpayers.⁵²

I also urge the Committee to conduct vigilant oversight of the whistleblower and taxpayer protections you ushered into law. As you know, the Administration has already taken actions that undermine these reforms. I hope you will keep a close eye on implementation, and will legislate as necessary to preserve strong protections for whistleblowers, including those in the intelligence

⁴⁸ 112th U.S. Congress, "Transparency and Openness in Government Act" (H.R. 1144), introduced March 17, 2011, by Representative Elijah Cummings.

⁴⁹ 112th U.S. Congress, "Federal Advisory Committee Act Amendments of 2011" (H.R. 3124), introduced October 6, 2011, by Representative Lacy Clay Jr.

⁵⁰ 112th U.S. Congress, "Government Accountability Office Improvement Act of 2011" (S. 237), introduced January 31, 2011, by Senator Claire McCaskill.

⁵¹ Project On Government Oversight, *Dangerous Liaisons: Revolving Door at SEC Creates Risk of Regulatory Capture*, February 11, 2013. <http://www.pogo.org/our-work/reports/sec-revolving-door.html>

⁵² Letter from Project On Government Oversight et al. to the Chairmen and Ranking Members of the House and Senate Appropriations Committees and the Chairmen and Ranking Members of the House and Senate Financial Services and General Government Subcommittees, regarding investing in OSC pays dividends, February 26, 2013. <http://www.pogo.org/our-work/letters/2013/POGO-and-Partners-Tell-Congress-Investing-in-OSC-Pays-Dividends.html>

and national security communities. It may be necessary to explicitly clarify that there should be no restrictions on executive branch disclosures to Congress. Congress cannot fulfill its constitutional mandate to conduct oversight if it is kept in the dark.

We also hope you will fight for the House's stronger provisions included in the STOCK Act passed last year.⁵³ The STOCK Act will shine a brighter light on potential financial conflicts of interest of Members of Congress, congressional staff, and executive branch employees. Unfortunately, the implementation has been slowed.⁵⁴ We believe that the House had the right idea in making all public financial disclosure forms available online, and that there shouldn't be another retreat from these enacted reforms.

Conclusion

In conclusion, when I was last here, I urged you all to work collaboratively, across party lines, on legislative reform and productive oversight. While it hasn't always been the case that this Committee has put aside partisanship, it is truly encouraging to see the tremendous good you have done for the country when you have.

Though everyone can agree that we ought to have a more open and accountable government, there are enormous challenges and we need your leadership more than ever. In particular, we can't allow whole swaths of our government to be hidden and unaccountable just because they have been labeled as having something to do with national security.

Lastly, I can't resist ending with another call for you to model openness. Congress, and particularly the House, is increasingly making more information available online in a timely fashion for the American people. We applaud this, but also think it is time for you to do what you have done for the executive branch: make Congress subject to FOIA and to protect members and staff who blow the whistle on waste, fraud, abuse, and other illegality.

Thank you again for inviting me to testify today. I hope that the next time Sunshine Week rolls around there will be more progress to report. POGO and our partners pledge to continue to work with you to fulfill the promise of a government that is truly open and accountable to the American people.

⁵³ Suzanne Dershowitz, "President Obama Signs the STOCK Act into Law," *The (POGO) Blog*, April 4, 2012. <http://www.pogo.org/blog/2012/04/president-obama-signs-the-stock-act-into-law.html>

⁵⁴ Kellie Lunney, "Congress again delays STOCK ACT for senior execs," *Government Executive*, December 6, 2012. <http://www.govexec.com/pay-benefits/2012/12/congress-again-delays-stock-act-senior-exec/60006/> (Downloaded March 4, 2013)

Chairman ISSA. And I thank you.
Mr. Harper.

STATEMENT OF JIM HARPER

Mr. HARPER. Thank you, Chairman Issa, Mr. Cummings, members of the committee. I am very pleased to be with you about this issue in which I have invested a great deal of time over the last few years, and I am glad that you are doing so as well.

I will start as you did, Mr. Chairman, with a note about bipartisanship. It is a pleasure to work on transparency precisely because it is a bipartisan issue; it is a nonideological issue. I take pains, whenever I am working with my liberal and progressive friends and with my conservative friends, to tone it down and I do my best; they tolerate me well, regardless of my ability to actually tone it down.

Chairman ISSA. It is the one time they want a libertarian in the room.

Mr. HARPER. Yes. It doesn't happen very often, so that makes this a true pleasure.

If I could characterize the work we have done at Cato, it would be that we are trying to bring real methodology and measurement to transparency issues. Of course, not all issues are subject to that kind of methodology, but in the data are areas we have worked to model what legislative process would look like as data should look like as data; what budgeting, appropriating, and spending would look like as data. And then we proceeded to grade how well that data is published by the Government. In terms of authority, completeness, machine discoverability, and machine readability. These are the things that would make the data amenable to use on the Internet.

The grades are relatively poor, and in my last, most recent, report, I found that the Obama administration was somewhat lagging the House in terms of transparency. Obama controls a great deal of the Government, obviously, and has not met the outsized promises that he made as a campaigner. Meanwhile, the House has taken steps in the area that it controls to move transparency forward, and we see more coming, and that is exciting good news.

One of the things that really sticks out, though, in analyzing the quality of data published by the Government is that data reflecting the structure of the executive branch is essentially not available data. Data, a machine readable government organization chart does not exist. You would think that in this day and age, in an administration that has touted transparency, we would at least have, in computer readable form, the basic layers: agency, bureau, program, and project.

If we had that, so many things we could hook to it. We could figure out how appropriations bills actually affect agencies before they are passed and the lower organizational levels. So the lack of a machine readable government organization chart is a point that I think is worth emphasizing.

We are moving forward, regardless, to mark up legislation with semantically rich XML, code that will make available to computers more accurately, more completely, what is in the bills that you write. So references to existing law are marked up; budget authori-

ties, both authorizations of appropriations and appropriations, are marked up. Behind me here I have some of the staff who have suffered through this project, and I certainly appreciate the work that they do.

In addition, to the extent we can, we are marking up federal organizational units, the agencies and bureaus where we can. Lower organizational units we essentially can't. That is why I think the DATA Act is so important, because it would essentially require a data structure for all the spending in the U.S. Government; not only agencies, bureaus, programs, and projects, but obligations and outlays.

With this data you can tell stories, you can tell the story about how a budget became an appropriation, which became an obligation, which became an outlay, which resulted in something, whether it be funding for the military in some respect, whether it be funding for some program that aids people in their health or well-being. The stories that could be made available to the public are nearly endless given data that reflect them well. So I think the DATA Act is an essential way of getting that transparency that makes available to the public what actually happens here in Washington, D.C.

Starting tomorrow and on Friday, we are going to be moving ahead, having sessions on how to get legislative data on Wikipedia. We are doing a Wikipedia editathon to train people up. Everybody is welcome tomorrow afternoon at Cato. And then on Friday we are going to roll our sleeves up and see if we can make legislative data a tool for Wikipedians. I think Wikipedia is one of the places where people most often go to look for information, including information about public policy, and we are going to try to get legislative data up there as quickly as possible, and we will move to other areas as we proceed.

Most importantly, I think, we are having a happy hour tomorrow night from 5:30 to 6:30. Everyone is also welcome to that.

Chairman ISSA. You could end on a high note, if you wanted, there.

[Laughter.]

Mr. HARPER. I will bore you with a couple more thoughts.

When I think about transparency and how to communicate about transparency to the public, I think about the newspaper and the number of facts per square inch that appear in the newspaper. Go to the sports page, look at the charts, look at the data for your baseball scores, hockey, whatever it may be; go to the financial section. Data. Lots of data that people are able to consume. The weather page is data, but when you go to the national page you get things like Republicans are girding for battle or Obama won't give in. That is essentially meaningless to ordinary people, ordinary citizens out in the land. They are able to consume data in other parts of the newspaper; they are able to consume data about public policy. So as soon as we can get it and give it out to them, we will move forward quite a bit in government transparency and a happier public, which is a thing that we all agree on.

Thank you very much.

[Prepared statement of Mr. Harper follows:]

**Testimony of Jim Harper
Director of Information Policy Studies
The Cato Institute
to the
Committee on Oversight & Government Reform
United States House of Representatives
at a hearing entitled
“Addressing Transparency in the Federal Bureaucracy:
Moving Toward A More Open Government”
March 13, 2013**

Executive Summary

President Obama’s 2008 campaign helped light a fire under the government transparency movement that still burns. However, the effort to produce transparent government has flagged. This is essentially because of poor awareness of exactly what practices produce transparent government.

Confusion between “open government” and “open government data” illustrates this. They are often treated as interchangeable, but the first is about revealing the deliberations, management, and results of government, and the second is general availability of data that the government has produced, covering any subject matter.

More importantly, the transparency community has failed to articulate what it wants. A quartet of data practices would foster government transparency: authoritative sourcing, availability, machine-discoverability, and machine-readability. The quality of government data publication by these measures is low.

We are not waiting for the government to produce good data. At the Cato Institute, we have begun producing data ourselves, starting with legislation that we are marking up with enhanced, more revealing XML code.

Our efforts are hampered by the unavailability of fundamental building blocks of transparency, such as unique identifiers for all the organizational units of the federal government. There is today no machine-readable organization chart for the federal government.

Well-published data, such as what the DATA Act requires, would allow the transparency community to propagate information about the government in widely varying forms to a public that very much wants to understand what happens in Washington, D.C.

Chairman Issa, Ranking Member Cummings, and members of the committee:

Thank you for the opportunity to testify before you today. I am keenly interested in the subject matter of your hearing, and I hope that my testimony will shed some light on your oversight of federal government transparency and assist you in your deliberations on how to promote this widely agreed-upon goal.

My name is Jim Harper, and I am director of information policy studies at the Cato Institute. Cato is a non-profit research foundation dedicated to preserving the traditional American principles of limited government, individual liberty, free markets, and peace. In my role there, I study the unique problems in adapting law and policy to the information age, issues such as privacy, intellectual property, telecommunications, cybersecurity, counterterrorism, and government transparency.

For more than four years, I have been researching, writing on, and promoting government transparency at Cato. For more than a dozen years, I have labored to provide transparency directly through a Web site I run called WashingtonWatch.com. Other transparency-related work of mine includes serving on the Board of Directors of the National Priorities Project, serving on the Board of Advisors of the Data Transparency Coalition, and serving on the Advisory Committee on Transparency, a project of the Sunlight Foundation run by my co-panelist today Daniel Schuman.

WashingtonWatch.com is still quite rudimentary and poorly trafficked compared to sites like Govtrack.us, OpenCongress, and many others, but collectively the community of private, non-profit and for-profit sites have more traffic and almost certainly provide more information to the public about the legislative process than the THOMAS Web site operated by the Library of Congress and other government sites.

There is nothing discreditable about THOMAS, of course, and we appreciate and eagerly anticipate the improvements forthcoming on Congress.gov. But the many actors and interests in the American public will be best served by looking at the federal government through many lenses—more and different lenses than any of us can anticipate or predict. Thus, I recommend that you focus your transparency efforts not on Web sites or other projects that interpret government data for the public. Rather, your task should be to make data about the government's deliberations, management, and results available in the structures and formats that facilitate experimentation. There are dozens—maybe hundreds—of ways the public might examine the federal government's manifold activities.

Delivering good data to the public is no simple task, but the barriers are institutional and not technical. Your leadership, if well-focused, can produce genuine progress.

I will try to illustrate how to think about transparency by sharing a short recent history of transparency, a few reasons why the transparency effort has flagged, the publication

practices that will foster transparency, our work at the Cato Institute to show the way, the need for a machine-readable government organization chart, and finally the salutary results that the DATA Act could have for transparency.

A Short Recent History of Federal Government Transparency

President Obama deserves credit for lighting a fire under the government transparency movement in his first campaign and in the first half of his first term. To roars of approval in 2008, he sought the presidency making various promises that cluster around more open, accessible government. Within minutes of his taking office on January 20, 2009, the Whitehouse.gov website declared: “President Obama has committed to making his administration the most open and transparent in history.”¹ And his first presidential memorandum, entitled “Transparency and Open Government,” touted transparency, public participation, and collaboration as hallmarks of his forthcoming presidential administration.²

In retrospect, the prediction of unparalleled transparency was incautiously optimistic. But at the time, the Obama campaign and the administration’s early actions sent strong signals that energized many communities interested in greater government transparency.

My own case illustrates. In December 2009, between the time of President Obama’s election and his inauguration, I hosted a policy forum at Cato entitled: “Just Give Us the Data! Prospects for Putting Government Information to Revolutionary New Uses.”³ Along with beginning to explore how transparency could be implemented, the choice of panelists at the event was meant to signal that agreement on transparency would cross ideologies and parties, regardless of differences over substantive policies. That agreement has held.

In May 2009, White House officials announced on the new Open Government Initiative blog that they would elicit the public’s input into the formulation of its transparency policies.⁴ The public was invited to join in with the brainstorming, discussion, and drafting of the government’s policies.

The conspicuously transparent, participatory, and collaborative process contributed to an “Open Government Directive,” issued in December 2009 by Office of Management and

¹ Macon Phillips, “Change Has Come to Whitehouse.gov,” The White House Blog, January 20, 2009 (12:01 p.m. EDT), http://www.whitehouse.gov/blog/change_has_come_to_whitehouse-gov.

² Barack Obama, “Transparency and Open Government,” Presidential Memorandum (January 21, 2012), <http://www.whitehouse.gov/the-press-office/transparency-and-open-government>.

³ Cato Institute, “Just Give Us the Data! Prospects for Putting Government Information to Revolutionary New Uses,” Policy Forum, December 10, 2008, <http://www.cato.org/event.php?eventid=5475>.

⁴ Jesse Lee, “Transparency and Open Government,” May 21, 2009, <http://www.whitehouse.gov/blog/2009/05/21/transparency-and-open-government>.

Budget head Peter Orszag.⁵ Its clear focus was to give the public access to data. The directive ordered agencies to publish within 45 days at least three previously unavailable “high-value data sets” online in an open format and to register them with the federal government’s data portal, data.gov. Each agency was to create an “Open Government Webpage” as a gateway to agency activities related to the Open Government Directive.

They did so with greater or lesser alacrity.

But while pan-ideological agreement about transparency has held up well, the effort to produce transparent government has flagged. The data.gov effort did not produce great strides in government transparency or public engagement. And many of President Obama’s transparency promises went by the wayside.

His guarantee that health care legislation would be negotiated “around a big table” and televised on C-SPAN was quite nearly the opposite of what occurred.⁶ His promise to post all bills sent him by Congress online for five days was nearly ignored in the first year.⁷ His promise to put tax breaks online in an easily searchable format was not fulfilled. Various other programs and projects have not produced the hoped-for transparency, public participation, and collaboration. And the Special Counsel to the President for Ethics and Government Reform, who handled the White House’s transparency portfolio, decamped for an ambassadorial post in Eastern Europe at the midpoint of President Obama’s first term.

It’s easy (and cheap) for critics of the president to chalk his transparency failures up to campaign disingenuousness or political calculation. It is true that the Obama administration has not shone as brightly on transparency as the president promised it would. But my belief is that transparency did not materialize in President Obama’s first term because nobody knew what exactly produces transparent government. The transparency community had not put forward clearly enough what it wanted from the government, and the transparency effort got sidetracked in a subtle but important way from “open government” to “open government data.”

Open Government vs. Open Government Data

When the White House instructed agencies to produce data for data.gov, it gave them a very broad instruction: produce three “high-value data sets” per agency. According to the open government memorandum:

⁵ Peter R. Orszag, “Memorandum for the Heads of Executive Departments and Agencies, Subject: Open Government Directive,” M 10-06, December 8, 2009, <http://whitehouse.gov/open/documents/open-government-directive> [hereinafter “Open Government Directive”].

⁶ “Negotiate Health Care Reform in Public Sessions Televised on C-SPAN,” Politifact.com, <http://www.politifact.com/truth-o-meter/promises/obameter/promise/517/health-care-reform-public-sessions-C-SPAN/>.

⁷ Jim Harper, “Sunlight Before Signing in Obama’s First Term,” Cato blog, February 12, 2013, <http://www.cato.org/blog/sunlight-signing-obamas-first-term>.

High-value information is information that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation.⁸

That's a very broad definition. Without more restraint than that, public choice economics predicts that the agencies will choose the data feeds with the greatest likelihood of increasing their discretionary budgets or the least likelihood of shrinking them. That's data that "further[s] the core mission of the agency" and not data that "increase[s] agency accountability and responsiveness."

"It's the Ag Department's calorie counts," as I wrote before the release of data.gov data sets, "not the Ag Department's check register."⁹ And indeed that's what the agencies produced.

In a grading of the data sets, I found that most failed to expose the deliberations, management, and results of the agencies. Instead, they provided data about the things they did or oversaw. The Agriculture Department produced data feeds about the race, ethnicity, and gender of farm operators; feed grains, "foreign coarse grains," hay, and related commodities; and the nutrients in over 7,500 food items.

"That's plenty to chew on," I wrote in my review of all agency data sets, "but none of it fits our definition of high-value."¹⁰

The agencies, and the transparency project, were diverting from open government to open government data. David Robinson and Harlan Yu identified this shift in policy focus in their paper: "The New Ambiguity of 'Open Government.'" They wrote:

Recent public policies have stretched the label "open government" to reach any public sector use of [open] technologies. Thus, "open government data" might refer to data that makes the government as a whole more open (that is, more transparent), but might equally well refer to politically neutral public sector disclosures that are easy to reuse, but that may have nothing to do with public accountability.¹¹

⁸ Open Government Directive.

⁹ Jim Harper, "Is Government Transparency Headed for a Detour?" Cato blog, January 15, 2010, <http://www.cato.org/blog/government-transparency-headed-detour>.

¹⁰ Jim Harper, "Grading Agencies' High-Value Data Sets," Cato blog, February 5, 2010, <http://www.cato.org/blog/grading-agencies-high-value-data-sets>.

¹¹ Harlan Yu and David G. Robinson, "The New Ambiguity of 'Open Government,'" *UCLA Law Review* 59, no. 6 (August 2012): 178.

There's nothing wrong with open government data, but the heart of the government transparency effort is getting information about the functioning of government. I think in terms of a subject-matter trio that I have mentioned once or twice already—deliberations, management, and results.

Data about these things are what will make for a more open, more transparent government. That is what President Obama campaigned on in 2008, it is what I believe you are interested in producing through your efforts, and it is what I believe will satisfy the American public's demand for transparency. Everything else, while entirely welcome, is just open government data.

Publication Practices for Transparent Government

Deliberations, management, and results are complex processes, so it is important to be aware of another, more technical level on which the transparency project got bogged down. The transparency community did not meet public demand for, and political offer of, government transparency with a clear articulation of what produces it. We failed to communicate our desire for well-published, well-organized data, making clear also what that is.

Believing this to be the problem, I embarked in 2010 on a mission to learn what data publication practices will produce government transparency. A surprisingly intense, at times philosophical, series of discussions with propeller-heads of various types—information scientists, librarians, data geeks, and so on—allowed me to meld their way of seeing the world with what I knew of public policy processes.

In the Cato report, "Publication Practices for Transparent Government" (attached to my testimony as Appendix I), I sought to capture four categories of data practice that can produce transparency: authoritative sourcing, availability, machine-discoverability, and machine-readability. I summarized them briefly as follows:

The first, authoritative sourcing, means producing data as near to its origination as possible—and promptly—so that the public uniformly comes to rely on the best sources of data. The second, availability, is another set of practices that ensure consistency and confidence in data.

The third transparent data practice, machine-discoverability, occurs when information is arranged so that a computer can discover the data and follow linkages among it. Machine-discoverability is produced when data is presented consistent with a host of customs about how data is identified and referenced, the naming of documents and files, the protocols for communicating data, and the organization of data within files.

The fourth transparent data practice, machine-readability, is the heart of transparency, because it allows the many meanings of data to be discovered. Machine-readable data is logically structured so that computers can automatically generate the myriad stories that the data has to tell and put it to the hundreds of uses the public would make of it in government oversight.¹²

Following these data practices does not produce instant transparency. Users of data throughout the society would have to learn to rely on governmental data sources. Transparency, I wrote,

turns on the capacity of the society to interact with the data and make use of it. American society will take some time to make use of more transparent data once better practices are in place. There are already thriving communities of researchers, journalists, and software developers using unofficial repositories of government data. If they can do good work with incomplete and imperfect data, they will do even better work with rich, complete data issued promptly by authoritative sources.¹³

Our efforts have not ceased with describing how the government can publish data to foster transparency. Starting in January 2011, the Cato Institute began working with a wide variety of groups and advisers to “model” governmental processes as data and then to prescribe how this data should be published.

Our November 2012 report, “Grading the Government’s Data Publication Practices”¹⁴ (part of which is attached to my testimony as Appendix II) examined how well the government publishes data reflecting legislative process and the budgeting, appropriating, and spending processes. Having broken down each element of these processes, we polled the community of government data users to determine how well that data is produced, and we issued letter grades.

The grades were generally poor, and my assessment (mine alone, not endorsed by other participants in our process) was that the House has taken a slight lead on government transparency, showing good progress with the small part of government it directly controls. The Obama administration, having made extravagant promises, lags the House by comparison. Since the release of the report, more signs of progress have come from the House, including forthcoming publication of committee votes, for example.¹⁵ This

¹² Jim Harper, “Publication Practices for Transparent Government,” Cato Institute Briefing Paper no. 121, September 23, 2011, <http://www.cato.org/publications/briefing-paper/publication-practices-transparent-government> [hereinafter “Publication Practices”].

¹³ *Id.*

¹⁴ Jim Harper, “Grading the Government’s Data Publication Practices,” Cato Policy Analysis no. 711, November 5, 2012, <http://www.cato.org/publications/policy-analysis/grading-governments-data-publication-practices>.

¹⁵ See Jim Harper, “Sunlight Before Signing in Obama’s First Term,” Cato blog, February 12, 2013, <http://www.cato.org/blog/sunlight-signing-obamas-first-term>.

gap could easily be closed, however, if the administration gives focused attention to data transparency.

We Are Extending and Enriching Government Data Publication

Having assessed the publication practices that we believe will foster transparency, and having graded the government's publication practices in key areas, we are not waiting for good data to materialize. We have begun producing the data ourselves.

The low-hanging fruit for government transparency is the legislative process. In Congress, the long existence of the THOMAS Web site and the practice of publishing bills in a data format called XML (eXtensible Markup Language) make it easier to track what is happening than it is in other areas. But it is not easy enough, and we are working to make it even easier.

At the Cato Institute, we have acquired and modified software that allows us to extend the XML markup in existing bills. While most of the code embedded in the bills that Congress produces deals with the appearance of the bills when printed, we are adding code that fleshes out what the bills mean.

Using the data modeling we have done, we are tagging references to existing law in an organized, machine-readable way, so that people can learn instantly when a provision of law they care about is the subject of a bill. We are tagging budget authorities—both authorizations of appropriations and appropriations themselves—so that proposals to expend taxpayer funds are instantly and automatically available to the public and to you in Congress.

This being Sunshine Week, we are holding sessions tomorrow and Friday to examine how our enhanced bill XML can be a tool for Wikipedians. People across the country go to Wikipedia for information, including information about public affairs, and we would like to see that they are met there by good information about prominent pieces of legislation and our laws.

We plan to take our experience with marking up bills to other types of government documents and other processes. But it is difficult work. In the bills you write, you in Congress refer to existing law in varied, sometimes anachronistic ways. The varying ways your bills denote budget authorities sometimes make it very hard to represent clearly how many dollars are being made available for how many years.

But one of the problems we really should not be having is identifying the organizational units of government referred to in bills. In addition to tagging existing law and proposed spending, we tag agencies, bureaus, and such. But we are essentially unable to tag entities below the agency and bureau level, and the tagging we are doing uses identifiers we cannot be sure are reliable.

We are doing what we can to make bills available for computer interpretation—and we should be able to do wonders when appropriation season comes around—but we are hindered by the lack of a machine-readable federal government organization chart. We need this basic government data, which is essential to transparency.

Needed: A Machine-Readable Federal Government Organization Chart

Data is a collection of abstract representations of things in the world. We use the number “3,” for example, to reduce a quantity of things to an abstract, useful form—an item of data. Because clerks can use numbers to list the quantities of fruits and vegetables on hand using numbers like “3,” for example, store managers can effectively carry out their purchasing, pricing, and selling instead of spending all of their time checking for themselves how much of everything there is. Data makes everything in life a little easier and more efficient for everyone

Legislative and budgetary processes are not a grocery store’s produce department, of course. They are complex activities involving many actors, organizations, and steps. The Cato Institute’s modeling of these processes reduced everything to “entities,” each having various “properties.” The entities and their properties describe the things in legislative and budgetary processes and the logical relationships among them, like members of Congress, the bills they introduce, hearings on the bills, amendments, votes, and so on.

A member of Congress is an important entity in legislative process, as you might imagine. And happily, there are already systems in place to identify them accurately to computers. The “Biographical Directory of the United States Congress” is a compendium of information about all present and former members of the U.S. Congress (as well as the Continental Congress), including delegates and resident commissioners. The “Bioguide” website at bioguide.congress.gov is a great resource for searching out historical information about members.

Bioguide does a brilliant thing in particular for making the actions of Members of Congress machine-readable. It assigns a unique ID to each of the people in its database.

To illustrate how Bioguide works, I’ve copied the Bioguide IDs for each member of this committee into a table. The Bioguide IDs you see in this table are used across machine-readable documents and government Web sites to make crystal clear to computers exactly whom is being referred to when the name of a member of Congress is used, no matter what variation there is in the way the member is referred to in the resource.

This simple idea, of providing unique IDs for important components of governmental processes, is a basic building block of government transparency. Having Bioguide IDs has vastly improved the public’s ability to oversee Congress, and the Congress’s ability to track its own actions.

**House Committee on Oversight and Government Reform:
Membership and Bioguide IDs**

Republican Members	Bioguide ID	Democratic Members	Bioguide ID
Rep. Darrell E. Issa	I000056	Rep. Elijah Cummings	C000984
Rep. John L. Mica	M000689	Rep. Carolyn Maloney	M000087
Rep. Michael Turner	T000463	Rep. Eleanor Holmes Norton	N000147
Rep. John J. Duncan	D000533	Rep. John Tierney	T000266
Rep. Patrick T. McHenry	M001156	Rep. Wm. Lacy Clay	C001049
Rep. Jim Jordan	J000289	Rep. Stephen Lynch	L000562
Rep. Jason Chaffetz	C001076	Rep. Jim Cooper	C000754
Rep. Tim Walberg	W000798	Rep. Gerald Connolly	C001078
Rep. James Lankford	L000575	Rep. Jackie Speier	S001175
Rep. Justin Amash	A000367	Rep. Matt Cartwright	C001090
Rep. Paul Gosar	G000565	Rep. Mark Pocan	P000607
Rep. Pat Meehan	M001181	Rep. Tammy Duckworth	D000622
Rep. Scott DesJarlais	D000616	Rep. Danny K. Davis	D000096
Rep. Trey Gowdy	G000566	Rep. Peter Welch	W000800
Rep. Blake Farenthold	F000460	Rep. Tony Cardenas	C001097
Rep. Doc Hastings	H000329	Rep. Steve Horsford	H001066
Rep. Cynthia Lummis	L000571	Rep. Michelle Lujan Grisham	L000580
Rep. Rob Woodall	W000810		
Rep. Thomas Massie	M001184		
Rep. Doug Collins	C001093		
Rep. Mark Meadows	M001187		
Rep. Kerry Bentivolio	B001280		
Rep. Ron DeSantis	D000621		

But unique identification has not been applied to many other parts of government. The most glaring example is the lack of authoritative and unique IDs for the organizational units of government. The agencies, bureaus, programs, and projects that make up the executive branch of government are not uniquely identified to the public in a similar way, and the relationships among all the federal government's organizational units is not authoritatively published anywhere.

In short, there is no machine-readable federal government organization chart. This is a glaring problem and a serious impediment to government transparency.

Were there a machine-readable federal government organization chart, the unique identifiers for organizational units could appear in all manner of document: budgets, authorization bills, appropriation bills, regulations, budget requests, and so on. Then we could use computing to help knit together stories about all the different agencies in our federal government, what they do, and how they use national resources. Internal management and congressional oversight would both strengthen. The DATA Act holds out the possibility of all this happening.

The DATA Act: That Organization Chart and More

The DATA Act essentially requires there to be a machine-readable government organization chart and much more. Building on widely lauded experience of the Recovery Accountability and Transparency Board, the DATA Act calls for data reporting standards that are “widely accepted, non-proprietary, searchable, platform-independent [and] computer-readable.”¹⁶ This is the centerpiece of the DATA Act, from my perspective, and it is true of versions of the bill in both the House and the Senate last Congress.

To be a success, such standards must not only uniquely identify all the organizational units that carry out Congress’s instructions in the executive branch. They must also identify budget documents; legislation; budget authorities; warrants, apportionments, and allocations; obligations; non-federal parties; and outlays.

Having unique identifiers for each of these things, and attributes that signal their relationships to one another, will allow vast stores of information to emerge from the data. “Seeing” the relationship between a given budget, a given appropriations bill, the obligation it funded, and an outlay of funds will make available the “story” of what Congress does year in and year out with taxpayers’ money.

This data will make internal and congressional oversight far stronger. And it may help knit together the entire budget and spending process, so that expenditures can be matched to the results that Congress sought when it created programs and funded them. You in Congress and your constituents in the public will have better awareness of what happens in Washington, D.C. and in government offices around the country.

All this serves goals that span partisan and ideological lines. Organizing the spending process will reduce waste, fraud, and abuse in the first instance, as the likelihood of discovery will rise. Debates about programs may base themselves less on ideology and more on actual statistics about what spending achieved what results. In my “Publication Practices” paper, I wrote:

Transparency is likely to produce a virtuous cycle in which public oversight of government is easier, in which the public has better access to factual information,

¹⁶ H.R. 2146 (112 Cong., 2nd Sess.).

in which people have less need to rely on ideology, and in which artifice and spin have less effectiveness. The use of good data in some areas will draw demands for more good data in other areas, and many elements of governance and public debate will improve.¹⁷

I do believe this is true, though these ideal outcomes will not be reached automatically. Indeed, they will require a lot of effort to achieve.

Essential to producing the standards that foster these benefits is the existence of one authority positioned to require them. It seems natural for spending data standardization to be handled by the Office of Management and Budget, but that office has so far proven unwilling to move forward. Thus, the creation of a Federal Accountability and Spending Transparency board or commission may be warranted. My preference, of course, would be for economy in the creation of more federal entities to track...

I was surprised in September of 2011 to see the Congressional Budget Office estimate for the version of the DATA Act this committee reported to the House. The estimate of \$575 million in outlays to implement the DATA Act over five years was quite nearly unbelievable. The thing that may make it believable is if waste, fraud, and abuse infects implementation of the DATA Act.

I believe that it will cost less than the CBO predicts to implement the DATA Act should it become law. Modifying federal data systems may have costs in the short term, but complying with standards should have essentially no cost after the initial retooling. If it does take as much to fully implement the Act as the CBO estimates, that is proof of a sort that we need oversight systems like this that can hold costs down.

The GRANT Act, FOIA Reform, and More

Our transparency research and work has not extended to federal grant-making, which is a significant subset of all federal spending. It seems obvious that bringing transparency and organizational rigor to grant administration would have similar salutary effects to what we can expect in government spending generally.

Outright waste would be curtailed. The results of grant-making for public policy goals would be clearer. And participants in the grant-making process would be more sure of fair treatment.

I understand there are concerns with the version of the GRANT Act introduced in the last Congress, such as with the potential that anonymous peer review might be undercut by transparency. This is a genuine issue, which can almost certainly be overcome with some careful thinking and planning. If it cannot, my belief is that the interest of the taxpayer in

¹⁷ Publication Practices.

accountable grant administration is generally superior to the interests of peer reviewers in privacy or anonymity.

Of course, Freedom of Information Act reforms are an important part of the transparency agenda. I am not expert in FOIA, and it is my hope that proactive and thorough data transparency may partially diminish the need for FOIA requests because transparency policy has made clear what deliberative processes agencies have used, for example.

Even in a world with the fullest data transparency, there will be a public need for access to key government documents and information on request. I support the FOIA reforms that will get the most important information disseminated the most broadly so that American democracy functions better and so that public oversight of the government is strong.

Conclusion

It is a pleasure to work on an issue like transparency, widely supported as it is across partisan and ideological lines. Transparency is a means to various ends that can co-exist. I believe, for example, along with my conservative friends, that transparency will reduce the demand for government and increase the demand for private authority over decisions and spending that the government currently controls. If transparency produces this result, it will be a product of democratic processes that I think my liberal and progressive friends would be hard-pressed to reject. If, on the other hand, transparency wrings waste, fraud, and abuse out of government programs, validating them and increasing their support, I will enjoy the gain of having a better-managed government.

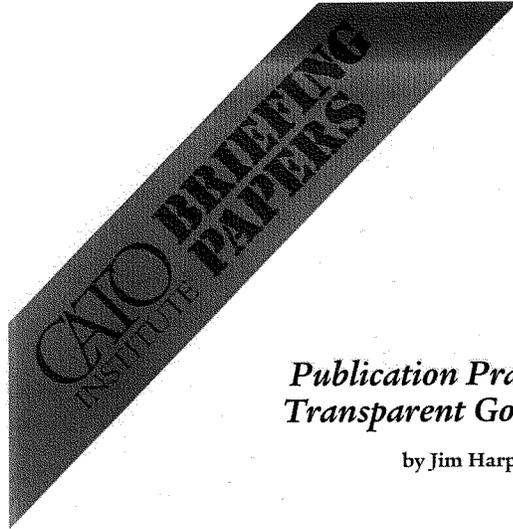
If there is division in the transparency issue, it is between the outsiders and the insiders. Information is power, and non-transparent practices are a way of preserving power for the few who have attained it.

The enjoyment of power by the few is inconsistent with the underlying theory of democracy, of course, and with our shared American commitment to the idea that power springs from the people. The moral high-ground in debates about transparency is always with those who want to know more about what their government is doing with their money and their rights. While there may be some narrow exceptions to the rule that the people have a right to know, the transparency status quo is far from that line.

Anything this committee can do to improve the quality and quantity of data about the government's deliberations, management, and results will bring credit to the committee and this Congress.

Appendix I

Publication Practices for Transparent Government



Publication Practices for Transparent Government

by Jim Harper

No. 121

September 23, 2011

Executive Summary

Government transparency is a widely agreed upon goal, but progress on achieving it has been very limited. Transparency promises from political leaders such as President Barack Obama and House Speaker John Boehner have not produced a burst of information that informs stronger public oversight of government. One reason for this is the absence of specifically prescribed data practices that will foster transparency.

Four key data practices that support government transparency are: authoritative sourcing, availability, machine-discoverability, and machine-readability. The first, authoritative sourcing, means producing data as near to its origination as possible—and promptly—so that the public uniformly comes to rely on the best sources of data. The second, availability, is another set of practices that ensure consistency and confidence in data.

The third transparent data practice, machine-discoverability, occurs when information is arranged so that a computer can discover the data and follow linkages among it. Machine-discoverability is produced when data is presented consistent with a host of customs about how data is identified and referenced, the naming of documents and files, the protocols for communicating data, and the organization of data within files.

The fourth transparent data practice, machine-readability, is the heart of transparency, because it allows the many meanings of data to be discovered. Machine-readable data is logically structured so that computers can automatically generate the myriad stories that the data has to tell and put it to the hundreds of uses the public would make of it in government oversight.

Jim Harper is director of information policy studies at the Cato Institute and webmaster of government transparency website WashingtonWatch.com.

Digitization and the Internet have had transformative effects on bookselling, banking and payments, news, and entertainment, but these technologies have barely touched government.

Introduction

I'll make our government open and transparent, so that anyone can ensure that our business is the people's business.

When there's a tax bill being debated in Congress, you will know the names of the corporations that would benefit and how much money they would get.

The Internet offers new opportunities to open the halls of Congress to Americans in every corner of our nation.

The lack of transparency in Congress has been a problem for generations, under majorities Republican and Democrat alike. But with the advent of the Internet, it's time for this to change.

During electoral and political campaigns, transparency promises seem to flow like water. The quotes above—the first two from President Obama and the second two from Speaker Boehner—were issued during these officials' runs for higher office. Then-senator Barack Obama (D-IL) spoke about transparency to roars of applause on the presidential campaign trail.¹ Minority Leader John Boehner (R-OH), seeking to outflank Speaker Nancy Pelosi and the Democrats on their management of the House of Representatives, touted transparency in a video recorded in the U.S. Capitol's Statuary Hall.²

So what happens to transparency promises when the campaign ends? Having achieved their political goals, do elected officials just throw transparency out like so much bathwater? Digitization and the Internet have had transformative effects on bookselling, banking and payments, news, and entertainment, but these technologies have barely touched government. This might be consistent with the predictions of public choice economics:

transparency will generally reduce politicians' freedom of action by increasing public oversight. Having more information available to more people would allow more second-guessing of politicians' decisions, weakening inputs into electoral success such as fundraising and logrolling. So maybe politicians will always reject transparency, even as they sing its praises.

But the story is more complex than that. If transparency promises were convenient election-eve fibs, Obama would probably not have made issuing an open government memorandum his first executive action upon taking office. With his election only months past and a re-election campaign nearly as far away as it could be, he called for a transparent, participatory, and collaborative federal government on his first day in office.³ Late in Obama's first year, his director of the Office of Management and Budget (OMB), Peter Orszag, issued an Open Government Directive instructing executive departments and agencies to take specific actions to implement the principles of transparency, participation, and collaboration.⁴ The White House created an "Open Government Initiative" page on its website, Whitehouse.gov,⁵ and documented the work on its open-government blog.⁶ Pursuant to the Orszag directive, agencies produced "open government plans" and released "high-value data sets," registering the latter on the new Data.gov website.⁷ These actions do not reflect insincerity, but rather a good-faith effort to advance transparency goals.

Boehner commands far fewer organs of government than the president, but his efforts, and those of the Republican House leadership, have been roughly proportional to the president's. Upon taking control in the 112th Congress, Republicans passed a package of rule changes aimed at increasing transparency.⁸ This package included a 72-hour rule requiring the posting of bills "in electronic form" for three days before a vote on the House floor. In April, Boehner and Majority Leader Eric Cantor (R-VA) wrote a letter to the House Clerk asking her to tran-

sition toward publishing legislative data in open formats.⁹

Like Obama, House Republicans are following up their transparency promises with efforts that are at least adequate. All probably recognize that transparency is a growing demand of the public and that meeting that demand will help them win elections. Yet neither the administration nor Congress has become notably more transparent.

Perhaps the transparency shortage can be explained by simple lack of effort. Time constraints exist for politicians just like everyone else—if they spent more time on transparency, we would probably get more of it. But this conclusion is too facile and not revealing enough. It provides no way forward other than to join the interest-group scum urging “more dedication” to a particular cause. And it offers no hope of resolving the problem: How will we know when we’ve got transparency?

The better explanation for transparency floundering in the face of good-faith effort is indeterminacy. Though transparency is a widely recognized value, nobody knows exactly what it is. The steps that produce transparent government are opaque—ironically—so transparency efforts have not crystallized or produced positive change.

The Data.gov project helps to illustrate this. The OMB’s Open Government Directive called for each agency to publish three high-value data sets. According to the memorandum, high-value information is:

. . . information that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation.¹⁰

For all its verbiage, that definition has almost no constraints. Anything could be ranked “high-value.” And sure enough, agen-

cies’ high-value data feeds ran the gamut from information that might truly inform the public to things that could interest only the tiniest niche researcher. An informal Cato Institute analysis examined the data streams each agency released and graded the agencies using a more-demanding definition of high value: whether their releases provide insight into agency management, deliberations, or results.¹¹ There were some As, but Ds were more common. The rating given to the Agriculture Department is an example of the latter:

The Ag Department produced data feeds about the race, ethnicity, and gender of farm operators; feed grains, “foreign coarse grains,” hay, and related items; and the nutrients in over 7,500 food items. That’s plenty to chew on, but none of it fits our definition of high-value.

“Management, deliberation, and results” is only a loose description of what information the public might most benefit from seeing, and agencies were not obligated by OMB to rise to that standard, so a poor grade is not damning. More discussion between the public (represented by the transparency community) and government will specify more concretely what information should be published.

But there are more questions than this: How is it that thousands of data feeds are supposed to “connect up” with the websites, researchers, and reporters who would turn them into useful information? How is it that a great mass of data is supposed to find the people that can use it, and the people find the data?

In December 2008, a Cato Institute policy forum focused on the transparency commitments of the new president. Its title was “Just Give Us the Data! Prospects for Putting Government Information to Revolutionary New Uses.”¹² The Obama administration did exactly that, publishing lots and lots of data, but transparency did not flourish. The

Though transparency is a widely recognized value, nobody knows exactly what it is.

simple sloganeer's demand for "the data" was immature.

In this paper, we explore more deeply how to produce government transparency. Transparency is not only about access to data, or its substance in management, deliberation, or results. Government transparency is a set of data-publication practices that facilitate "finding"—the matching up of information with public interest.

Recognizing the discrete publication practices that produce transparency can crystallize the forward progress that everyone wants in this area. Rather than "more effort," or other indeterminate demands, the transparency community and the public can measure whether government entities and agencies are publishing data consistent with transparency. Measurable transparency behaviors will help the public hold officials to account after their transparency promises have brought them into office. Government officials should know that the public is not satisfied, and will not be satisfied, until data flows like water and government information like a mighty stream.

Publication Practices for Transparent Government

Water is a useful metaphor for data. Salt water can't quench a person's thirst. Nor can a block of ice, or water vapor. Water has to be in a specific form, liquid and reasonably pure, for it to be drinkable. So it is with government data and transparency. There is an endless sea of publications, websites, speeches, news reports, data feeds, and social media efforts, but somehow the public still thirsts for information it can use. Water, water, everywhere, and not a drop to drink.

It turns out that information, like water, must be delivered in specific ways—"liquid" and relatively "pure"—for the body politic to consume it well. Data about government agencies, entities, and activities must be published in particular ways if it is going to facilitate transparency.

When the Republican 104th Congress created the THOMAS legislative system in 1995, it was a huge advance for transparency—a huge advance from a very low baseline, at least. Publication on THOMAS might be summarized as a disclosure model, in which certain key documents and records were made available "as is," or in a limited number of forms optimized for the World Wide Web, which is just one way of sharing information on the Internet. Much of the discussion today about putting bills online and having members of Congress "read the bill" is still framed in terms of disclosure, but the underlying demand is something more.

Since the mid-90s, the way people use the Internet has changed dramatically. "Web 2.0" is the buzzword that captures the shift from one-way publishing toward interactivity and user-generated content. On the modern Internet, data serves as a platform for interaction and decisionmaking.

The next steps in government transparency must match this change, going beyond simple disclosure of documents and records to publication of data in ways the modern Internet can use. Governments should publish data that reflects their deliberations, management, and results in highly accessible ways that natively reveal meaning. Publication of government data this way will allow the public to digest government information and take concrete actions in response.

Four categories of information practice, discussed below, are a foundation for government transparency that the public is quickly coming to expect. They are: authoritative sourcing, availability, machine-discoverability, and machine-readability.

A number of papers and documents produced over the last few years have advocated, described, and discussed transparent government data practices in parallel to these concepts. A 2007 working group meeting in Sebastopol, California, for example, produced a suite of 8 principles for open government data,¹³ which was later increased to 10 principles in August, 2011.¹⁴ The recommendations of the Open House Project, also

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published in 2007, were animated by these good information practices.¹⁵ There are many other such documents.¹⁶

The federal government has not embraced these data publication practices yet, so transparency has not yet flourished as it could. In part, this is because the specific information practices that will set the stage for transparency are still unclear.

Everyone knows what drinkable water is, but it takes physicists, chemists, and biologists to make sure drinkable water is what comes out of the tap. Parallel sciences go into producing data in formats that are consistent, fully useful, and fully informative. The discussion that follows does not fully detail each information practice that will foster government transparency, but it should alert people familiar with computing and the Internet to the practices that prepare data adequately for public consumption.

The digital world is different from the physical world in many ways. Data can come and go in ways that physical things do not, so things that are given, obvious, or easy in the physical world have to be thought through and watched after in the digital world. For this reason, the first transparent data practice—establishment of “authority” around data—requires unique attention.

Authoritative Sourcing

Just as people look to authoritative books or thinkers to know the right answers about science, life, or philosophy, they look to authority in data to be confident of having the right information and a fully accurate account of the things data describe. Authority in data is a lot like authority in other areas—it is about knowing where to look for data and what sources to trust. Because of people’s willingness to trust and use reliable resources more than unreliable ones, data can be more or less transparent depending on the quality of its authority.

Authority means a number of related concepts dealing with who is responsible for pub-

lication and who is recognized as responsible. The word “authoritative” has a couple of senses, both of which are relevant to authoritative sourcing. One sense is formal: data should come from the authoritative source—which is almost always the entity that creates or first captures the data.¹⁷ Uniting the data and its origin is a good idea because authoritative sourcing reduces the chance of error and fraud, for example. Authoritative sourcing also makes it easier for newcomers to find data, because the creator and the publisher are the same. The shortest possible “chain of custody” between the information’s origination and its publication is best.

If the data’s creator delegates the responsibility to publish, then the second sense of authoritative is in play. That is the sense that some entity is recognized by the relevant public as fully reliable. The delegated publisher should be recognized as the authoritative data source.

It is sometimes easiest to illustrate good practices by highlighting error. A small gap in authority exists today in the publication of certain U.S. federal legislative data, such as the text of bills. Congress has delegated the authority to publish information about bills and their texts to the Government Printing Office, which puts such information on its FDsys website.¹⁸ But if you were to ask most experienced Washington hands, and even many people working with legislative data, what the source of legislative information was, they would probably think first of the Library of Congress’ THOMAS system.¹⁹ But THOMAS is a downstream republisher of data, some of which the Government Printing Office originates on behalf of the Congress. Most users of legislative data do not look to FDsys or THOMAS, however. They use data collections at govtrack.us,²⁰ a website whose operator curates legislative data for public use.

These small gaps in authority are not a significant problem. But multiple sources publishing the same data without revealing its provenance can be a problem for authority. The entity that has the legal authority

Data can be more or less transparent depending on the quality of its authority.

Authoritative sourcing—the notion of one entity known to have responsibility for publishing data—is a simple but important transparency practice.

to publish data and the entity that is recognized by the relevant public as the authoritative source should be the same.

A practice that promotes authority is real-time or near-real-time publication.²¹ If an agency like the Department of Defense, for example, were to publish a compilation of contract documents every month, rather than a real-time, hourly, or daily record of such documents, then data aggregators, lobbying firms, news outlets, or others might make a good business of collecting contract information and publishing it before the Defense Department does. Various audiences, hungry for information, would rightly turn to these organizations and divide their loyalties among data sources. Though meeting a legitimate need, this dynamic would produce multiple nonauthoritative data sources, introducing inefficiency and the potential for error and confusion—as well as literal delay—into the process. These are all things that weaken transparency.

The authority required for transparency is *earned* through prompt publication of data in useful open standards—“authority through being awesome,” in the words of the Sunlight Foundation’s Eric Mill.²² This contrasts with the assertion of authority that exists when the focus is on publishing in file formats that explicitly include authority information. Digital mechanisms that seek to ensure authenticity, such as cryptographically signed files, certainly have their place in securing against forgery, for example. But ensuring authenticity this way can be counterproductive to transparency if it slows publication or locks data in difficult-to-use formats.

Transparency will also be strengthened if an authority has ways to correct data.²³ Especially in widely variable human processes like legislating and regulating, there are plenty of opportunities for incorrect data to see publication. This highlights the need for an authoritative publisher. When the authority becomes aware of error—and it should be open to receiving such information from data users—the authority can publish the fix

and propagate the newly corrected information to all downstream users.

If several data sources act as originators for downstream users, errors may persist in some systems while they are corrected in others. The information produced by one set of data may be different from another, sowing confusion and detracting from transparency’s goals. Society would waste time and effort in the absence of good authority determining which data set is right, rather than moving forward on the things that make life better for people.

Authoritative sourcing—the notion of one entity known to have responsibility for publishing data—is a simple but important transparency practice. It is an anchor for the next set of transparency-friendly data publication practices, clustered around availability.

Availability

Availability consists of a variety of practices that ensure information can reliably be found and used.²⁴ Availability in the digital world is a lot like availability in the physical world—it’s having access to what you need—but availability is very easy to violate in the data realm. A physical thing, like a phone booth, takes a fair amount of work to make unavailable, so we don’t think about the importance of availability with such things. Data can be made unavailable with careless planning or the touch of a button, so availability is important to plan for. Availability has a number of features.

Permanence is an important part of availability.²⁵ A thing is not truly available unless it exists for good. Data that reflects the activities of an agency in issuing regulations, for example, reflects very important real-world activity. Just as society needs a permanent record of this lawmaking process to have confidence in it, data users need a permanent record of data to be confident in the data they use and the results it produces. Once published, data should exist forever, so that

one person can confirm another's version of events, so that anyone can check the original data source, and so on. Data that disappears at some point after publication is harder to rely on. Part of making data available is keeping it available forever.

Similarly, data should be stable, meaning it should always be found in the same location. Think of whether you might consider a pay phone to be available for your use if it was only sometimes on the street corner near your office. If a pay phone moved from place to place at random times, it would be hard to know if you could actually use it at any given hour. It would not be fully available. It is the same with data, which has to be in the same place all the time to be truly available.

Data is available when it is complete.²⁶ A partial record is partial because some part of it is unavailable. That is not sufficient, because users of the data could produce incorrect results with incomplete information. Of course, any data set must have a scope. But if the scope is not obvious from context, it should be explained in the data's documentation. A partial record is unreliable, and it cannot be used to tell the stories that full data records can, so it does not foster transparency as it should.

In general, data about government deliberation, management, and results should be made available on the Internet for free.²⁷ If government entities are executing well on authoritative publication, this practice should have no costs additional to the creation of the data. Execution of key government functions, creation of data about that execution, and publication of that data should all be essentially the same thing. Data that is not at the core of governmental functions or other exceptions—gigantic, niche-interest, or rarely used data sets, for example—might be made available on other terms. But cost-free online access to essential-government-function data is best.

The processes by which data is made available are also relevant. Data is fully available when it is available both in bulk and

incrementally. In bulk means that the entire data set is available all at once. This is so that a new user can access the data or existing users can double-check that a copy of the data they have is accurate and complete. Incremental means that updates to the data are published in a way that allows a user to update his or her copy of the data. Requiring users to download bulk data just to access recent changes may be prohibitively costly, so it does not fully meet the need for data availability.

There is another sense to availability—a legal sense. In fact, there are two senses to legal availability. Data is fully available when it is structured using standards that are unencumbered by intellectual property claims.²⁸ There are techniques for manipulating and storing data that are covered by patent claims, for example. To use them, one must pay the owner of the patent a licensing fee. If it costs money to use the standard in which data is published, that data is not fully available. It is encumbered by licensing costs.

Similarly, data itself may sometimes be subject to intellectual property claims. If a string of text in a database is copyrighted, for example, that datum is not fully available. It is encumbered by legal claims that limit its use. This will not usually be the case with federal government data; works of the government are not generally copyrightable. But some materials that are made a part of government records may be copyrightable or copyrighted, and some government entities may claim copyright in their documents or try to assert other forms of restriction on information they produce or publish.²⁹ Government data should not be controlled by intellectual property laws or otherwise restricted, and data that is so controlled is not sufficiently available.

"Available" in the world of data is more complex than it sounds. There are a variety of ways that data can be rendered unavailable, so it is important to think about availability and to provide it in support of transparency. With authoritative sources making

Availability consists of a variety of practices that ensure information can reliably be found and used.

There must be sufficient order to the way things are referred to in links and data for that data to be truly machine-discoverable.

data available, machine-discoverability and machine-readability round out the data publication practices that can produce transparency.

Machine-Discoverability

As we move more deeply into the technical details of transparency, we come to a concept closely related to availability, but going more to the particular techniques by which data is made available. This is machine-discoverability. The question here is whether data is arranged so that a computer can discover the data and follow linkages among it.

In a literal sense, data is machine-discoverable when it can be found by a machine. Because of powerful consensus around protocols, this basically means using hypertext transfer protocol (HTTP), the language used behind all websites,³⁰ and links using hypertext markup language (HTML)³¹ that direct machines to data.

But full machine discoverability means more than following these two customs alone: it means following a host of customs about how data is identified and referenced, including the organization and naming of links, the naming of files, the protocols for communicating files, and the organization of data within files. There must be sufficient order to the way things are referred to in links and data for that data to be truly machine-discoverable.

A consistent uniform resource locator (URL) structure is an important way of making data discoverable. The links from the home page of a website to substantive data should exist and make sense. The words in the link, and the links themselves, should be accurately descriptive or orderly in some other logical way to help people find things. Just as people follow links they think will take them to the data they want, search engines “spider” data—crawling, spiderlike, through every link they find—to record what data is available.

One illustration of discoverability fail-

ure comes from early implementation of Obama’s “Sunlight Before Signing” promise on Whitehouse.gov. As a campaigner, Obama promised he would post bills online for five days prior to signing them. When the White House began to implement this practice early in the new administration, it began putting pages up on Whitehouse.gov for bills Congress had sent to the president. But these pages were not within the link structure that starts on the Whitehouse.gov homepage. A person (or search engine) following every link on Whitehouse.gov would not have arrived at these pages.³² The bills were literally posted on the Whitehouse.gov domain, but they were not discoverable in any practical sense. The only way to find them was to use Whitehouse.gov’s search engine, knowing ahead of time what terms to search for.

Sometimes machine-discoverability will be thwarted by the failure to publish like data in like ways. In 2007, Congress began requiring its members to disclose the earmarks that they had requested from the appropriations committees. This was an important step forward for transparency—some disclosure is better than none—but nothing about the disclosure rules made the information machine-discoverable. Members of Congress put their disclosures on their own websites with no consistency as to how the files were named. The result was that earmark requests were still hard to find—for humans and machines both. Members of Congress followed the path of least resistance, which also happened to frustrate transparency and the small transfer of power to the public that transparent publication would have produced. Fully transparent earmark disclosure would have required earmark requests to be consistently linked or, more likely, to have been reported to a central clearinghouse for publication, such as the appropriations committees receiving the requests.

Not only was the dispersion of earmark data across websites a problem, it was also in multiple, inconsistent file formats. Some members posted their information on webpages in HTML format. Some posted por-

table-document file (PDF) lists of their earmarks. Still others posted scanned PDF images of earmark request printouts. Because there was no consistency among the earmark disclosures, computers had a very hard time recognizing them as being similar, and earmark transparency was weakened. To enhance public access to earmark information, transparency and taxpayer groups gathered earmark data from all over the House and Senate websites.³³ Though these assemblages lacked authority, they were more transparent than the undiscoverable earmark request webpages produced pursuant to House and Senate rules.

File naming, storage, and transfer conventions are important. When they look at a file, some machines (and a few people) look at the name of the file to figure out how to open it and learn what it contains. There are strong conventions about file naming that help machines do this—conventions that are familiar to many. Webpages often end with .html, for example. Microsoft Word files end with the suffix .doc. Excel files end with .xls. Simple text files, or plain text, end with .txt. HTTP improves on file-name extensions by indicating files' multipurpose Internet mail extension (MIME) type, which is independent of file name extensions.³⁴

When these customs are violated it makes data harder to discover by machine. The Federal Election Commission (FEC), for example, has created its own class of text file that it labels .fec.³⁵ This means that a visitor does not know what kind of files they are. The FEC site serves files using file transfer protocol (FTP), which does not signal the MIME type. This frustrates a computer scan or search-engine spider's attempt to open the files. Worst of all, the files are zipped, meaning they have been compressed using an algorithm that makes it hard for a Web crawler to look inside them.

Ultimately, discoverability is a function of how easy or hard it is for machines to locate data. Various good practices make data more discoverable, and failure to follow these practices makes it less discoverable. These

things have to be thought through in the data world, which does not have the same fixity that makes maps reliable in the physical world.

Machine-discoverability is the product of relatively mechanical practices and conventions about data publication—"where things are on the Internet."³⁶ But as it reaches higher levels of refinement, discoverability of files and their content blends in with what might be called *conceptual* discoverability—"what the things on the Internet are." Data is most discoverable if its meaning is apparent from its structure and organization. This blends into machine-readability, which allows data, once discovered, to see substantive use.

Machine-Readability

Machine-readability is what truly brings data to life and makes it transparent. Machine-readability goes beyond the generic finding in machine-discoverability to a deeper level—a level at which the data can be used in meaningful and valuable ways.³⁶ As legislative data guru Josh Tauberer writes, "[D]ata's value depends not only on its subject, but also on the format in which the information is shared. Format determines the value of the resource and the extent to which the public can exploit it for analysis and reuse."³⁷ The Association for Computing Machinery puts it similarly: "Data published by the government should be in formats and approaches that promote analysis and reuse of that data."³⁸ Analysis and reuse—that means searching, sorting, linking, and transforming information in ways that support people's substantive goals.

Machine-readable data has what might be called semantic richness. That means that *meaning* is easy to discover from it. Transparency is meant to give the public access to the meaning of various government actions the way the public has access to meaning in other areas of life.

The human brain brings a wealth of semantic information to bear when it per-

Machine-readability is what truly brings data to life and makes it transparent.

ceives the world. When a student sitting in an American history class, for example, hears another student talk about Wilson, she knows from the context of the situation that the other student is probably talking about the former president of the United States. A student in a popular-film class might assume Wilson to be the name of the volleyball friend of Tom Hanks in the movie *Castaway*. A student in a physical education course might assume Wilson to be the company that makes volleyballs and tennis balls. To say these people know these things is to say that they make quick—blindingly quick—calculations about what the word “Wilson” refers to when they hear it.

A computer does not do those kinds of calculations unless it is told to do them. To make computers comprehend strings of letters like “Wilson,” these strings have to be disambiguated, or normalized. That is, they have to be placed into a logical structure, often using distinct identifiers that substitute for clumsy identifiers like names. This allows machines to recognize distinctions among things that are otherwise similar.

Distinct Identifiers

Like Wilson, the name Rogers has many meanings. It's the name of a telecommunications company in Canada. It's also a city in Arkansas, and another city in Minnesota. It's a county in Oklahoma, and it's the name of a famous architect. A man and his wife in Portland, Oregon, are named Rogers—as are their three children—and lots of other people around the country. While the name Rogers does a lot of good in small circles to distinguish among people, it is a terrible way in to find a specific person or thing in the big digital world. Even the custom of attaching a given name to a surname doesn't work in digital environments. Just ask Mike Rogers.

Mike Rogers is the name of two different people currently serving in the House of Representatives. One Mike Rogers is from Michigan and the other Mike Rogers is from Alabama. Their staffs undoubtedly receive mail and phone calls meant for the other

Mike Rogers all the time. But Congress has done something important to clear up this ambiguity. It has disambiguated these Mike Rogerses (and all elected representatives) within its Bioguide system.³⁹

Mike Rogers, the representative of Michigan's 8th district, has the Bioguide ID: “R000572.” Mike Rogers, the representative of Alabama's 3rd district, has the Bioguide ID: “R000575.” Substituting abstract strings of letters and numbers for names helps computers identify more accurately the information they are scanning. With a Bioguide lookup table, a computer can tell when data refers to Mike Rogers from Michigan and when it refers to Mike Rogers from Alabama. It will never mistake these Rogerses for any other Mike Rogers, much less the famous architect or the Canadian telecommunications company.

This is how the structuring of data gives it semantic meaning. With broadly known and well-followed naming conventions like this, information about Mike Rogers and every other member of Congress can easily and quickly be collected and shared with their constituents and the public as a whole.

This type of structure can be applied to all generic entities in a data system, allowing computers to observe the logical relationships among them and to tell relevant stories automatically. When data properly disambiguates representatives' names, their votes, and party affiliation, for example, computers can easily calculate party cohesion from one vote to another. If vote data includes the date, as it should, computers can quickly calculate party cohesion over time. If representatives' names and Bioguide IDs are correlated to states (as they are), computers can automatically calculate state and regional cohesion in voting. Each addition of data expands the range of stories the data can tell.

There are just a few small illustrations of the literally thousands of different stories that computers might generate automatically from disambiguated or normalized data. There are dozens of different entities involved in legislative processes, dozens

There are literally thousands of different stories that computers might generate automatically from disambiguated or normalized data.

more in budgeting and appropriations, dozens more in regulatory processes, litigation, and so on. There are many overlaps among the entities involved in each of these, and relationships among them as well. For transparency to flourish, all these entities must be described in data with logical coherence.⁴⁰

Formatted Data

When data is published in machine-readable ways, its meanings can come to life, and it can be the foundation of truly transparent government. The ways this can be done have many layers of complexity, but they are worth understanding in general. Most people are familiar with formats, the agreed-upon arrangements, protocols, and languages used to collect, store, and transmit data. From the moment information is captured digitally—when a word is typed on a computer keyboard or a camera and microphone record a speech—it is arranged and rearranged through various formats that convert it to binary data (ones and zeroes, or on/off, up/down). This binary data can later be converted back into letters and words, symbols, and the combinations of sounds and images that comprise audio and video.

Just as there are formats for collecting, storing, and transmitting data, there are formats for organizing data in ways that optimize it for human consumption. Some of the most familiar and easiest to understand are in the area of typesetting and display.

If an author means to emphasize a certain point, and makes a word or phrase display as boldface text to do that, her word processing software will record that display preference. (“Only **fourteen** people in Peoria drive a Fiat Spider!”) Later copies of the document should retain signals that make her chosen words appear in bold. When the text is converted to the format suitable for the World Wide Web—hypertext markup language, or HTML—the signal that the word “fourteen” should be displayed bold looks like this:

```
Only <b>fourteen</b> people
in Peoria drive a Fiat Spider!
```

When a browser like Internet Explorer or Firefox sees the signals and , it displays the material between the “start” and “end” signals as bold. A human looking at the resulting text knows that the author wanted to convey the importance of the word “fourteen.”

This is a very rudimentary example, and it deals only with display and printing. The same technique could be used for highlighting semantic information in a machine-readable way. For example, the words “Fiat Spider” could be surrounded by signals that indicate a discussion about automobiles:

```
Only <b>fourteen</b> people in
Peoria drive a <car make="Fiat"
model="Spider">Fiat Spider
</car>!
```

This uses the same kind of signaling to allow a properly programmed computer to recognize that this is a discussion of cars, specifically, a mention of the Fiat Spider. With the right signals in place, a computer will recognize that the word “Fiat” refers to a car, not some authoritative decree, and that “Spider” is a type of Fiat car, not a creepy bug with eight long legs.

With this semantic information embedded in the text, not only can a human look at the text and appreciate the very small number of people driving a Fiat Spider in Peoria, but people interested in the Fiat Spider car can use computers and search engines to find this text knowing for certain it is about the car and not the bug. If the text signals which Peoria it refers to—the one in Illinois or the one in Arizona—people interested in one or the other city could learn more information more quickly as well. The difference matters: fourteen drivers of the Fiat Spider in Peoria, Illinois, is indeed a low number. Fourteen drivers of that one car in tiny Peoria, Arizona, is a lot.

There are many ways of putting signals into documents—and not only text documents, but also audio and video files—to make them more informative. There is al-

When data is published in machine-readable ways, its meanings can come to life, and it can be the foundation of truly transparent government.

Machine-readability, machine-discoverability, availability, and authoritative sourcing can produce tremendous advances in government transparency.

most no end to what can be done with this kind of signaling in webpages or in other documents and data. HTML is a format that it is well known and followed by most Web publishers and browsers across the globe, which is one of the things that makes the Web so powerful and important. Nobody ever has to ask for a more transparent Web page; the use of a widely recognized format takes care of that problem.

Metadata

The term of art for this kind of signaling, done by embedding information in documents or data, is metadata. Metadata is a sort of “who, what, when, and where” that is one step removed from the principal data being collected and presented. It helps a user of the data understand its meanings and importance.

Here’s a familiar example of metadata: lots of peoples’ photographs and home videos from the 80s and 90s have a date stamp in the picture, because cameras could be programmed to insert this information into the image (or perhaps it was hard to keep the date stamp out . . .). That metadata allows someone looking at the image later to know when the picture or video was shot. Thus, parents can know the ages of their children in photos, which vacation trip the image is from, and so on. Metadata helps make data more complete and useful.

Metadata can create powerful efficiencies. Say a group of cattle ranchers wants to manage their herds in concert, but maintain separate ownership. They can save money and expense if they all use the same pens and fields, feed their animals together, and so on. Before they move their herds together, they might attach to the ears of each of their cattle a distinctive tag to indicate who is the owner. Then, when the time comes to divide up their herds, this can easily be done.

They can do much more this same way, though. If juvenile animals require different feed than the mature ones, a tag indicating the age of each animal might allow them to be sorted appropriately at feeding time. An-

other tag might indicate what inoculations each animal has gotten so that disease management of the herd is streamlined. Each of the many “use cases” for managing a herd can be facilitated by metadata that is physically attached to each animal via the ear tag.

The use cases for government data, and thus the metadata needed in government data, are many. Some people will want to see how bills affect existing laws, existing programs, or agencies. Each of these things can be highlighted in documents and discussions so that they are easily found. Some people will want to follow appropriations and spending, so metadata for dollar proposals and dollar-oriented discussions are worthwhile. Other people will want to know what regions, states, localities, parks, buildings, or installations are the subject of documents and debate. And the corporations, associations, and people who take part in public policy processes are of keen interest. All these things—and more—should be in the metadata of government-published information, and the data should be structured so that rich troves of meaningful information are readily apparent in both documents and data. This will make the relevance of documents and information immediately apparent to various interests using computers to scan the information environment. This is machine-readability, and it is the publication practice that will bring government transparency to fruition.

Machine-readability, machine-discoverability, availability, and authoritative sourcing can produce tremendous advances in government transparency. Well-published data about governments’ deliberations, management, and results will inform people better and empower them to do a better job of overseeing their governments.

Conclusion

Government transparency is a widely agreed-upon value, but it is agreed upon as a means toward various ends. Libertarians

and conservatives support transparency because of their belief that it will expose waste and bloat in government. If the public understands the workings and failings of government better, the demand for government solutions will fall and democracy will produce more libertarian outcomes. American liberals and progressives support transparency because they believe it will validate and strengthen government programs. Transparency will root out corruption and produce better outcomes, winning the public's affection and support for government.

Though the goals may differ, pan-ideological agreement on transparency can remain. Libertarians should not prefer large government programs that are failing. If transparency makes government work better, that is preferable to government working poorly. If the libertarian vision prevails, on the other hand, and transparency produces demand for less government and greater private authority, that will be a result of democratic decisionmaking that all should respect and honor.

The publication practices described here—authoritative sourcing, availability, machine-discoverability, and machine-readability—can help make government more transparent. Governments should publish data about their deliberations, management, and results following these good data practices.

But transparency is not an automatic or instant result of following these good practices, and it is not just the form and formats of data. It turns on the capacity of the society to interact with the data and make use of it. American society will take some time to make use of more transparent data once better practices are in place. There are already thriving communities of researchers, journalists, and software developers using unofficial repositories of government data. If they can do good work with incomplete and imperfect data, they will do even better work with rich, complete data issued promptly by authoritative sources. When fully transparent data comes online, though, researchers will have to learn about these data sources and begin

using them. Government transparency and advocacy websites will have to do the same. Government entities themselves will discover new ways to coordinate and organize based on good data-publication practices. Reporters will learn new sources and new habits.

By putting out data that is “liquid” and “pure,” governments can meet their responsibility to be transparent, and they can foster this evolution toward a body politic that better consumes data. Transparency is likely to produce a virtuous cycle in which public oversight of government is easier, in which the public has better access to factual information, in which people have less need to rely on ideology, and in which artifice and spin have less effectiveness. The use of good data in some areas will draw demands for more good data in other areas, and many elements of governance and public debate will improve.

Both government and civil society have obligations to fulfill if government transparency is to be a reality. By publishing data optimized for transparency, governments can put the ball back into the court of the transparency advocates.

Notes

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Transparency turns on the capacity of the society to interact with data and make use of it.

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16. A catalog of many such documents can be found on Open Government Data's website, at <http://www.opengovdata.org/home/reading-list>.
17. The second Open Government Data Principle called for data "published as collected at the source, with the finest possible level of granularity, not in aggregate or modified forms." Open Government Principles.
18. Government Printing Office, FDsys, <http://www.gpo.gov/fdsys/>.
19. Library of Congress, THOMAS, <http://thomas.loc.gov/home/thomas.php>.
20. Govtrack.us, <http://www.govtrack.us/>.
21. The third Open Government Data Principle is making data "available as quickly as necessary to preserve the value of the data."
22. Author's correspondence, on file.
23. The Open Government Data Principles document called for a contact person "designated to respond to people trying to use the data."
24. The fourth Open Government Data Principle called for accessibility, defined as "available to the widest range of users for the widest range of purposes."
25. This "nearly implicit" principle is featured by Josh Tauberer in his paper, "Open Data is Civic Capital: Best Practices for Open Government Data," January 29, 2011, <http://razor.occams.info/pubdocs/opendataciviccapital.html>.
26. The first of the Open Government Data Principles was that data should be "complete." The Association for Computing Machinery recommends: "Citizens should be able to download complete datasets of regulatory, legislative or other information, or appropriately chosen subsets of that information, when it is published by government." Association for Computing Machinery, "ACM U.S. Public Policy Committee (US-ACM) Recommendations on Open Government," <http://www.acm.org/public-policy/open-government>.
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28. Open Government Data Principles six, seven, and eight address availability. Access must be "non-discriminatory" (available to anyone, with no requirement of registration) (principle 6); non-proprietary (principle 7); and license-free (principle 8).
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Appendix II

Grading the Government's Data Publication Practices

Policy Analysis

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Grading the Government's Data Publication Practices

by Jim Harper

Executive Summary

Barack Obama promised transparency and open government when he campaigned for president in 2008, and he took office aiming to deliver it. Today, the federal government is not transparent, and government transparency has not improved materially since the beginning of President Obama's administration. This is not due to lack of interest or effort, though. Along with meeting political forces greater than his promises, the Obama transparency tailspin was a product of failure to apprehend what transparency is and how it is produced.

A variety of good data publication practices can help produce government transparency: authoritative sourcing, availability, machine-discoverability, and machine-readability. The Cato Institute has modeled what data the govern-

ment should publish in the areas of legislative process and budgeting, spending, and appropriating. The administration and the Congress both receive fairly low marks under systematic examination of their data publication practices.

Between the Obama administration and House Republicans, the former, starting from a low transparency baseline, made extravagant promises and put significant effort into the project of government transparency. It has not been a success. House Republicans, who manage a far smaller segment of the government, started from a higher transparency baseline, made modest promises, and have taken limited steps to execute on those promises. President Obama lags behind House Republicans, but both have a long way to go.

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There was no lack of effort or creativity around data transparency at the outset of the Obama Administration.

Introduction

As a campaigner in 2008, President Obama promised voters hope, change, and transparency.¹ Within minutes of his taking office on January 20, 2009, in fact, the Whitehouse.gov website declared: "President Obama has committed to making his administration the most open and transparent in history."² His first presidential memorandum, issued the next day, was entitled "Transparency and Open Government." It declared:

My Administration is committed to creating 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 and promote efficiency and effectiveness in Government.³

The road to government transparency is long. Nearly four years later, few would argue that American democracy has materially strengthened, or that the government is any more effective and efficient, due to forward strides in transparency and openness. Indeed, the administration has come under fire recently—as every administration does, it seems—for significant transparency failings.

Freedom of Information Act (FOIA) policy is an example. In its early days, the Obama administration committed to improving the government's FOIA practices. In March 2009 Attorney General Eric Holder issued a widely lauded memorandum ordering improvements in FOIA compliance.⁴ But this September, Bloomberg news reported on its test of the Obama Administration's commitment to transparency under FOIA. Bloomberg found that 19 of 20 cabinet-level agencies disobeyed the public disclosure law when it asked for information about the cost of agency leaders' travel. Just 8 of 57 federal agencies met Bloomberg's request for docu-

ments within the 20-day disclosure window required by the act.⁵

President Obama's campaign promise to post laws to the White House website for five days of public comment before he signed them went virtually ignored by the White House in the first year of his administration. Only recently has he reached two-thirds compliance with the "Sunlight Before Signing" promise, and this is because of the multitude of bills Congress passes to rename post offices and such. More important bills are often given less than the promised five days' sunlight.⁶

There was no lack of effort or creativity around data transparency at the outset of the Obama Administration. In May 2009 White House officials announced on the new *Open Government Initiative* blog that they would elicit the public's input into the formulation of its transparency policies. In a meta-transparency flourish, the public was invited to join in with the brainstorming, discussion, and drafting of the government's policies.⁷

The conspicuously transparent, participatory, and collaborative process contributed something, evidently, to an "Open Government Directive," issued in December 2009 by Office of Management and Budget head Peter Orszag.⁸ Its clear focus was to give the public access to data. The directive ordered agencies to publish within 45 days at least three previously unavailable "high-value data sets" online in an open format and to register them with the federal government's data portal, Data.gov. Each agency was to create an "Open Government Webpage" as a gateway to agency activities related to the Open Government Directive.

Many, many of President Obama's transparency promises went by the wayside. His guarantee that health care legislation would be negotiated "around a big table" and televised on C-SPAN was quite nearly the opposite of what occurred.⁹ People are free to observe whether it is political immaturity, idealism, or dishonesty that prompted transparency promises of this kind. Whatever the

case, history may show that the “high-value data set” challenge was where the Obama Administration’s data transparency effort began its tailspin.

Celebrated though it is, transparency is not a well-defined concept, and the administration’s most concerted effort to deliver it missed the mark. The reason is that the definition of “high-value data set” it adopted was hopelessly vague:

High-value information is information that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation.

Essentially anything agencies wanted to publish they could publish claiming “high value” for it.

Agencies “adopted a passive-aggressive attitude” toward the Data.gov effort, according to political scientist Alon Peled.¹⁰ They technically complied with the requirements of the Open Government Memorandum, but did not select data that the public valued.

The Open Government Directive allowed agencies to exploit a subtle “shift in vocabulary” in the area of open government. They diverted the project away from the core government transparency that the public found so attractive about President Obama’s campaign claims. “The term ‘open government data’ might refer to data that makes the government as a whole more open (that is, more publicly accountable),” write Harlan Yu and David Robinson, “or instead might refer to politically neutral public sector disclosures that are easy to reuse, even if they have nothing to do with public accountability.”¹¹

The Agriculture department published data about the race, ethnicity, and gender of farm operators, for example, rather than about the funds it spent to collect that kind

of information. An informal Cato Institute study examining agencies’ “high-value” data feeds found, “almost uniformly, the agencies came up with interesting data—but ‘interesting’ is in the eye of the beholder. And interesting data collected by an agency doesn’t necessarily give the insight into government we were looking for.”¹²

Genuinely high-value data for purposes of government transparency would provide insight in three areas not found in many of the early Data.gov feeds. True high-value data would be about government entities’ management, deliberations, or results.¹³

“Open data can be a powerful force for public accountability,” write Yu and Robinson, “It can make existing information easier to analyze, process, and combine than ever before, allowing a new level of public scrutiny.”¹⁴ This is undoubtedly true, and Americans have experienced vastly increased access to information in so many walks of life—shopping, news-gathering, and investments, to name just three. Data-starved public oversight of government appears sorely lacking in comparison.

In September a new transparency-related international initiative took center stage for the administration, the Open Government Partnership (OGP).¹⁵ This “multilateral initiative” was created “to promote transparency, fight corruption, strengthen accountability, and empower citizens.”¹⁶ Participating countries pledged “to undertake meaningful new steps as part of a concrete action plan, developed and implemented in close consultation with their citizens.” The OGP website touts a panoply of meetings, plans, and social media outreach efforts, and a recent graphic displayed on the home page said in bold letters, “From Commitment to Action.” Its authors probably have no sense of the irony in that declaration. Significant actions, after all, announce themselves.

Nothing about the OGP is harmful, and it may produce genuine gains for openness in participating countries. However, it has not produced, and does not hold out, the fundamental change—data-oriented change—that

Celebrated though it is, transparency is not a well-defined concept.

was at the heart of President Obama's campaign promises.

The Obama administration is not the only actor on the federal stage, of course. House Republicans made transparency promises of their own in the course of their campaign to retake control of the House of Representatives, which they did in 2011.

"The lack of transparency in Congress has been a problem for generations, under majorities Republican and Democrat alike," said aspiring House speaker John Boehner (R-OH) in late 2009. "But with the advent of the Internet, it's time for this to change."¹⁷

Since 1995, the Library of Congress's THOMAS website has published information, sometimes in the form of useful data, about Congress and its activities. Upon taking control of the House for the first time in 40 years, the Republican leadership of the 104th Congress directed the Library of Congress to make federal legislative information freely available to the public. The offerings on the site now include bills, resolutions, activity in Congress, the *Congressional Record*, schedules, calendars, committee information, the president's nominations, and treaties.¹⁸

In an attempt to improve the availability of key information, at the beginning of the 112th Congress the House instituted a rule—not always complied with—that bills should be posted online for three calendar days before receiving a vote on the House floor.¹⁹ The House followed up by creating a site at data.house.gov where such bills are posted. In February 2012 the House Committee on Administration held a day-long conference on legislative data,²⁰ evidence of continuing interest and of plans to move forward. And in September, the Library of Congress debuted beta.congress.gov, which is slated to be the repository for legislative data that ultimately replaces the THOMAS website.²¹

Between the Obama administration and House Republicans, the former, starting from a low transparency baseline, made extravagant promises and put significant ef-

fort into the project of government transparency. It has not been a success. House Republicans, who manage a far smaller segment of the government, started from a higher transparency baseline, made modest promises, and have taken limited steps to execute those promises.

The transparency problem is far from solved, of course. The information that the public would use to increase their oversight and participation is still largely inaccessible. The Republican House may be ahead, but both the administration and Congress score poorly under systematic examination of their data publication practices.

The Data that Would Make for Transparent Government

It was not disinterest that caused the Obama administration transparency effort to fade. Arguably, it was the failure of the transparency community to ask clearly for what it wants: good data about the deliberations, management, and results of government entities and agencies. So in January 2011 the Cato Institute began working with a wide variety of groups and advisers to "model" governmental processes as data and then to prescribe how this data should be published.

Data modeling is arcane stuff, but it is worth understanding here at the dawn of the Information Age. "Data" is collected abstract representations of things in the world. We use the number "3," for example, to reduce a quantity of things to an abstract, useful form—an item of data. Because clerks can use numbers to list the quantities of fruits and vegetables on hand, store managers can effectively carry out their purchasing, pricing, and selling instead of spending all of their time checking for themselves how much of everything there is. Data makes everything in life a little easier and more efficient for everyone.

Legislative and budgetary processes are not a grocery store's produce department, of course. They are complex activities involving many actors, organizations, and steps. The Cato Institute's modeling of these processes

The transparency problem is far from solved.

reduced everything to “entities,” each having various “properties.” The entities and their properties describe the things in legislative and budgetary processes and the logical relationships among them, like members of Congress, the bills they introduce, hearings on the bills, amendments, votes, and so on. The “entity” and “property” terminology corresponds with usage in the world of data management, it is used to make coding easier for people in that field, and it helps to resolve ambiguities in translating governmental processes into useful data. The modeling was restricted to formal parts of the processes, excluding, for example, the varied organizations that try to exert influence, informal communications among members of Congress, and so on.

The project also loosely defined several “markup types,” guides for how documents that come out of the legislative process should be structured and published to maximize their utility. The models and markup types are discussed in a pair of *Cato@Liberty* blog posts that also issued preliminary grades on the quality of data publication about the entities.²² The models and markup types for legislative data and budgeting/appropriations/spending data can be found in Appendixes A and B, respectively.

Next, the project examined the publication methods that allow data to reach its highest and best use. Four key data practices that support government transparency emerged. Documented in a Cato Institute Briefing Paper entitled “Publication Practices for Transparent Government,”²³ those practices are authoritative sourcing, availability, machine-discoverability, and machine-readability.

Authoritative sourcing means producing data as near to its original source and time as possible, so that the public uniformly comes to rely on the best sources of data. The second transparent data practice, availability, entails consistency and confidence in data, including permanence, completeness, and good updating practices.

The third transparent data practice,

machine-discoverability, occurs when information is arranged so that a computer can discover the data and follow linkages among it. Machine-discoverability exists when data is presented consistently with a host of customs about how data is identified and referenced, the naming of documents and files, the protocols for communicating data, and the organization of data within files.

The fourth transparent data practice, machine-readability, is the heart of transparency because it allows the many meanings of data to be discovered. Machine-readable data is logically structured so that computers can automatically generate the myriad stories that the data has to tell and put it to the hundreds of uses the public would make of it in government oversight. A common and popular language for structuring and containing data is called XML, or eXtensible Markup Language, which is a relative of HTML (hypertext markup language), the language that underlies the World Wide Web.

Beginning in September 2011 the project graded how well Congress and the administration publish data about the key entities in the processes they oversee. Congress is responsible for data pertaining to the legislative process, of course. The administration has the bulk of the responsibility for budget-related data (except for the congressional budgets and appropriations). These grades are available in a pair of *Cato@Liberty* blog posts²⁴ and in Appendixes C and D.

With the experience of the past year, the project returned to grading in September 2012. With input from staff at GovTrack.us, the National Priorities Project, OMB Watch, and the Sunlight Foundation (their endorsement of the grades not implied by their assistance), we assessed how well data is now published. The grades presented in Figures 1 and 2 are largely consistent with the prior year—little changed between the two grading periods—but there were some changes in grades in both directions due to improvements in publication, discovery of data sources by our panel of graders, and

Four key data practices support government transparency: authoritative sourcing, availability, machine-discoverability, and machine-readability.

Government transparency is a widely agreed-upon value, sought after as a means toward various ends.

heightened expectations. “Incompletes” given in the first year of grading became Fs in some cases and Ds in others.

It is important to highlight that grades are a lagging indicator. Transparency is not just a product of good data publication, but also of the society’s ability to digest and use information. Once data feeds are published, it takes a little while for the community of users to find them and make use of them. A new web site dedicated to congressional information, beta.congress.gov, will undoubtedly improve data transparency and the grades for data it publishes, assuming it lives up to expectations.

Government transparency is a widely agreed-upon value, sought after as a means toward various ends. Libertarians and conservatives support transparency because of their belief that it will expose waste and bloat in government. If the public understands the workings and failings of government better, the demand for government solutions will fall and democracy will produce more libertarian outcomes. American liberals and progressives support transparency because they believe it will validate and strengthen government programs. Transparency will root out corruption and produce better outcomes, winning the public’s affection and support for government.

Though the goals may differ, pan-ideological agreement on transparency can remain. Libertarians should not prefer large government programs that are failing. If transparency makes government work better, that is preferable to government working poorly. If the libertarian vision prevails, on the other hand, and transparency produces demand for less government and greater private authority, that will be a result of democratic decisionmaking that liberals and progressives should respect and honor.

With that, here are the major entities in the legislative process and in budgeting, appropriating, and spending; the grades that reflect the quality of the data published about them; and a discussion of both.

Publication Practices for Transparent Government: Rating Congress

House Membership: C-

Senate Membership: A-

It would seem simple enough to publish data about who holds office in the House of Representatives and Senate, and it is. There are problems with the way the data is published, though, which the House and Senate could easily remedy.

On the positive side—and this is not to be discounted—there is a thing called the “Biographical Directory of the United States Congress,” a compendium of information about all present and former members of the U.S. Congress (as well as the Continental Congress), including delegates and resident commissioners. The “Bioguide” website at bioguide.congress.gov is a great resource for searching out historical information.

But there is little sign that Bioguide is Congress’s repository of record, and it is little known by users, giving it lower authority marks than it should have. Some look to the House and Senate websites and beta.congress.gov for information about federal representatives, splitting authority among websites, rather than one established and agreed upon resource.

Bioguide scores highly on availability—we know of no problems with up-time or completeness (though it could use quicker updating when new members are elected). Bioguide is not structured for discoverability, though. Most people have not seen it, because search engines are not finding it.

Bioguide does a good thing in terms of machine readability, though. It assigns a unique ID to each of the people in its database. This is the first, basic step in making data useful for computers, and the Bioguide ID should probably be the standard for machine identification of elected officials wherever they are referred to in data. Unfortunately, the biographical content in Bioguide is not machine-readable.

Figure 1

October 2012

PUBLICATION PRACTICES FOR TRANSPARENT GOVERNMENT: RATING THE CONGRESS <i>How well can the Internet access data about Congress' work? The Cato Institute rated how well Congress publishes information in terms of authoritative sourcing, availability, machine-discoverability, and machine-readability.</i>		
SUBJECT	GRADE	COMMENTS
House and Senate Membership	 House C- Senate A-	The Senate has taken the lead on making data about who represents Americans in Washington machine-readable.
Committees and Subcommittees	 C-	Organizing and centralizing committee information would create a lot of clarity with a minimum of effort.
Meetings of House, Senate, and Committees	 House B Senate B	The House has improved its data about floor debates. The Senate is strong on committee meetings.
Meeting Records	 D-	There is lots of work to do before transcripts and other meeting records can be called transparent.
Committee Reports	 C+	Committee reports can be found, but they're not machine-readable.
Bills	 B-	Bills are the "pretty-good-news" story in legislative transparency, though there is room for improvement.
Amendments	 F	Amendments are hard to track in any systematic way—and Congress has done little to make them trackable.
Motions	 F	If the public is going to have insight into the decisions Congress makes, the motions on which Congress acts should be published as data.
Decisions and Votes	 B+	Vote information is in good shape, but voice votes and unanimous consents should be published as data.
Communications (Inter- and Intra-Branch)	 F	Transparent access to the messages sent among the House, Senate, and executive branch would complete the picture available to the public.

Figure 2

October 2012

PUBLICATION PRACTICES FOR TRANSPARENT GOVERNMENT: BUDGETING, APPROPRIATING, AND SPENDING		
<i>How well can the Internet access data about the federal government's budgeting, appropriating, and spending? The Cato Institute rated how well the government publishes information in terms of authoritative sourcing, availability, machine-discoverability, and machine-readability.</i>		
SUBJECT	GRADE	COMMENTS
Agencies	 D-	<i>This grade is generous. There really should be a machine-readable federal government "organization chart."</i>
Bureaus	 D-	<i>The sub-units of agencies have the same problem.</i>
Programs	 D	<i>Program information is obscure, incomplete, and unorganized.</i>
Projects	 F	<i>Some project information gets published, but the organization of it is bad.</i>
Budget Documents	 Congress D  White House B-	<i>The president's budget submission and congressional budget resolutions are a mixed bag.</i>
Budget Authority	 F	<i>Legal authority to spend is hidden and unstructured.</i>
Warrants, Apportionments, and Allocations	 F	<i>Spending authority is divided up in an opaque way.</i>
Obligations	 B-	<i>Commitments to spend taxpayer money are visible some places.</i>
Parties	 F	<i>A proprietary identifier system makes it hard to know where the money is going.</i>
Outlays	 C-	<i>We need real-time, granular spending data.</i>

As noted above, the other ways of learning about House and Senate membership are ad hoc. The Government Printing Office has a "Guide to House and Senate Members" at <http://memberguide.gpo.gov/> that duplicates information found elsewhere. The House website presents a list of members along with district information, party affiliation, and so on, in HTML format (<http://www.house.gov/representatives/>), and beta.congress.gov does as well (<http://beta.congress.gov/members/>). Someone who wants a complete dataset must collect data from these sources using a computer program to scrape the data and through manual curation. The HTML presentations do not break out key information in ways useful for computers. The Senate membership page,²⁵ on the other hand, includes a link to an XML representation that is machine readable. That is the reason why the Senate scores so well compared to the House.

Much more information about our representatives flows to the public via representatives' individual websites. These are nonauthoritative websites that search engine spidering combines to use as a record of the Congress's membership. They are available and discoverable, again because of that prime house.gov and senate.gov real estate. But they only reveal data about the membership of Congress incidentally to communicating the press releases, photos, and announcements that representatives want to have online.

It is a narrow point, but there should be one and only one authoritative, well-published source of information about House and Senate membership from which all others flow. The variety of sources that exist combine to give Congress pretty good grades on publishing information about who represents Americans in Washington, but improving in this area is a simple matter of coordinating House and Senate efforts.

Committees and Subcommittees: C-

Like Americans' representation in Congress, lists of committees, their membership,

and jurisdiction should be an easy lift. But it is not as easy as it should be to learn about the committees to which Congress delegates much of its work and the subcommittees to which the work gets further distributed.

The Senate has committee names and URLs prominently available on its main website.²⁶ The House does, too, at <http://house.gov/committees/>. But neither page offers machine-readable information about committees and committee assignments. The Senate has a nice list of committee assignments, again, though, not machine-readable. The House requires visitors to click through to each committee's web page to research what they do and who serves on them. For that, you'd go to individual committee websites, each one different from the others. There is an authoritative list of House committees with unique identifiers,²⁷ but it's published as a PDF, and it is not clear that it is used elsewhere for referring to committees.

Without a recognized place to go to get data about committees, this area suffers from lacking authority. To the extent there are data, availability is not a problem, but machine-discoverability suffers for having each committee publish distinctly, in formats like HTML, who their members are, who their leaders are, and what their jurisdiction is.

With the data scattered about this way, the Internet can't really see it. More prominence, including data such as subcommittees and jurisdiction, and use of a recognized set of standard identifiers would take this resource a long way.

Until committee data are centrally published using standard identifiers (for both committees and their members), machine-readability will be very low. The Internet makes sense of congressional committees as best it can, but a whole lot of organizing and centralizing—with a definitive, always-current, and machine-readable record of committees, their memberships, and their jurisdictions—would create a lot of clarity in this area with a minimum of effort.

There should be one and only one authoritative, well-published source of information about House and Senate membership.

Can the public learn easily about what meetings are happening, where they are happening, when they are happening, and what they are about? It depends on which side of the Capitol you're on.

Meetings of House, Senate, and Committees—House: B/Senate: B

When the House, the Senate, committees, and subcommittees have their meetings, the business of the people is being done. Can the public learn easily about what meetings are happening, where they are happening, when they are happening, and what they are about? It depends on which side of the Capitol you're on.

The Senate is pretty good about publishing notices of committee meetings. From a webpage with meeting notices listed on it,²⁸ there is a link to an XML version of the data to automatically inform the public.

If a particular issue is under consideration in a Senate committee meeting, this is a way for the public to learn about it. This is authoritative, it is available, it is machine-discoverable, and has some machine-readable features. That means any application, website, researcher, or reporter can quickly use these data to generate more—and more useful—information about Congress.

The House does not have anything similar for committee meetings. To learn about those meetings, one has to scroll through page after page of committee announcements or calendars. Insiders subscribe to paid services. The House can catch up with the Senate in this area.

Where the House excels and the Senate lags is in notice about what will be considered on the floor. The House made great strides with the institution of docs.house.gov, which displays legislation heading for the floor. This allows any visitor, and various websites and services, to focus their attention on the nation's business for the week.

Credit is due the House for establishing this resource and using it to inform the public using authoritative, available, and machine-discoverable and -readable data. This is an area where the Senate has the catching up to do.

For different reasons, the House and Senate both garner Bs. Were they to copy the best of each other, they would both have As.

Meeting Records: D-

There is a lot of work to do before meeting records can be called transparent. The *Congressional Record* is the authoritative record of what transpires on the House and Senate floors, but nothing similar reveals the content of committee meetings. Those meeting records are produced after much delay—sometimes an incredibly long delay—by the committees themselves. These records are obscure, and they are not being published in ways that make things easy for computers to find and comprehend.

In addition, the *Congressional Record* doesn't have the machine-discoverable publication or machine-readable structure that it could and should. Giving unique, consistent IDs in the *Record* to members of Congress, to bills, and other regular subjects of this publication would go a long way to improving it. The same would improve transcripts of committee meetings.

Another form of meeting record exists: videos. These have yet to be standardized, organized, and published in a reliable and uniform way, but the HouseLive site (<http://houselive.gov/>) is a significant step in the right direction. It will be of greater use when it can integrate with other records of Congress. Real-time flagging of members and key subjects of debate in the video stream would be a great improvement in transparency. Setting video and video meta-data standards for use by both Houses of Congress, by committees, and by subcommittees would improve things dramatically.

House video is a bright spot in a very dark field, but both will shine brighter in time. When the surrounding information environment has improved to educate the public about goings-on in Congress in real time, the demand for and usefulness of video will increase.

Committee Reports: C+

Committee reports are important parts of the legislative process, documenting the findings and recommendations that com-

mittees report to the full House and Senate. They do see publication on the most authoritative resource for committee reports, the Library of Congress's THOMAS system. They are also published by the Government Printing Office.²⁹ The GPO's Federal Digital System (FDsys) is relatively new and is meant to improve systematic access to government documents, but it has not become recognized as an authoritative source for many of those documents.

Because of the sources through which they are published, committee reports are somewhat machine-discoverable, but without good semantic information embedded in them, committee reports are barely visible to the Internet.

Rather than publication in HTML and PDF, committee reports should be published fully marked up with the array of signals that reveal what bills, statutes, and agencies they deal with, as well as authorizations and appropriations, so that the Internet can discover and make use of these documents.

Bills: B-

Bills are a "pretty-good-news" story in legislative transparency. Most are promptly published. It would be better, of course, if they were all immediately published at the moment they were introduced, and if both the House and Senate published last-minute, omnibus bills before debating and voting on them.

A small gap in authority exists around bills. Some people look to the Library of Congress and the THOMAS site, and now beta.congress.gov, for bill information. Others look to the Government Printing Office. Which is the authority for bill content? This issue has not caused many problems so far. Once published, bill information remains available, which is good.

Publication of bills in HTML on the THOMAS site makes them reasonably machine-discoverable. Witness the fact that searching for a bill will often turn up the version at that source.

Where bills could improve some is in their machine-readability. Some information such as sponsorship and U.S. code references is present in the bills that are published in XML, and nearly all bills are now published in XML, which is great. Much more information should be published machine-readably in bills, though, such as references to agencies and programs, to states or localities, to authorizations and appropriations, and so on, referred to using standard identifiers.

With the work that the THOMAS system does to gather information in one place, bill data are good. This is relative to other, less-well-published data, though. There is yet room for improvement.

Amendments: F

Amendments are not the good-news story that bills are. They are "barely available," says Eric Mill of the Sunlight Foundation. "Given that amendments (especially in the Senate) can be as large and important as original legislation, this is an egregious oversight."

With a few exceptions, amendments are hard to track in any systematic way. When bills come to the House and Senate floors, amendment text is often available, but amendments are often plopped somewhere in the middle of the *Congressional Record* without any reliable, understood, machine-readable connection to the underlying legislation. It is very hard to see how amendments affect the bills they would change.

In committees, the story is quite a bit worse. Committee amendments are almost completely opaque. There is almost no publication of amendments at all—certainly not amendments that have been withdrawn or defeated. Some major revisions in process are due if committee amendments are going to see the light of day as they should.

Motions: F

When the House, the Senate, or a committee is going to take some kind of action, it does so on the basis of a motion. If the

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public is going to have insight into the decisions Congress makes, it should have access to the motions on which Congress acts.

But motions are something of a black hole. Many of them can be found in the *Congressional Record*, but it takes a human who understands legislative procedure and who is willing to read the *Congressional Record* to find them. That is not modern transparency.

Motions can be articulated as data. There are distinct types of motions. Congress can publish which meeting a motion occurs in, when the motion occurs, what the proposition is, what the object of the motion is, and so on. Along with decisions, motions are key elements of the legislative process. They can and should be published as data.

Decisions and Votes: B+

When a motion is pending, a body such as the House, the Senate, or a committee will make a decision on it, only sometimes using votes. These decisions are crucial moments in the legislative process, which should be published as data. Like motions, many decisions are not yet published usefully. Decisions made without a vote in the House or Senate are published in text form as part of the *Congressional Record*, but they are not published as data, so they remain opaque to the Internet. Many, many decisions come in the form of voice votes, unanimous consents, and so on.

Voting puts members of Congress on record about where they stand. And happily, vote information is in pretty good shape. Each chamber publishes data about votes, meaning authority is well handled. Vote data are available and timely.

Both the House³⁰ and Senate³¹ produce vote information. The latter also publishes roll call tables in XML, which is useful for computer-aided oversight. Overall, voting data are pretty well handled. But the omission of voice votes and unanimous consents drags the grade down and will drag it down further as the quality of data publication in other areas rises.

Communications (Inter- and Intra-Branch): F

The Constitution requires each house of Congress to “keep a Journal of its Proceedings, and from time to time publish the same.” The basic steps in the legislative process (discussed elsewhere) go into the journals of the House and Senate, along with communications among governmental bodies.

These messages, sent among the House, Senate, and Executive Branch, are essential parts of the legislative process, but they do not see publication. Putting these communications online—including unique identifiers, the sending and receiving body, any meeting that produced the communication, the text of the communication, and key subjects such as bills—would complete the picture that is available to the public.

Publication Practices for Transparent Government: Budgeting, Appropriations, and Spending

Agencies: D-

Federal agencies are the “agents” of Congress and the president. They carry out federal policy and spending decisions. Accordingly, one of the building blocks of data about spending is going to be a definitive list of the organizational units that do the spending.

Is there such a list? Yes. It’s Appendix C of OMB Circular A-11, entitled: “Listing of OMB Agency/Bureau and Treasury Codes.” This is a poorly organized PDF document that is found on the Office of Management and Budget website.³²

Poorly organized PDFs are not good transparency. Believe it or not, there is still no federal government “organization chart” that is published in a way amenable to computer processing.

There are almost certainly sets of distinct identifiers for agencies that both the Treasury department and the Office of Management and Budget use. With modifications,

either of these could be published as the executive branch's definitive list of its agencies. But nobody has done that. Nobody seems yet to have thought of publishing data about the basic units of the executive branch online in a machine-discoverable and machine-readable format.

In our preliminary grading, we gave this category an "incomplete" rather than an F. That was "beyond generous," according to Becky Sweger of the National Priorities Project. We expect improvement in publication of this data, and the grades will be low until we get it.

Bureaus: D-

The sub-units of agencies are bureaus, and the situation with agencies applies to data about the offices where the work of agencies get divided up. Bureaus have identifiers. It's just that nobody publishes a list of bureaus, their parent agencies, and other key information for the Internet-connected public to use in coordinating its oversight.

Again, a prior "incomplete" in this area has converted to a D-, saved from being an F only by the fact that there is a list, however poorly organized and published, by the Office of Management and Budget.

Programs: D

It is damning with faint praise to call "programs" the brightest light on the organizational-data Christmas tree. The work of the government is parceled out for actual execution in programs. Like information about their parental units, the agencies and bureaus, data that identifies and distinguishes programs is not comprehensively published.

Some information about programs is available in usable form. The Catalog of Federal Domestic Assistance website (www.cfda.gov) has useful aggregation of some information on programs, but the canonical guide to government programs, along with the bureaus and agencies that run them, does not exist.

Programs will be a little bit heavier a lift than agencies and bureaus—the number of

programs exceeds the number of bureaus by something like an order of magnitude, much as the number of bureaus exceeds the number of agencies. And it might be that some programs have more than one agency/bureau parent. But today's powerful computers can keep track of these things—they can count pretty high. The government should figure out all the programs it has, keep that list up to date, and publish it for public consumption.

Thanks to the CFDA, data publication about the federal government's programs gets a D.

Projects: F

Projects are where the rubber hits the road. These are the organizational vehicles the government uses to enter into contracts and create other obligations that deliver on government services. Some project information gets published, but the publication is so bad that we give this area a low grade indeed.

Information about projects can be found. You can search for projects by name on USASpending.gov, and descriptions of projects appear in USASpending/FAADS downloads, ("FAADS" is the Federal Assistance Award Data System), but there is no canonical list of projects that we could find. There should be, and there should have been for a long time now.

The generosity and patience we showed in earlier grading with respect to agencies, budgets, and programs has run out. There's more than nothing here, but projects, so essential to have complete information about, gets an F.

Budget Documents—

Congress: D/White House: B-

The president's annual budget submission and the congressional budget resolutions are the planning documents that the president and Congress use to map the direction of government spending each year. These documents are published authoritatively, and they are consistently available, which is good. They are sometimes machine-

Believe it or not, there is still no federal government "organization chart" published in a way amenable to computer processing.

Ideally, there would be a nice, neat connection from budget authority right down to every outlay of funds.

discoverable, but they are not terribly machine-readable.

The appendices to the president's budget are published in XML format, which vastly reduces the time it takes to work with the data in them. That's really good. But the congressional budget resolutions—when they exist—have no similar organization, and there is low correspondence between the budget resolutions that Congress puts out and the budget the president puts out. You would think that a person—or better yet, a computer—should be able to lay these documents side by side for comparison, but nobody can.

For its use of XML, the White House gets a B-. Congress gets a D.

Budget Authority: F

"Budget authority" is a term of art for what probably should be called "spending authority." It's the power to spend money, created when Congress and the president pass a law containing such authority.

Proposed budget authority is pretty darn opaque. The bills in Congress that contain budget authority are consistently published online—that's good—but they don't highlight budget authority in machine-readable ways. No computer can figure out how much budget authority is out there in pending legislation.

Existing budget authority is pretty well documented in the Treasury Department's FAST book (Federal Account Symbols and Titles). This handy resource lists Treasury accounts and the statutes and laws that provide their budget authority. The FAST book is not terrible, but the only form we've found it in is PDF. PDF is terrible. And nobody among our graders uses the FAST book.

Congress can do a lot better, by highlighting budget authority in bills in a machine-readable way. The administration can do much, much better than publishing the obscure FAST book in PDF.

Ideally, there would be a nice, neat connection from budget authority right down to every outlay of funds, and back up again from every outlay to its budget authority.

These connections, published online in useful ways, would allow public oversight to blossom. But the seeds have yet to be planted.

Warrants, Apportionments, and Allocations: F

After Congress and the president create budget authority, that authority gets divvied up to different agencies, bureaus, programs, and projects. How well documented are these processes? Not well.

An appropriation warrant is an assignment of funds by the Treasury to a treasury account to serve a particular budget authority. It's the indication that there is money in an account for an agency to obligate and then spend. "OMB has a web portal that agencies used to send apportionment requests," notes the National Priorities Project's Becky Sweget, "so the apportionment data are out there."

Where is this warrant data? We can't find it. Given Treasury's thoroughness, it probably exists, but it's just not out there for public consumption.

An apportionment is an instruction from the Office of Management and Budget to an agency about how much it may spend from a Treasury account in service of given budget authority in a given period of time.

We haven't seen any data about this, and we're not sure that there is any. There should be. And we should get to see it.

An allocation is a similar division of budget authority by an agency into programs or projects. We don't see any data on this either. And we should.

These essential elements of government spending should be published for all to see. They are not published, garnering the executive branch an F.

Obligations: B-

Obligations are the commitments to spend money into which government agencies enter. Things like contracts to buy pens, hiring of people to write with those pens, and much, much more.

USASpending.gov has quickly become the authoritative source for this information, but it is not the entire view of spending, and the data is "dirty": inconsistent and unreliable. The use of proprietary DUNS numbers—the Data Universal Numbering System of the firm Dun & Bradstreet—also weakens the availability of obligation data.

There is some good data about obligations, but it is not clean, complete, and well documented. The ideal is to have one source of obligation data that includes every agency, bureau, program, and project. With a decent amount of data out there, though, useful for experts, this category gets a B-

Parties: F

When the government spends taxpayer dollars, to what parties is it sending the money?

Right now, reporting on parties is dominated by the DUNS number. It provides a unique identifier for each business entity and was developed by Dun & Bradstreet in the 1960s. It's very nice to have a distinct identifier for every entity doing business with the government, but it is not very nice to have the numbering system be a proprietary one.

"Parties" would grade well in terms of machine-readability, which is one of the most important measures of transparency, but because it scores so low on availability, its machine-readability is kind of moot. Until the government moves to an open identifier system for recipients of funds, it will get weak grades on publication of this essential data.

Outlays: C-

For a lot of folks, the big kahuna is knowing where the money goes: outlays. An outlay—literally, the laying out of funds—satisfies an obligation. It's the movement of money from the U.S. Treasury to the outside world.

Outlay numbers are fairly well reported after the fact and in the aggregate. All one has to do is look at the appendices to the

president's budget to see how much money has been spent in the past.

But outlay data can be much, much more detailed and timely than that. Each outlay goes to a particular party. Each outlay is done on a particular project or program at the behest of a particular bureau and agency. And each outlay occurs because of a particular budget authority. Right now these details about outlays are nowhere to be found.

"Surely the act of cutting a check doesn't sever all relationship between that amount of money and its corresponding obligation/project/program," writes a frustrated Becky Sweger from the National Priorities Project. "Surely these relationships are intact somewhere and can be published."

Plenty of people inside the government who are familiar with the movement of taxpayer money will be inclined to say, "it's more complicated than that," and it is! But it's going to have to get quite a bit less complicated before these processes can be called transparent.

The time to de-complicate outlays is now. It's a feat of generosity to give this area a C-. That's simply because there is an authoritative source for aggregate past outlay data. As the grades in other areas come up, outlay data that stays the same could go down. Way down.

Conclusion

Many of the entities discussed here are low-hanging fruit if Congress and the administration want to advance transparency and their transparency grades. Authoritative, complete, and well-published lists of House and Senate membership, committees, and subcommittees are easy to produce and maintain, and much of the work has already been done.

The same is true of agencies and bureaus, at least on the executive branch side. Presidential leadership could produce an authoritative list of programs and projects within months. Establishing authoritative identi-

Outlay data can be much, much more detailed and timely.

fiers for these basic units of government is like creating a language, a simple but important language computers can use to assist Americans in their oversight of the federal government.

The more difficult tasks—amendments to

legislation, for example, and discretely identified budget authorities—will take some work. But such work can produce massive strides forward in accountable, efficient, responsive, and—in the libertarian vision—smaller government.

Notes

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Chairman ISSA. We now go to the other partner in this, Sunlight, Mr. Schuman.

STATEMENT OF DANIEL SCHUMAN

Mr. SCHUMAN. Thank you, Mr. Chairman, Ranking Member Cummings, and distinguished members of the Oversight and Government Reform Committee. I appreciate the honor and the privilege of speaking with you here today.

At the heart of transparency is the idea that the public has the right to know what Government is doing. In our modern times, as Jim has alluded to, this means online and real-time in a computer-friendly format.

While the Obama administration has made significant rhetorical strides towards a 21st century vision of transparency and has launched several innovative transparency initiatives, Government must do more to address the fundamental challenge of being transparent. It is my intention today to encourage this committee to continue its good works, to adopt the Administration's best initiatives, and to help encourage the Administration to meet its pledge to be the most transparent one ever.

Let's start with federal spending transparency. A Sunlight Foundation analysis called Clear Spending found \$1.55 trillion in misreported federal grant spending. The numbers just don't line up. This is the third year in a row we found a problem of this magnitude. We believe the Government should publicly track each federal dollar from the moment spending is proposed in the budget until it reaches its final destination.

The Recovery Accountability and Transparency Board has shown us the way. How have they done so? By using unique identifiers to track who is spending, how much they are spending, and who gets the money; by demonstrating the necessity of an independent commission whose only job is fiscal transparency. As Angela mentioned, the importance of having independent commissions, independent bodies focused solely on transparency is something I cannot help but underscore. Finally, they have also released more information that allows data to be cross-checked.

Now, the DATA Act will make all of this happen government-wide, and I don't need to tell this committee that it should be speedily enacted into law.

What the DATA Act does for federal spending transparency, the access to Congressionally Mandated Reports Act does for oversight of agency policymaking. Reports to Congress are a means to find out what agencies are actually doing. These reports should all be online in one central place.

We also believe that advisory committees shouldn't be a stealthy way for special interests to influence the political process, and that sunlight should be shined on donors to presidential libraries who are snuggling up to future ex-presidents. It is time for Congress to pass the Federal Advisory Committee Act amendments and the Presidential Library Donation Reform Act.

There are several Administration initiatives that the committee should encourage and enhance. The White House's landmark Open Government Directive, which requires agencies to create and update open government plans, reduce FOIA backlogs, and release

new data sets has yielded mixed results. Some agencies are still trying to wait out this transparency fad. The OGD contains good ideas and, to make sure they are fully implemented, they should be codified.

New federal transparency Web sites such as Data.gov, USASpending.gov, and the IT Spending Dashboard are already changing Government. They should be moved out from under the E-Gov Fund, which is intended for startups, and given a statutory basis and their own funding. For FOIA, we have seen smart initiatives like FOIA Online, proactive disclosure, and a presumption in favor of disclosure. These ideas should all be codified, along with the strengthening of the federal FOIA ombudsman and the incorporation of the Public Online Information Act, which ensures publicly available materials are online, and we applaud Chairman Issa and Ranking Member Cummings' new released draft legislation.

The executive branch needs some encouragement from Congress on the following three issues: the rules covering White House visitor logs should be strengthened, codified, and stripped of their loopholes; all of the Department of Justice's Office of Legal Counsel opinions should be online, with only a few exceptions, not the two-fifths that we found were missing. It shouldn't require a 13-hour filibuster in the Senate to get an answer on one particular question. And the Office of Information and Regulatory Affairs at OMB isn't living up to its obligation to fully disclose when and how it is being lobbied on major rulemakings. This has gone on long enough.

More work is needed on money in politics. The Lobbying Disclosure Enhancement Act, for example, would make sure that our transparency regimes cover people who act like lobbyists, but who don't meet the current law's arbitrary definition. And, finally, Congressional Research Service regularly distributes reports on matters of importance to national policymaking to the thousands of staffers on Capitol Hill, but these reports aren't systematically available to the public. They should be. We ask that the committee publish on its Web site all reports relevant to its jurisdiction.

Transparency doesn't just keep our political system working properly; it gives people reason to have faith that our political system can work for all of us. I know the committee understands this and I thank you for the opportunity to speak here today.

[Prepared statement of Mr. Schuman follows:]



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**Testimony of Daniel Schuman,
Policy Counsel and Director of the Advisory Committee on Transparency,
the Sunlight Foundation,
before the House Committee on Oversight and Government Reform
on March 13, 2013**

Chairman Issa, Ranking Member Cummings, and distinguished members of the Oversight and Government Reform Committee, thank you for the honor and privilege of speaking here today.

My name is Daniel Schuman and I am policy counsel with the Sunlight Foundation, a non-partisan non-profit organization whose mission is to use cutting-edge technology to make government transparent and accountable. We take inspiration from Justice Brandeis' famous adage "Sunlight is said to be the best of disinfectants."

I appreciate the opportunity to appear during Sunshine Week to discuss the state of government transparency.

THE STATE OF TRANSPARENCY

Government transparency means different things to different people, but at its heart is the idea that the public has the right to know what the government is doing. Modern technology, when employed properly, makes government openness possible on an unprecedented scale and in ways previously unimaginable. We believe that public information should be available online, in real time, and in machine-readable formats because it empowers citizens, journalists, advocates, public officials, and everyone else to be more-fully involved in civic life.

While the Obama Administration has made significant rhetorical strides towards a 21st century vision of transparency, we believe that government must do more to yield information that is accurate, complete, and useful. It must rededicate itself to addressing the fundamental challenge of transparency itself.

Over the last few years, we saw the launch of the Open Government Directive,¹ which required agencies to create openness plans and release high value datasets to the public. We saw a memo that enshrined a presumption of disclosure for responses to Freedom of Information Act

¹ See "A Watershed Moment in Transparency and Accountability," by Ellen Miller, Sunlight Foundation (Dec. 11, 2009), available at <http://sunlightfoundation.com/blog/2009/12/11/a-watershed-moment-in-transparency-and-accountability/>; "Open Government: Idling in the Driveway," by Ellen Miller, Sunlight Foundation (April 8, 2010), available at <http://sunlightfoundation.com/blog/2010/04/08/open-government-idling-in-the-driveway/>.

requests.² We saw the creation of the first Federal Chief Technology Officer³ and the launch of Data.gov⁴. The newly created White House Ethics Czar fought against FOIA backlogs and implemented greater lobbying disclosure⁵ for the Wall Street and Main Street bailouts. The President spoke about fixing campaign finance disclosure in the wake of the *Citizens United* decision.⁶ And, more recently, we've seen the rollout of Ethics.gov,⁷ the "We the People" platform,⁸ the Open Government Partnership⁹, the Presidential Innovation Fellows,¹⁰ and FOIA Online¹¹. This is an impressive list, and there's more.

Unfortunately, many of these initiatives have tapered off. There's no longer any experimentation around improved lobbying disclosure.¹² The President has acquiesced to unlimited money in our political system.¹³ Agencies generally are not complying with the presumption of disclosure for FOIA requests.¹⁴ There's no longer an Ethics Czar, or any senior staffer devoted full time to pulling together the many strands of government openness. The technological solutions that are being embraced, such as the "We the People" platform, often are more centered on getting public input than providing data about the government to the public. The brightest spot is the international Open Government Partnership,¹⁵ but it contains little about ethics in government, and many of its commitments represent longstanding pledges for incremental change.

² See "New Obama Orders on Transparency, FOIA Requests," by Ed O'Keefe, Washington Post (Jan. 21, 2009), available at http://voices.washingtonpost.com/federal-eye/2009/01/in_a_move_that.html.

³ See "Kundra's Mission," by Ellen Miller, Sunlight Foundation (April 4, 2009), available at <http://sunlightfoundation.com/blog/2009/04/04/kundras-mission/>.

⁴ See "White House Opens Doors on Major Open Government Initiative," by Micah Sifry and Nancy Scola, TechPresident (May 21, 2009), available at <http://techpresident.com/blog-entry/white-house-opens-doors-major-open-government-initiatives>.

⁵ See "White House Lobbying Meeting: Public Debrief," by John Wonderlich, Sunlight Foundation (May 6, 2009), available at <http://sunlightfoundation.com/blog/2009/05/06/white-house-lobbying-meeting-public-debrief/>.

⁶ See "Transparency in the State of the Union," by Ellen Miller, Sunlight Foundation (January 24, 2012), available at <http://sunlightfoundation.com/blog/2012/01/24/transparency-in-the-state-of-the-union/>.

⁷ See "White House Launches Ethics.gov," by John Wonderlich, Sunlight Foundation (March 8, 2012), available at <http://sunlightfoundation.com/blog/2012/03/08/white-house-launches-ethics-gov/>.

⁸ See "With 'We The People,' White House Promises to Go E-to-the-People," by Nick Judd, TechPresident (Sep. 1, 2011), available at <http://techpresident.com/blog-entry/we-people-white-house-promises-go-e-people>.

⁹ See "Two Suggestions For the US National Action Plan," by John Wonderlich, Sunlight Foundation (Aug. 31, 2011), available at <http://sunlightfoundation.com/blog/2011/08/31/two-suggestions-for-the-us-national-action-plan/>.

¹⁰ See "Wanted: A Few Good Women and Men to Serve as Presidential Innovation Fellows," White House (May 23, 2012), available at <http://www.whitehouse.gov/blog/2012/05/23/wanted-few-good-women-and-men-serve-presidential-innovation-fellows>.

¹¹ See "A Status Report on FOIAonline," OpenTheGovernment.Org (Jan. 22, 2013), available at <http://www.openthegovernment.org/node/3835>.

¹² See "Lobbyists celebrate departure of White House ethics chief," by Paul Blumenthal, Sunlight Foundation (Aug. 9, 2010), available at <http://sunlightfoundation.com/blog/2010/08/09/lobbyists-celebrate-departure-of-white-house-ethics-chief/>.

¹³ See "Obama Versus Campaign Finance Laws," by John Wonderlich, Sunlight Foundation (Feb. 15, 2013), available at <http://sunlightfoundation.com/blog/2013/02/15/obama-versus-campaign-finance-laws/>.

¹⁴ See "Testing Obama's Promise of Government Transparency," Bloomberg (Sep. 27, 2012), available at <http://go.bloomberg.com/multimedia/bloomberg-checks-obama-transparency/>.

¹⁵ See "Preparing for the US National Action Plan," by John Wonderlich, Sunlight Foundation (Sep. 16, 2011), available at <http://sunlightfoundation.com/blog/2011/09/16/preparing-for-the-us-national-action-plan/>.

LEGISLATION RIPE FOR CONSIDERATION BY CONGRESS

Many challenges remain unmet by the executive branch. Fortunately, Congress has been active in crafting legislation solutions, many of which are ripe for final consideration by Congress. We identify four bills that already have been considered by this Committee and should be fast-tracked through the process.¹⁶ They are the DATA Act, the Access to Congressionally Mandated Reports Act, the Federal Advisory Committee Act Amendments, and the Presidential Library Donation Reform Act.

The DATA Act

The issue of federal spending transparency deserves special attention, particularly in light of the sequester, the Super Committee, and the fight over spending priorities. The American people should be able to track every federal dollar from the moment the President proposes a budget to the receipt of funds by sub-awardees or sub-contractors, and every point in between. This Committee took on this monumental task and crafted the DATA Act, regarding which Sunlight's executive director had the opportunity to testify in 2011.¹⁷

Without getting into too many details, we believe the DATA Act is a revolutionary transparency measure for three reasons. It provides for the government-wide systematic tracking of funds by instantiating unique identifiers for spending data at a high level of granularity. It vests responsibility for tracking spending in a Board that has the sole mission of spending transparency, building on the excellent work of the Recovery, Accountability, and Transparency Board. And, it would release new datasets and allow for the automatic checking of spending information to make sure that it is accurate and reliable.

We at the Sunlight Foundation know that currently released federal spending data is not reliable. For the third year in a row, we used the government's data to evaluate its grants, and found \$1.55 trillion in misreported spending.¹⁸ That's a huge discrepancy.¹⁹ We evaluated the consistency, completeness, and timeliness of how spending information is reported to the public, and found our government's effort to be sorely wanting.²⁰ While the Administration is again making vague declarations about its desire to start to get serious about unique identifiers and data quality, we

¹⁶ We are also keeping a close eye on the implementation of recently-passed transparency measures, such as the STOCK Act.

¹⁷ See "Testimony of Ellen Miller Before the House Oversight and Government Reform Committee Regarding Transparency Through Technology," Sunlight Foundation (March 11, 2011), available at <http://sunlightfoundation.com/policy/documents/testimony-ellen-miller-house-oversight/>.

¹⁸ See "Analysis of federal spending shows faults in data collection and reporting," available at <http://sunlightfoundation.com/press/releases/2013/02/04/us-government-misreported-155-trillion-grants-2011/>; and our Clear Spending Scorecard, available at <http://sunlightfoundation.com/clearspending/scorecard/>. See also "ClearSpending Released with New Data," by Kaitlin Divine (Feb. 14, 2013), available at <http://sunlightfoundation.com/blog/2013/02/04/clearspending-released-with-new-data/>.

¹⁹ We compared two datasets against each other. The first dataset is FAADS-PLUS (Federal Awards and Assistance Data System PLUS), which contains information about direct assistance and is available from USASpending.gov. The second dataset is the CFDA (Catalog of Federal Domestic Assistance), which are yearly program obligation estimates for all grants and loans. We measured the consistency between these two datasets. For more on methodology, see <http://sunlightfoundation.com/clearspending/methodology/>.

²⁰ 69.2% of reported funds failed because the numbers we cross-checked were inconsistent; 26% were incomplete; and 1.5% of obligations were not timely.

know that real progress will only come in response to congressional initiative.²¹ We hope that the legislation will speedily work its way through Congress.²²

Access to Congressionally Mandated Reports Act

Another transparency initiative championed on a bipartisan basis by this Committee is the ongoing effort to have all legally-mandated reports from federal agencies to Congress be made available online in one central location. The Access to Congressionally Mandated Reports Act was favorably reported by this committee and the Committee on House Administration, but time ran out before the House had an opportunity to vote on the measure in the 112th Congress.²³ With so much of the work done, we hope that Chairman Issa and Ranking Member Cummings will again spearhead the effort and speedily send the measure to the Senate, where a companion bill is waiting.²⁴

Federal Advisory Committee Act Amendments & Presidential Library Donation Reform Act

We also urge the Committee to speedily consider the Federal Advisory Committee Act Amendments bill and the Presidential Library Donation Reform Act.²⁵ Federal advisory committees play an important role in how agencies formulate rules, but significant loopholes have emerged in how they disclose their work to the public. Advisory committees shouldn't be a stealthy way for special interests to influence the political process.²⁶ The Presidential Library Donation Reform Act²⁷ would require presidential libraries to disclose their donors, which would provide valuable information on special interests whose donations put them in close proximity with (future) former presidents.

LEGISLATION THE COMMITTEE SHOULD EXPLORE

Presidential administrations are ephemeral, and (all too often) so is the will to be transparent. The White House has created several new transparency initiatives that should be made into government policy, such as the Open Government Directive, Data.gov, and FOIA reform.

²¹ See "Only Congressional Pressure Can Drive Real Federal Spending Transparency Reforms," by Daniel Schuman, Sunlight Foundation (Feb. 15, 2013), available at <http://sunlightfoundation.com/blog/2013/02/15/only-congressional-pressure-can-drive-real-federal-spending-transparency-reforms/>.

²² We also hope that the Committee will look at why many agencies are doing such a poor job meeting their current reporting obligations.

²³ See "'Access to Congressionally Mandated Reports Act' Advances to the House Floor," by Daniel Schuman, Sunlight Foundation (June 23, 2011), available at <http://sunlightfoundation.com/blog/2011/06/23/access-to-congressionally-mandated-reports-act-advances-to-the-house-floor/>.

²⁴ Senators Warner and Portman introduced the Senate version in the 112th Congress and are expected to do so again for the 113th.

²⁵ We also think highly of the Grant Reform and New Transparency Act (the GRANT Act), but have not delved deeply into the matter. See <http://sunlightfoundation.com/blog/2011/12/16/grant-transparency-good-duns-numbers-bad/>.

²⁶ See "Fixing Federal Advisory Committees," by Daniel Schuman, Sunlight Foundation (July 12, 2011), available at <http://sunlightfoundation.com/blog/2011/07/12/fixing-federal-advisory-committees/>.

²⁷ See "Two Transparency Bills Already On-Tap for New Congress," by Paul Blumenthal, Sunlight Foundation (Jan. 5, 2009), available at <http://sunlightfoundation.com/blog/2009/01/05/two-transparency-bills-already-on-tap-for-new-congress/>.

In addition, Committee oversight on issues where the executive branch has pre-existing transparency obligations, such as White House Visitor Logs, OIRA Lobbying Reports, and DOJ's OLC Opinions, would be salutary to government openness.

Open Government Directive

The Open Government Directive is a groundbreaking initiative led by the White House to make the federal government more open and accountable, and came out of extensive consultation with the public. With a tight timeframe, the OGD required agencies to publish 3 high value datasets, create and regularly update open government plans, proactively disseminate useful information using modern technologies, participate in a high level working group on transparency, reduce FOIA backlogs by 10% annually, and much more.²⁸

The results have been decidedly mixed, due in significant part to reticence by many agencies to comply.²⁹ The non-compliance is a reason to double-down, not back away. The goals and requirements of the Open Government Directive include a foundation for what is necessary to open up government, and agencies should not have the false sense that they can wait for the Obama Administration's transparency enthusiasm to wane or its focus to shift or the presidency to change hands. That's why Congressional action is necessary. Agencies should be under no illusion that they can avoid continually engaging the public, making and executing plans for openness, reducing their FOIA backlogs, publishing new data sets, and so on. The best parts of OGD should be codified into law.

Federal Transparency Websites Such As Data.gov

As part of the Administrations' openness efforts, it created a number of federal transparency websites, most notably Data.gov, which is a central clearinghouse where agencies post raw datasets. While it has its flaws, Data.gov contributes significantly to government openness.³⁰ The same is true for the IT Spending Dashboard, USASpending.gov, and many of the other initiatives funded through the E-Government Fund.³¹ However, the E-Government Fund is intended as a capital fund for start-up government transparency efforts, not mature programs. As many of these initiatives have matured and found their place serving important government purposes, they should be defined in law and given their own budget lines.

Freedom of Information Act

²⁸ See "Open Government Directive Timelines," by Daniel Schuman, Sunlight Foundation (Dec. 8, 2009), available at <http://sunlightfoundation.com/blog/2009/12/08/open-government-directive-timelines/>.

²⁹ See "Obama's Open Government Directive, Two Years On," by John Wonderlich, Sunlight Foundation (Dec. 7, 2011), available at <http://sunlightfoundation.com/blog/2011/12/07/obamas-open-government-directive-two-years-on/>; and the Sunlight Foundation's Open Government Implementation Tracker, available at http://www.opencongress.org/wiki/Open_Government_Directive_Implementation_Tracking.

³⁰ See "Data.gov Clarity," by John Wonderlich, Sunlight Foundation (April 4, 2011), available at <http://sunlightfoundation.com/blog/2011/04/14/data-gov-clarity/>.

³¹ See "GAO Progress Report for E-Gov Fund," by Daniel Schuman, Sunlight Foundation (Sept. 27, 2011), available at <http://sunlightfoundation.com/blog/2011/09/27/gao-looks-at-e-gov/>.

It's time to modernize FOIA. The Administration's directive placing a presumption in favor of disclosure should, with appropriate modifications, be enacted into law.³² The FOIA Online initiative, which allows the public to make online FOIA requests of agencies, search responses to other requests, and track agencies as they formulate a response, should be expanded to more agencies and placed on firmer financial footing.³³ In addition, documents that agencies publish to the public should be made available online, as is called for in the Public Online Information Act.³⁴ The Office of Government Information Services, better known as the federal FOIA Ombudsman, should be strengthened, including by giving it the ability to directly request its budget from Congress via a dedicated budget line item. Finally, and most importantly, real teeth must be put into measures that impose proactive disclosure, including requiring the federal government to identify the data it already holds.³⁵

White House Visitor Logs

The White House began releasing its visitor logs,³⁶ as part of an agreement to settle a lawsuit filed by Citizens for Responsibility and Ethics and Washington that sought the records, starting with records for the second half of September 2009.³⁷ (A separate lawsuit by Judicial Watch is ongoing.)³⁸ As my colleague John Wonderlich explained in testimony before the House Energy and Commerce Committee, "the visitor logs disclosure rules should be tightened, but real reform must also include updating lobbying disclosure laws."³⁹ The White House has significant discretion about which logs to release, and it is unclear how a future president would behave. There's also significant opportunity for avoiding disclosure, such as meetings at coffee shops across the street from the White House.⁴⁰ We believe the rules regarding disclosure of visitor

³² See "Memorandum for the Heads of Executive Departments and Agencies -- Subject: The Freedom of Information Act," The White House (Jan. 21, 2009), available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

³³ See the FOIA Online website at <https://foiaonline.regulations.gov/foia/action/public/home>. The British non-profit organization My Society's website *What Do They Know* likely is the inspiration for FOIA Online. More information available at <http://www.whatdotheyknow.com/>.

³⁴ See <http://sunlightfoundation.com/policy/poia/>.

³⁵ See "The Missing Open Data Policy," by John Wonderlich, Sunlight Foundation (March 22, 2012), available at <http://sunlightfoundation.com/blog/2012/03/22/the-missing-open-data-policy/>.

³⁶ See "White House Visitor Logs -- 25k Records Released for Late September," by Daniel Schuman, Sunlight Foundation (Dec. 30, 2009), available at <http://sunlightfoundation.com/blog/2009/12/30/white-house-visitor-logs-25k-records-released-for-late-september/>.

³⁷ See "CREW and Obama Administration Reach Historic Legal Settlement -- White House to Post Visitor Logs," CREW (Sep. 4, 2009), available at <http://www.citizensforethics.org/index.php/press/entry/crew-and-obama-administration-reach-historic-settlement-on-visitor-records/>.

³⁸ See "WH Selectively Releases More Visitor Logs," Judicial Watch (Sep. 4, 2012), available at <http://www.judicialwatch.org/blog/2012/09/wh-releases-more-visitor-logs-forced-by-jw-lawsuit/>.

³⁹ See "John Wonderlich Testimony Before the House Energy and Commerce Committee Regarding White House Visitor Logs," Sunlight Foundation (May 3, 2011), available at <http://sunlightfoundation.com/policy/documents/john-wonderlich-testimony-house-energy-and-commerce/>.

⁴⁰ See "White House meets lobbyists off campus," by Chris Frates, POLITICO (Feb. 24, 2011), available at <http://www.politico.com/news/stories/0211/50081.html>.

logs should be fleshed out and enacted into law. Of course, to truly track the exertion of influence by special interests, we need comprehensive lobbying reform.⁴¹

OIRA Lobbying

The Office of Information and Regulatory Affairs within OMB is responsible for reviewing all major rulemakings by executive branch agencies prior to promulgation. As such, it is a significant locus of lobbying activities. While there are executive-branch promulgated rules that are supposed to make lobbying activities transparent, as a practical matter the rules are evaded or ignored, according to reports by GAO, the Center for Progressive Reform, and the Center for Effective Government.⁴² While it is within the executive branch's power to fix this problem, it has failed to do so, and Congress should set these rules. We encourage the Committee to review whether the Administration is following its own rules and to formulate legislation that establishes a clear framework for disclosure.

Department of Justice Office of Legal Counsel Opinions

The opinions of the Department of Justice's Office of Legal Counsel constitute authoritative legal advice to the executive branch on questions central to the functioning of government. A 2010 Obama administration memo endorsed "the presumption that [OLC] should make significant opinions fully and promptly available to the public."⁴³ The Obama Administration's first nominee to head the OLC, along with 18 other former DOJ officials, went further in a 2006 article in which they declared that "OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure."⁴⁴

A Sunlight Foundation analysis revealed that the DOJ is still withholding 39% of the 509 opinions it issued between 1998 and March 2012.⁴⁵ We also determined that a list of opinion titles provided via FOIA request varied significantly from the list of opinions available on OLC's website.⁴⁶ These reports are essential to understanding executive branch behavior, but far too many of these reports are withheld from the public. Even for those reports that cannot be released in their entirety, their existence and subject matter should be identified publicly.⁴⁷ Rules

⁴¹ The Sunlight Foundation is a strong supporter of the proposed Lobbying Disclosure Enhancement Act, which would eliminate the 20% threshold to register as a lobbyist and enact other meaningful reforms. For more, see <http://sunlightfoundation.com/policy/lobbying/>.

⁴² See "Fix Federal Rulemaking Lobbying Transparency," by Daniel Schuman, Sunlight Foundation (Oct. 4, 2012), available at <http://sunlightfoundation.com/blog/2012/10/04/fix-federal-rulemaking-lobbying-transparency/>.

⁴³ See "Memorandum for Attorneys of the Office – Re: Best Practice for OLC Advice and Written Opinions," Office of Legal Counsel, Department of Justice (July 16, 2010), available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>.

⁴⁴ See "Guidelines for the President's Legal Advisors," the American Constitution Society (May 2006), available at http://www.acslaw.org/files/Microsoft%20Word%20-%2011_Johnsen_OLC.pdf.

⁴⁵ See "39% of Office of Legal Counsel Opinions Kept from the Public," by Daniel Schuman, Sunlight Foundation (Aug. 15, 2012), available at <http://sunlightfoundation.com/blog/2012/08/15/39-of-office-of-legal-counsel-opinions-kept-from-the-public/>.

⁴⁶ 21 opinions were available on the DOJ's website that were not identified in FOIA responses to public requests for a list of these documents. The DOJ did not publish on its website 24 reports that it identified in its FOIA response that we were able to locate using a Google search.

⁴⁷ Here are some sample reports: "Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions"; "Whether Proposals by Illinois and New York to Use the Internet and Out-Of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act Date

regarding when and how the reports are made available to Congress and to the public should be spelled out and enacted into law.

A BRIEF WORD ABOUT CONGRESS AND CRS

While this hearing focuses on executive branch transparency, I would be remiss if I did not mention an additional measure that this Committee, on its own, could implement right now to make government more transparent.⁴⁸ The Congressional Research Service regularly issues reports on matters of importance to national policymaking, including executive branch activities. These timely, authoritative reports help Congress and the public gain a deeper understanding of issues ranging from FOIA reform to the E-Government Fund to the Presidential Records Act.⁴⁹ Unfortunately, the reports are not systematically made available to the public, and the reports that are available to the public are either out-of-date or behind a pay wall.

While we and many others support a resolution that would make all reports available through the House Clerk,⁵⁰ we recommend that the Committee on Oversight and Government Reform publish CRS reports that pertain to matters under its jurisdiction on the committee website. Other legislative support agencies, such as GAO and CBO, already release their reports to the public, and CRS reports are often made available on an *ad hoc* basis by individual members of Congress and committees. The release of the reports in a timely fashion would help make sure that the public has up-to-date and complete access to scholarly discussions on executive branch activities.

CONCLUSION

Today's discussion of transparency in the federal bureaucracy, well-timed to coincide with Sunshine Week, provides a welcome opportunity to discuss how the government can become more open and accountable. While there are important transparency-related issues that my testimony does not explore in great depth, such as the important of disclosing the role of money in our political system as reflected in lobbying and campaign finance disclosure, or the great issues of national security,⁵¹ it is my hope that we've provided a solid foundation for discussing

Posted"; "Constitutionality of Legislation Extending the Term of the FBI Director"; "Whether Bills May Be Presented by Congress and Returned by the President by Electronic Means"; and "Authority to Use Military Force in Libya."

⁴⁸ I can't help but mention that Congress should provide Bulk Access to Legislative Data as well as publish its expenditures as spreadsheet files, but as you can see I'm doing so in this footnote. For more, see "House Convenes Second Public Meeting on Legislative Bulk Data," by Daniel Schuman, Sunlight Foundation (Feb. 14, 2013), available at <http://sunlightfoundation.com/blog/2013/02/14/house-convenes-second-public-meeting-on-legislative-bulk-data/>; and "Will the House's Leg Spending Bill Match Its Transparency Priorities?" by Daniel Schuman, Sunlight Foundation (May 24, 2012), available at <http://sunlightfoundation.com/blog/tag/House-Appropriations-Committee/>.

⁴⁹ See "The Freedom of Information Act and Nondisclosure Provisions in Other Federal Laws," by Gina Stevens, Congressional Research Service (Sep. 24, 2010), available at <http://www.fas.org/sgp/crs/secrecy/R41406.pdf>; "Reauthorization of the E-Government Act: A Brief Overview," by Jeffrey W. Seifert, Congressional Research Service (May 14, 2008), available at <http://www.fas.org/sgp/crs/secrecy/RL34492.pdf>; "The Presidential Records Act: Background and Recent Issues for Congress," by Wendy Ginsberg, Congressional Research Service (Nov. 15, 2012), available at <http://www.fas.org/sgp/crs/secrecy/R40238.pdf>.

⁵⁰ See "It's Time to Give the Public Access to CRS Reports," by Matt Rumsey, Sunlight Foundation (March 7, 2013), available at <http://sunlightfoundation.com/blog/2013/03/07/its-time-to-give-the-public-access-to-crs-reports/>.

⁵¹ Or making the legislative or judicial branches more transparent, for that matter.

many important issues. More information about federal transparency issues can be found on the Sunlight Foundation's website.⁵²

James Madison, whose birthday anchors Sunshine Week, said "a popular government without popular information or the means of acquiring it, is but a prologue to a farce, or a tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

He was surely right. Thank you for the opportunity to appear before you today and for your continued attention to these issues. I am looking forward to our discussion.

⁵² See "Sunlight Foundation Policy Agenda," available at <http://sunlightfoundation.com/policy/agenda/>.

Mr. MICA. [Presiding.] Thank you, Mr. Schuman.

We will now hear from the last witness, Celia Wexler, the Senior Washington Representative for the Union of Concerned Scientists. Welcome, and you are recognized.

STATEMENT OF CELIA VIGGO WEXLER

Ms. WEXLER. Representative Mica, Ranking Member Cummings, and members of the committee, thank you for inviting me to testify today and for holding this hearing during Sunshine Week.

Our Union of Concerned Scientists has more than 400,000 members and supporters throughout the Country. This nonpartisan, nonprofit puts rigorous independent science to work to solve our planet's most pressing problems. Our new Center for Science and Democracy is committed to promoting science and fact-based evidence to inform public policy decisions and enrich our democratic discourse. FACA reform reflects our longstanding commitment to improve scientific integrity at federal agencies.

The Federal Advisory Committee Act is a lesser known, but valuable, tool in ensuring a transparent and accountable Government. It requires that when federal policymakers seek advice from outside experts and stakeholders, that the public is informed and has the opportunity to participate.

Congress enacted FACA in 1972, after hearings exposed a system where more than 2,000 advisory Groups were offering guidance to federal officials in secret. In 1971, Senator Lee Metcalf warned that this secret fifth arm of Government threatened democracy. Information is the important commodity in this capital, Metcalf said. He warned about the influence of special interest groups who are not subject to rebuttal because opposing interests do not know about the meetings and could not get in the door if they did.

The point of FACA was to change this corrupt system to restore to the public what Metcalf termed the two fundamentals of a democracy: disclosure and counsel; the rights of people to find out what is going on and, if they want, to do something about it. FACA did open up the system and allow more scrutiny, but the law needs to be updated and strengthened. It has been weakened by judicial decisions that have created loopholes, making it easy for agencies in executive branch to evade the rules and meet with outside groups in secret. And my written testimony goes into more detail about that.

Too many FACA panelists also are evading conflict of interest groups. Experts with financial ties to the very companies that will be affected by a panel's recommendations often exert considerable influence on how agencies address vital issues like the safety of our drugs or the quality of our environment.

This committee has been a pioneer in bipartisan FACA reform, and in the 112th Congress it unanimously approved H.R. 3124, the FACA Amendments Act of 2011. And, as you know, this bill had substantive reforms that we heartily endorse and we urge you to build on the reforms that that legislation proposed.

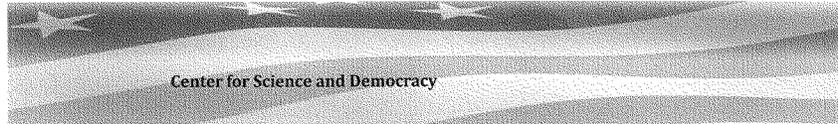
And we would hope that this committee will approve an even stronger FACA bill, one that will limit the number of conflicted experts on scientific and technical panels. We also urge you to begin the process to build a FACA for the 21st century, requiring the

General Services Administration to help agencies use new technology to Webcast meetings; experiment with virtual meetings, which could reduce travel expenses; expand the pool of experts; and increase public participation.

Like whistleblower protection reform, FACA reform has been discussed for years, but under your leadership, last Congress, the strongly bipartisan Whistleblower Protection Enhancement Act became law. We believe this committee can reach another transparency and accountability milestone this Congress with the enactment of a significant FACA reform law.

We look forward to working with you on this crucial reform legislation and believe that under your leadership the prospects for bicameral, bipartisan success are bright. Thank you, and I look forward to your questions.

[Prepared statement of Ms. Wexler follows:]



Center for Science and Democracy

Written Testimony of Celia Viggo Wexler, Senior
 Washington Representative,
 Center for Science and Democracy at the Union of Concerned Scientists
 Before the House Oversight and Government Reform Committee
 March 13, 2013

Chairman Issa, Ranking Member Cummings and members of the committee. Thank you for recognizing the importance of a more transparent government by holding this hearing during Sunshine Week. With more than 400,000 members and supporters throughout the country, the nonpartisan nonprofit Union of Concerned Scientists puts rigorous, independent science to work to solve our planet's most pressing problems. Our new Center for Science and Democracy is committed to promoting science and fact-based evidence to inform public policy decisions and enrich our democratic discourse. Thank you for giving me this opportunity to speak in support of this committee's pioneering efforts to reform the Federal Advisory Committee Act, or FACA.



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Federal advisory panels are an established part of government. Annually, about 1,000 panels help federal agencies address challenges that touch on issues as diverse as the safety of prescription drugs, the quality of our air, hospital outpatient fees, animal health and biomass research. In 2012, expenditures on federal advisory panels totaled near \$360 million, and involved more than 70,000 participants.ⁱ The advice such outside experts provide to federal agencies can far exceed their cost to the taxpayer.

But that advice should not be given in secret, nor should it be rendered by panelists who have undisclosed financial ties to entities that would directly benefit from a committee's recommendations. Indeed, it was concern about the lack of transparency in the dispensing of advice to the federal government that created the law to begin with. More than 40 years ago, Congress held a number of hearings that uncovered the existence of what some members termed a "fifth arm" of government that operated with very little scrutiny. Congress didn't even know how many advisory panels existed, although they assumed there were more than 2,000. Advisory panels routinely were held without any advance notice and were not open to the public. There was a concern that many advisory panels largely consisted of corporate insiders more than happy to influence public policy with nobody the wiser.ⁱⁱ

Congress justifiably felt that advisory panels had a place in government, an important one, but that the way they were operating was not democratic. In 1971, Sen. Lee Metcalf (D-MT) held a series of hearings on the federal advisory committee process. In his opening statement, he observed: "What we are dealing with in these hearings goes to the bedrock of government decision making. Information is the important commodity in this capital.

Those who get information to policymakers, or get information for them, can benefit their cause, whatever it may be. ... And decision makers who get information from special interest groups who are not subject to rebuttal because opposing interests do not know about meetings – and could not get in the door if they did – may not make tempered judgments.

“We are looking at two fundamentals,” Metcalf continued, “disclosure and counsel, the rights of people to find out what is going on, and if they want, to do something about it.”ⁱⁱⁱ That’s still what FACA should be about – these two bedrocks of democracy – letting people know what their government is doing, and offering them a way to participate.

Over the years, however, the goals of FACA have been eroded, in part by flawed agency practices and also by unwise judicial decisions that created loopholes that allow advisory panel work to be done in secret. We urge you to:

- Address these loopholes and any unforeseen weaknesses in the original law;
- Ensure that FACA panels are truly independent and free of special- interest influence;
- Make their work fully transparent, and
- Create a foundation for FACA to flourish in the 21st century.

In its work in the 113th Congress, this Committee can wisely build on a foundation of legislative proposals, the most recent, The Federal Advisory Committee Act Amendments Of 2011, HR 3124, approved unanimously by House Oversight and Government Reform members. HR 3124 contains many of the reforms my testimony will touch on. This Committee can also look to the work of the Office of Science and Technology Policy and its

Scientific Integrity Memorandum, issued in 2010. The Memorandum specifically addresses the use of federal advisory committees to ensure the greatest scientific integrity.

Righting Judicial Wrongs

This Committee was a leader in reforms to address court-created gaps in our federal whistleblower law. It must assume the same role in addressing loopholes in FACA created by unwise judicial decisions. The loophole that has the most likelihood of causing mischief is the subcommittee loophole. Currently, a FACA panel may form subgroups to achieve certain tasks and then report back to the full panel, where a public meeting and a vote would take place. There is nothing wrong with forming subcommittees to speed along a panel's work. What is wrong is excluding them from the law's transparency requirements. Subcommittees should be subject to the same public scrutiny as full advisory panels for the same reason: the public ought to be able to know the source of the advice their government relies on, and how that advice influences public policy decisions.

This is crucial because we know that advisory panels strive for consensus and often can be greatly influenced by the one or two members who may be most engaged and informed on the issue. Equally troubling, the subcommittee loophole makes it easy for subcommittees to avoid hearing alternative views at the time when the discussion of issues is at its formative stage, because there has been no public notice of a meeting, and no opportunity to speak or submit written comments.

In late 2009, for example, professionals working on health information technology issues complained that the Department of Health and Human Services appeared to be using the subcommittee loophole to hold secret meetings to discuss health IT policy under the American Recovery and Reinvestment Act. One IT expert was so frustrated by the lack of

transparency that he filed a Freedom of Information Act request to get access to the meeting minutes and agenda.^{iv}

When government elects to do its work in secrecy, it not only weakens the public's faith in its policies, it also fails to benefit from the views of citizens whose skills and expertise may enrich the process.

We strongly urge that the contractor loophole be closed for very similar reasons. The fact that an agency has asked a contractor to do some of the work of forming a federal advisory panel should not change the rules of how that panel operates. As long as a contractor-formed panel's aim is to provide recommendations to a federal agency, it is doing the public's business, and ought to conduct that business in public.

We also urge you to close the loophole that permits federal officials to secretly and routinely seek the guidance of outsiders, as long as these non-federal participants are not voting members of an advisory group.^v The public has a right to know not only who has been invited to be at the table, but those who were left out. The Cheney energy task force, for example, only sought the advice of energy companies. It failed to consult in any meaningful way with environmental groups.^{vi}

Addressing Bad Agency Practices

Federal advisory panels consist of experts, who are called Special Government Employees (SGEs), and representatives, selected to speak for a particular industry or stakeholder group. FACA requires that "the advice and recommendations of the advisory committee not be inappropriately influenced by the appointing authority or by any special interest." To that end, the Ethics in Government Act requires SGEs to file financial disclosure forms to identify any financial relationship that may constitute a conflict of

interest. Essentially, a conflict or potential conflict occurs when an SGE or his immediate family has financial ties - through investments, employment, job offers, grants or consulting fees - to entities that will be affected by the advice the panel will give. The Ethics in Government Act requires that such conflicts be disclosed to the appropriate agency official. The agency may decide that the conflict is too great, and the SGE must not participate in a particular meeting or on a particular panel, that the extent of the financial relationship is too remote or insignificant to affect the SGE's participation, or that the conflict or potential conflict is outweighed by the benefit of the expert's participation. Agencies issue waivers to permit conflicted experts to participate. Members who are designated representatives instead of SGEs are not subject to these ethics rules.

While these conflict rules are not terribly onerous, agencies often have found ways to evade them. In 2004, the Government Accountability Office examined advisory panels at the Department of Energy, the Department of the Interior, and the Department of Agriculture that consisted almost entirely of representatives, even when their expert advice was being sought, and they should have more properly been designated SGEs. The GAO again raised concerns about this practice in 2008, when it came before this Committee's subcommittee on Information Policy, Census and the National Archives. GAO director of natural resources and environment Robin Nazzaro testified that, "in light of indications that some agencies may continue to use representative appointments inappropriately," it would be prudent for Congress to address this problem in statute.^{vii} As of 2012, more than 11,000 individuals served on advisory panels as representatives, while 22,000 members were designated SGEs.^{viii} This ratio may still demonstrate an overuse of representative classification that a FACA reform law can address.

Curbing Conflicts of Interest

Agencies for the most part have not done a good job policing advisory panels for undue special-interest influence. At the Food and Drug Administration, recommendations made by federal advisory panels can mean millions of dollars in revenue for drug companies. Our research, and that of our colleagues working on public health issues, has uncovered many instances where panels included members with significant financial ties to drug makers whose bottom lines would be affected by the panels' recommendations. These conflicts are all the more pernicious because they often emerge only in media accounts. Panelists often fail to disclose a potential conflict. Sometimes, the FDA decides that the conflict is not serious enough to warrant a waiver or a recusal.

Conflicts matter. In some cases, such as votes on the painkillers Bextra and Vioxx^{ix} and the contraceptive Yaz,^x conflicted experts made a difference in the outcome. But more common, and just as concerning, are the situations where conflicted experts are able to influence other panelists precisely because of their investment in the issue. Panels operate in ways similar to juries, and that means that committee members with the strongest views are able to influence the process in ways far beyond their votes.^{xi} Our research into past FACA panels also has uncovered significant conflicts among experts serving on panels at the Centers for Disease Control, the National Institutes of Health, and the USDA.

How can we reduce conflicts? Certainly one way is to enlarge the pool of qualified applicants for advisory panel slots, and to engage the public in vetting these candidates.

The EPA's Science Advisory Board does just that. It's also made the absence of a conflict of interest a major selection criterion.

While agencies often complain that the pool of experts is too small to avoid conflicts,

that has not been our experience. At the Union of Concerned Scientists, we invited members of our science network to apply for vacancies at FDA advisory panels. Within weeks, we received the CVs of 61 qualified candidates without conflicts. Those candidates alone would have filled more than half the 100 vacancies that were then pending on FDA advisory panels.^{xii}

We recommend that Congress go much farther, and, at least for scientific or technical committees, ban all experts from FACA panels who have significant financial ties to businesses that will be affected by the panel's recommendations. Congress has already demonstrated its concerns about conflicts. The FACA Amendments Act of 1997 states that no federal agency may receive advice from the National Academy of Sciences or the National Academy of Public Administration unless certain conflict of interest and other disclosure requirements are met. The law requires that NAS and NAPA publicly disclose nominees and seek public comments on nominees' qualifications. The law directs NAS and NAPA to retain conflicted experts only when the participation of such an expert is "unavoidable."^{xiii} This practice would not mean a loss of valuable expertise. A panel may ask any expert, no matter how conflicted, to make a presentation, and respond to questions. Conflicted experts, however, would not be permitted to engage in panel discussions and votes.

FACA for the Future

Also important for FACA reform is ensuring the highest degree of public participation and transparency in the work of advisory panels. At the very least, advisory panels must offer the public detailed minutes of meetings, but full transcripts are far preferable. All information about panels – the numbers of SGEs and representatives, and the reasons for

their designations, the panel's charter, biographical information on panel members, waivers to conflicted members and the reasons for the waiver – should be accessible on an agency website. Panel meeting materials should also be part of the website's public record.

These common-sense openness reforms are reiterated in the Scientific Integrity Memorandum issued by Dr. John Holdren, director of the Office of Science and Technology policy, in 2010. The Memorandum recommends that agencies recruit panel members as widely and transparently as possible, and solicit nominations from the public. Public information about panelists and their qualifications should be part of the public record. When an agency must issue a conflict of interest waiver that too, should be publicly disclosed.

But we should aim for more comprehensive reforms. We would urge this Committee to explore innovative ways to use new technology to make advisory panels more inclusive. Holding panel meetings remotely should be encouraged. It would save the government travel expense and per diems, and would permit more experts to participate, hopefully enlarging the pool of experts without financial ties to companies affected by panel recommendations. It would also make it possible for an interested and engaged citizen in Wyoming or Texas, Ohio or Florida to log on to a secure website, listen to the meeting, and ideally be able to participate.

It is the 21st century. We would hope that the General Services Administration could provide guidance to agencies about virtual meetings, and how to webcast their meetings inexpensively, or at least provide audio/video recordings of meetings. The disability community should also be consulted so that these participatory experiments do not exclude them.

We look forward to working with you to enact into law a FACA reform bill that includes all the reforms of HR 3124, but that also makes other significant advances in enhancing the transparency and accountability of federal advisory panels. With new leadership at the Senate Homeland Security and Governmental Affairs Committee, we believe the prospects for a bipartisan, bicameral reform bill have never been brighter.

ⁱ General Services Administration, "What is the Composition of Committees?", www.gsa.gov/portal/content/249049.

ⁱⁱ Barbara Tuerkheimer, "Veto by Neglect: The Federal Advisory Committee Act," Center for Study of Responsive Law, based on a speech given Feb 6, 1975.

ⁱⁱⁱ The Federal Advisory Committee Act, House Report to Accompany, S. 3529, 9 Sept. 1972, 54.

^{iv} Joseph Coon, "Gov't. groups keep quiet on closed-door meetings," *ModernHealthcare.com*, 23 Dec. 2009.

<http://www.modernhealthcare.com/article/20091223/NEWS/312239986#>

^v Explanation of loopholes relies on the Testimony of Sidney A. Shapiro before the House Oversight and Government Reform Committee Subcommittee on Information Policy, Census and National Archives, Hearing on the Federal Advisory Committee Act, 2 Apr. 2008.

^{vi} Joseph Kahn, "Cheney Refuses to Release Energy Task Force Records," *New York Times*, 4 Aug. 2001.

<http://www.nytimes.com/2001/08/04/us/cheney-refuses-to-release-energy-task-force-records.html>

^{vii} Robin M. Nazzaro, Testimony before the Subcommittee on Information Policy, Census and National Archives,

Committee on Oversight and Government Reform, on The Federal Advisory Committee Act, 2 Apr. 2008

^{viii} General Services Administration, "What is the Composition of Committees?" www.gsa.gov/portal/content/249049.

^{ix} Gardiner Harris and Alex Berenson, "10 Voters on Panel Backing Pain Pills Had Industry Ties," *New York Times*, 25 Feb. 2005.

http://www.nytimes.com/2005/02/25/politics/25fda.html?_r=0&pagewanted=print&position=

^x Jeanne Lenzer and Keith Epstein, "The Yaz Men: Members of FDA panel reviewing the risks of popular Bayer contraceptive had industry ties," *Washington Monthly*, 9 Jan. 2012.

http://www.washingtonmonthly.com/ten-miles-square/2012/01/the_yaz_men_members_of_fda_pan034651.php

^{xi} Diana M. Zuckerman, "FDA Advisory Committees: Does Approval Mean Safety?" A Report from National Research Center for Woman & Families, September 2006.

^{xii} Michael Halpern, "We Found Independent Experts, The FDA Can Too," *The Equation Blog*, Union of Concerned Scientists, 18 Jun. 2012. <http://blog.ucsusa.org/we-found->

[independent-expertsthe-fda-can-too/](#)

^{xiii} “Improving the Use of Science in Regulatory Decision-Making,” *A Report from the Research Integrity Roundtable*, The Keystone Center, 5 Jul. 2012.

Chairman ISSA. [Presiding.] Thank you.

I recognize myself for a first round of questioning, and I will start with Ms. Wexler.

FACA reform is something that we intend on marking up in the very short near future. One of the challenges I am facing, and it is right in your testimony, is that historically you try to limit conflicts, but as the pool of people in many of these areas become smaller and smaller, and I don't want to use the word revolving door because sometimes people misunderstand that.

Getting people into government who have real world experience in things that hopefully are not always just funded by government in the way of science, and then getting them back into the real world and then still being able to use their expertise. Science is a good example, but so are our former top officers, military experts and so on.

As we mark the bill up, should we have a bias toward limiting conflicts or disclosing conflicts? Because I will tell you I personally think that, in this day and age, it may be more a matter of making sure there are no hidden agendas possible as the better way to put together people who come in with a life of experience, but undoubtedly do have economic interests, or sometimes just pride of historic authorship? How do you feel about that?

Ms. WEXLER. Well, I think disclosure is the floor. We have to have disclosure. We have to know about these ties. We also feel that agencies have not basically done a very good job to expand the pool.

Chairman ISSA. The panel balance, if you will.

Ms. WEXLER. Exactly, and to really go out of their way to recruit non-conflicted experts. I can only tell you our experience at the FDA. The FDA has claimed that it is very difficult sometimes for them to fill panels with non-conflicted experts. We sent an email to our scientists. We have about 20,000 scientists in our network.

And in the course of a couple of weeks we got 61 applicants who were qualified to serve on FDA panels. They sent their curriculum vitae. They were not people who walked off the street; they had absolute essential qualifications. We screened those folks; we sent them to FDA; we heard not a word since.

So I think there is this necessity to recruit from a larger pool.

I also think that nothing in FACA would prevent presentations by those with the kind of real world experience you talk about. Presentations, answering questions, not necessarily being around for the discussion and the debate if the financial ties are significant. But I do think that we shouldn't give up on either goal.

Chairman ISSA. Let me go to Mr. Harper along that line. You mentioned sort of Wikiing things in a greater way. As you know, this committee used the Madison Project to try to do just that, to open up a dialogue on legislation. Ms. Wexler's comments, do those also resonate that when agencies, not just Web casts, their actual and store their actual hearings and forums, should we in fact view all these proposals and all of the science presented as the starting point for comment by, if you will, the professional world, people who Ms. Wexler just mentioned, 61 people who were not included but who had the CV necessary to be meaningfully part of the mark-up?

Mr. HARPER. Yes, I think the ability of the public to contribute to discussion is probably unrecognized, or not well recognized in Washington, and it is natural that a group of agency officials who are trying to put something together, they have a limited sphere of knowledge about who their experts would be.

Chairman ISSA. The usual list of suspects, if you will.

Mr. HARPER. The usual suspects. So reaching out more broadly for FACA, for Federal Advisory Committee membership is a good thing to do, and then opening the activities of FACA is quite welcome.

I served on one, the DHS privacy committee, and I was surprised, I think many of the members were surprised when we were doing email discussion that constituted a quorum, or would have constituted a quorum, and the members of the committee said let's just publish that. Because if you have a quorum you need to publish, right?

And staff were essentially, well, no, we need to have less than a quorum so we don't have to publish. The membership of the committee was willing to put it out there for the public to consume and observe, and the agency staff, maybe because that was a whole new idea, weren't willing to do that. So sharing more broadly I think is always a good thing.

Chairman ISSA. Ms. Canterbury, you talked about the need for a new model. I was just at South by Southwest last weekend. Everybody there is a new model person. Almost everybody there is under 30 and they all see the things that we are struggling with, things like the DATA Act, as, my goodness, why isn't that already a given? Why is it it is hard? Why would anyone think of having data that is published in PDF so that it is inherently unreadable by machines, as Mr. Harper said? Do you see it the same way, that we shouldn't even any longer accept the concept that this is hard?

Ms. CANTERBURY. Well, I think, unfortunately, it is because of the way that the Government acquires technology, because of in part investments and systems. So, for example, USASpending.gov, we spent quite a lot of taxpayer dollars trying to make that portal work for showing how the Government spends money, and it doesn't, and it was premised on antiquated systems.

So your idea in the DATA Act of starting fresh with a better concept, I think we need to educate members and we need to educate the Government that these things can be done now at economies of scale.

Chairman ISSA. My time has expired, but would it surprise any of you to know that under the stimulus \$800 billion or so spending, some States made a determination to create, if you will, a system in their accounting so that all of their reporting was essentially simply opening up to the Federal Government those portals necessary to see the tag metadata and pull it up. In other words, they did nothing but set their system up to be readable and, as a result, their reporting requirement went to zero. Does that surprise any of you that that kind of sunlight, if you will, was possible with those States that chose to do it?

[No audible response.]

Chairman ISSA. It doesn't me either, but we plan on having some of those States in here so that we can begin thinking in those terms.

I now recognize the ranking member for his questions.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I want to thank the witnesses for their testimony.

Ms. Canterbury, the FOIA Oversight Implementation Act that Chairman Issa and I released yesterday would codify federal law in two very important revisions: it would create a legal presumption in favor of disclosure in response to FOIA requests. So let me ask you this. That was the standard under Clinton, is that right?

Ms. CANTERBURY. That is correct.

Mr. CUMMINGS. And then it was reversed under Bush, is that right?

Ms. CANTERBURY. Yes, sir.

Mr. CUMMINGS. And so now we are going back to that. And I guess you would prefer that, is that right?

Ms. CANTERBURY. President Obama, as you mentioned, ordered a presumption of openness, and that was very welcome in our community. We would very much like to see that a part of the permanent law so that it is not a political decision or a decision based on the presidency, but the Congress can decide.

Mr. CUMMINGS. And how did that work under Clinton? I am just curious. That standard.

Ms. CANTERBURY. I think it was a very good standard and I think it was a good start to the kind of reform that we are talking about today. But the bill that you propose takes some next steps that are really necessary to modernize FOIA.

Mr. CUMMINGS. Another thing that our bill does is to require records to be disclosed under FOIA unless agencies can demonstrate foreseeable harm. In 2009, Attorney General Holder issued a memo that rescinded the Bush administration policy. The Bush administration policy was for the Justice Department to defend agency decisions to withhold records "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records," is that right?

Ms. CANTERBURY. That is right, and as it should be, sir.

Mr. CUMMINGS. And in 2009 Attorney General Holder raised the bar, instructed agencies that the Department will defend FOIA denials only if agencies reasonably foresee that disclosure would harm an interest protected by one of the statutory exemptions or disclosure is prohibited by law, is that correct?

Ms. CANTERBURY. Yes, sir.

Mr. CUMMINGS. Ms. Canterbury, you said in your testimony that you agree with adding these provisions into the text of the FOIA law. Let me ask you this. If agencies are already required to do this under these administrative requirements, why is it important for Congress to put these provisions in the actual FOIA statute?

Ms. CANTERBURY. Well, I would say that there is implementation and there is enforcement of the President's directive, which we have discussed a bit, the challenges and some of the drawbacks of not having an entity that actually does the enforcement, that has independence to pursue the agencies and ensure that they are pro-

mulgating a presumption of openness and using the foreseeable harm standard.

So your bill will begin to strengthen the Office of Government Information Services in a way that could provide added independence, so we welcome that, of course. But also the difference between our experience with FOIA when there was no presumption of openness under the Bush administration, it was a more secretive government. It was much more difficult to get FOIA requests. So there has been a shift that is demonstrable, that is important; it is just that it hasn't been a shift as large as we might have liked.

Mr. CUMMINGS. In other words, in the words of the chairman, we can do better.

Ms. CANTERBURY. Yes. We should.

Mr. CUMMINGS. Although I think he kind of took those words from me.

[Laughter.]

Mr. CUMMINGS. That just hit me. It sounds familiar.

In your opinion, will any of these provisions to the FOIA law change the way the Department of Justice is currently implementing these standards?

Ms. CANTERBURY. Would your bill do that?

Mr. CUMMINGS. Yes.

Ms. CANTERBURY. I think so. I mean, I think certainly mandating that the FOIA regulations be updated, finally, will ensure that we finally see a change in that respect.

Mr. CUMMINGS. Now, do any of the other witnesses have an opinion about whether these standards should be put into the FOIA law? Yes, Mr. Schuman.

Mr. SCHUMAN. They certainly should. There was just an Associated Press story yesterday which looked at implementation, APS number of national security and other related questions, and they simply weren't getting answers. And what we have seen in other contexts is that oftentimes agencies simply don't get the memo; they, for whatever reason, don't hear what the administration is saying. And if you put it in the law, well, they may not get the memo, but they certainly can read the U.S. code.

Mr. CUMMINGS. Ms. Wexler? I saw you shaking your head.

Ms. WEXLER. Yes, I agree entirely, and it is the same thing. Agency culture always kind of pushes back against transparency. And as Chairman Issa talked about, regardless of the administration that you are in, regardless of the political party, this wanting to be secret is a systemic problem.

Mr. CUMMINGS. Mr. Harper?

Mr. HARPER. Being a non-FOIA expert, I will just adopt the opinions of my colleagues.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Chairman ISSA. Would the gentleman yield for a second?

Mr. CUMMINGS. Of course.

Chairman ISSA. Would all of you say that it is fair that what we are really doing with the ranking member's bill is making a situation in which we are codifying the assumption that if you want to know, it is your right to know, rather than, prior to this President, if you wanted to know, you had to say why you wanted to know,

that that would be the most significant permanent change by codifying President Obama's changes?

For those who are familiar, that is pretty much what we are really doing with the bill, is making permanent that assumption that it is yours unless you can demonstrate why not, rather than, in the past, you had to sort of say why you wanted to know something that you didn't yet know.

Ms. CANTERBURY. It shifts the burden to the agency to show that there is an exemption and there is an interest in withholding under that exemption.

Mr. CUMMINGS. I want to thank you very much.

Chairman ISSA. Thank you, Mr. Ranking Member.

We now go to the gentleman from Texas, who was here at the very start, Mr. Farenthold.

Mr. FARENTHOLD. Thank you very much, Mr. Chairman. I just had a couple of quick questions.

And just because I am a little bit of a techno geek, I will start with you, Mr. Harper. One of the Government's big success stories, I guess was founding the Internet, and it was done through a series of collaborations, RFC process where experts got together and came up with the standard that created the Internet today. Your push for machine readable data transparency, are we going to be able to structure that in a way people aren't going to be able to hide behind multiple legal entities and embedded entities, and is the Internet model of kind of going out and collaboratively coming up with a set of standards, would that be the way to do it, or do you think the Government or some outside organization could do those by themselves?

Mr. HARPER. Well, obviously, data structure is at a very different level than TCPIP, the basic language of the Internet.

Mr. FARENTHOLD. Right.

Mr. HARPER. And there is actually just a lot of heavy lifting. You identify corporate entities as being a challenge, and it is a genuine challenge. Who are the recipients of outlays? Well, many corporations have multiple subunits and they use different identifiers and so on and so forth, but we can at least get to where we use an open identifier system for the recipients of outlays, and that is an important goal for many of my transparency colleagues.

Where I talk about identifying the agencies, bureaus, programs, and projects, they are as interested, more interested in the entities that are receiving the outlays, so they can tell stories about the recipients and how they affect the political process that might enhance their transparency.

Mr. FARENTHOLD. And you envision, perhaps, tying this into FEC donor data and the whole nine yards?

Mr. HARPER. Yes. I think of all the different sets of data as essentially tiles, and you want the tiles to sit adjacent to one another. So when you see that an agency or a particular program or project is involved, you want to know where the outlays went; you want to know who received the money; you also want to know what kind of campaign donations they gave so that there can be transparency in the relationship among spending and campaign finance. That is an important goal.

Mr. FARENTHOLD. And you think a lot of that can be automated if we can get the data in a machine readable format?

Mr. HARPER. I do.

Mr. FARENTHOLD. All right, great.

Ms. Canterbury, let's go over to you a little bit and talk about I am going to call it the culture of secretism that is in the Government. I mean, several of our witnesses have spoke about that. Is the DOJ part of the problem in that their enforcement mechanism for it is different? I guess, from Texas, I am used to something different. Our open records and open meetings act, the attorney general is pretty aggressive about enforcing that and we lean towards disclosure.

But when you get to the federal level, the amount of delays that we are able to, the agencies and then through the whole process, do you see any way we can change the culture? Specifically, the DOJ, particularly under Mr. Holder, this committee has struggled to get information out of him. I can only imagine what the public is having to go through.

Ms. CANTERBURY. Yes, DOJ is a big part of the problem. I don't think that it is specific to this administration in that, as I mentioned in my testimony, there is a true conflict of mission there when you have the agency defending in court the other agency's right to withhold under FOIA, they will have a defensive posture, and you can see that defensive posture in their own rulemaking.

So while they haven't updated their regulations in a very long time and, again, not leading in that respect on the presumption of openness, but when they proposed rules, we were really shocked because of the defensive posture in their own rules, the ways in which they would make it harder for requesters to get information and the way that they attempted to even make official a policy to lie to requesters in circumstances where they had investigative information that could not be revealed. So I think that there are some real problems with DOJ and, again, I think that one of the ways to deal with that would be go give an independent entity more authority to enforce FOIA.

Mr. FARENTHOLD. I remain concerned of growing government, so that is my issue, that we create another agency, another agency, and pretty soon you are talking real money.

Finally, I am a supporter of the chairman and ranking member, support of the DATA Act. I am with them on that, but I want to ask you, as experts in the field, you all have looked at that. Are we missing anything obvious in that? Is there something, as it comes up, we need to be talking about? Are there any gotchas or, wow, if we didn't spend any more money, we could do this? Does anybody have any suggestion for improving it? Mr. Schuman.

Mr. SCHUMAN. If anything, the DATA Act solves some of the problems that you were mentioning before. For example, it would deal with the legal entity identifier problem, so you actually know who you are talking with. The DATA Act doesn't just have applicability for federal spending transparency, it has applicability for federal transparency at large.

Mr. FARENTHOLD. Okay.

Ms. CANTERBURY. I would say the House version of the DATA Act is extremely comprehensive and I think hits the primary re-

forms that we would like to see. There are a handful that I cite in my written testimony, they are bulleted, and those are the things that I hope will, at a minimum, emerge from whatever compromise is necessary with the Senate.

Mr. FARENTHOLD. All right. Well, thank you all very much. I see I have gone a little bit over my time. I would like to apologize and yield back.

Chairman ISSA. No problem.

And just before I go to Ms. Duckworth, the good news is that the Senate now is seeing the advantages of recipient reporting, so it is likely that the final passage would be a little closer to what went out of the House last time, or at least that is what we are discussing.

Now we recognize the patient gentlelady from Illinois, Ms. Duckworth.

Ms. DUCKWORTH. Thank you, Mr. Chairman.

Ms. Canterbury, the Open Government Directive instructed agencies with large backlogs of FOIA requests to reduce those backlogs by 10 percent each year. Yet, only 3 out of the 11 agencies with more than 500 backlog requests met that goal in 2012 and nearly 60,000 backlog requests remain in these 11 agencies, again, falling short of the 10 percent goal. Why do you think agencies are struggling to reduce their backlogs?

Ms. CANTERBURY. Well, I think some of the problems are bureaucratic and systems oriented, so there are some agencies that have really taken initiative, like at DHS, where they have prioritized streamlining their practices so that they have a system where they can prioritize requests coming in. So I think that that can work when there is a focus by the agency, but it takes leadership.

Ms. DUCKWORTH. You also mentioned the importance of watchdogs and for those offices within the Government that have watchdog responsibilities to receive adequate funding. I would be interested to hear your opinion about the expected impact of the sequestration on government transparency, especially with the capability of the watchdogs to do their jobs if they are going to be cut.

Ms. CANTERBURY. I would like to say catastrophic, but I hope not, because I hope this Congress is going to deal with the need to address government spending in a different way. So I hope that those aren't permanent impacts. But our inspectors general, the Office of Special Counsel, both of those watchdog entities have received a large mandate to do more oversight and accountability work, in particular on whistleblower protections.

So the very excellent legislation that the ranking member and the chairman advanced last year to protect federal workers means that the Office of Special Counsel has a lot more work coming its way and no additional funding for that work, and yet they have shown, under their new leadership with Special Counsel Lerner, that they are doing extremely effective work for the taxpayers.

Also, the inspectors general now have responsibilities for the next four years to protect contractor and grantee whistleblowers who come forward, and we think this is going to do a huge amount to increase accountability in contracting and for grants. But, again, they receive no additional funding for that, although they did

under the Recovery Act. It is important to note that they had additional responsibilities there.

I think all of us would agree that under recovery there was a relatively small amount of waste and fraud because of the approach of having an accountability board and giving inspectors general more authority to protect whistleblowers, so working together, but they had additional funding to do so under the Recovery Act, so we need to do that for them.

Ms. DUCKWORTH. Thank you.

Do any other members of the panel have any comments on adequate support or funding for whistleblower companies or agencies?

Mr. SCHUMAN. I would just add, and this is something that the chairman and the ranking member testified about before, I think it was the Committee on House Administration, the effects of the sequester, of course, on Congress are also significant. The legislative support agencies are having their funding cut significantly, as are committee staff, and your ability to keep and retain and pay the sufficient number and quality of people to do the work that is necessary for this Congress to engage in oversight is something that will be significantly affected by the sequester.

Ms. DUCKWORTH. Thank you.

Mr. Harper?

Mr. HARPER. This is an example where I tone down my libertarianism, but I don't necessarily agree with my colleagues on the need for more funds. Thank you.

Ms. DUCKWORTH. Well, Mr. Harper, if there is an increased need through FOIA backlogs or there is an increased need for greater oversight, how do we do that without funding and providing the resources to do the oversight?

Mr. HARPER. Well, seeking out the path of least partisanship and ideology, hopefully the availability of data going to the deliberations management and results of agencies will reduce the need for FOIA inquiries. So I think FOIA will never go away, but I would like to see more proactive transparency on the part of agencies so that the FOIA requests go down in number and the need for resources will drop as well.

Ms. DUCKWORTH. Ms. Canterbury?

Ms. CANTERBURY. I agree with that, but I would also like to disagree with my friend, Mr. Harper. We have friends who I think consider themselves libertarians and conservatives who agree that there are some parts of Government where it makes sense to invest, because when you invest in those watchdog entities, you return taxpayer dollars that would have been misspent otherwise.

A great example of this is the huge success we have seen under the False Claims Act. Last year, 4 billion taxpayer dollars were returned because of the whistleblower incentives and protections that we have under that law. So it has been demonstrated and I think when you look at the budget of some of our watchdogs, I mean, the Office of Special Council has such a meager budget compared to so many others; they have 100 staff, and it is just not adequate.

Ms. DUCKWORTH. Thank you, Ms. Canterbury.

I apologize to the chairman for going over my time.

Chairman ISSA. No, it was well spent. I might note that every time the IRS does an audit, statistically it actually gains us money,

not loses us money. So to my friends, both libertarian and otherwise, that is one of the great questions, is do you cut something that has a net productivity; and the IGS, as you know, and we saw in the hearing last week, they have a net revenue gain through the work they do. I share your concerns that if you cut the people that actually reduced waste, you will get more waste and, thus, you will get less effective spending.

Mr. CONNOLLY. Would the chairman yield?

Chairman ISSA. Well, it is the gentlelady's time.

Ms. DUCKWORTH. I will certainly yield.

Mr. CONNOLLY. I was just going to add to what you were saying, Mr. Chairman. A subcommittee on this committee has looked at this very question and I am very concerned about money left on the table that is owed the U.S. Government but for resources at IRS to collect it. So I echo what the chairman has said; I think it is a smart investment.

Chairman ISSA. I thank both the gentlelady and the gentleman.

We now go to the gentleman from North Carolina, who has been patiently waiting at the very bottom of the dais, for five minutes.

Mr. MEADOWS. Thank you, Mr. Chairman.

I wanted to follow up on something that was just shared. I think, Ms. Canterbury, you were sharing in terms of the legislation that is put forth, and you said it is very comprehensive in terms of what was put forth or recommended by the House. As we look to reconcile those, what would be the top three areas you would identify as areas of concern that we ought to be looking for as we identify those?

Ms. CANTERBURY. Can I have six?

Mr. MEADOWS. Sure, go ahead and have six.

Ms. CANTERBURY. Okay, unique identifiers, data standardization, Treasury outlay data, real and frequent data quality assessments, and an independent board that will have the necessary independence and motivation to implement the DATA Act.

Mr. MEADOWS. All right. So out of those six, which would be your very top priority?

Ms. CANTERBURY. I think that some things can't come without others, so to sequence, there will need to be attention paid to the unique identifiers and the data standardization I think to lay the groundwork, and then the matching of the Treasury data and other linkages will be far easier to do.

Mr. MEADOWS. All right. And you mentioned in your testimony, you talked about routinely the 20-day rule and how the responses are not adequate. I think there was only 8 out of 100 agencies that responded with the requested information, and some of those, literally, it was a response that we have your request, that they felt like qualified that 20-day fulfillment. Can you characterize the problem over the last 10 or 15 years? Has it gotten worse? Has it gotten better? You spoke to that a little bit already, but, as we look at that, has it gotten progressively worse in terms of that response rate?

Ms. CANTERBURY. I would say that it has gotten worse and gotten better depending upon the administration, but it is a continuing problem. There has never been a success under the 20-day limit for any administration, and part of the problem is there really

are no consequences for violating that. And as I mentioned in my written testimony, the agencies, and as you mentioned, like to send a letter and then that qualifies. If they send a letter saying, thanks, we got your request, we are working on it.

And we disagree with that and our friends at the Citizens for Ethics and Responsibility in Washington do too; they brought a lawsuit against the Federal Elections Commission and the results of that will be very interesting. I think that agencies might actually come to Congress and ask for more time if they lose that suit. We would object and say that there is a way to do that in most circumstances and there is a way to extend under the law, as well. So I think moving away from the time limit would be a mistake but, rather, addressing what are your systems problems.

Mr. MEADOWS. All right. And you mentioned the one thing, and I want to follow up on that, about penalties and enforcement, because we can pass all kinds of regulation laws and create agencies to do this, and without an enforcement mechanism nothing really changes. So there is the defer and delay kind of mentality that is pervasive within many agencies in Government. So what kind of penalty and enforcement mechanism, other than just strictly watchdog or overseeing, would you recommend?

Ms. CANTERBURY. Well, I think that if the agency had to pay for its appeals, that might be a disincentive to delay and to deny in the firsthand, and then we have more than 50 percent of our appeals, the information is actually disclosed, and it should not require an appeal. It seems to for many agencies; you know you are going to make a request and then you will have to appeal to have a shot at getting the information. So if the agencies had to pay out of their own budgets, that might be a disincentive.

Mr. MEADOWS. And did I pick up in your earlier testimony or response to the question that you believe that oversight of this particular request would best not be under the Department of Justice, just because of conflict of interest?

Ms. CANTERBURY. That is absolutely right, sir.

Mr. MEADOWS. Mr. Harper, you were saying earlier, in my last remaining questions, in terms of not needing money and the transparency of putting things on the Internet or where it is focused there, what percentage of requests do you think it might reduce if we had that kind of transparency? Or on a scale of 1 to 10, and let me make it easier, with 10 being the best, where would you rank that in terms of your recommendation there?

Mr. HARPER. It is a very hard question to answer seriously or honestly because there are some different types of FOIA requests. But I would guess that you might be able to cut FOIA by 50 percent, something like that, if there was consistent reporting of deliberations, management, results. There would be much less need for FOIA requests. They would still definitely be there, though.

Mr. MEADOWS. All right. Thank you.

I yield back.

Mr. DUNCAN. [Presiding.] Thank you very much.

Mr. Clay.

Mr. CLAY. Thank you, Mr. Chairman.

Let me thank the witnesses for their testimony and I will start with Ms. Wexler.

You mentioned in your testimony that the GAO has found that agencies often improperly designate advisory committee members to avoid conflict of interest requirements. Agencies complain about the administrative burden imposed by these requirements. These requirements, however, are in place for a reason. Advisory committees provide recommendations on important issues such as drug safety, children's health, and national security; and if a committee member has a conflict, that member could influence government policy for personal gain.

What is the danger of allowing a committee member to serve without disclosing a conflict?

Ms. WEXLER. Well, at the very least, the danger is that the conflict becomes part of the media reports about the deliberations, which we have seen happen repeatedly. So the public trust is shaken. Certainly, there have been situations. The world I know best is the world of FDA, where votes on drugs like Yaz and Vioxx and Bextra, a difference was made because of the conflicted members on those panels, particularly in the case of Yaz, a contraceptive later found to be quite harmful. So I think that there are real world problems with conflicted experts.

There is also the larger problem when a vote is not necessarily effected. But a conflicted expert because what panels just generally strive for is consensus, so they operate more like juries than anything else. If you have somebody with a financial stake, with skin in the game, they are going to be very influential when it comes to making a difference, making a case for their point of view within these deliberations. Often, other panelists may not feel that they are as knowledgeable; they may look to this person, particularly if he has a lot of expertise, and expertise is something that comes with financial ties, we understand that.

So that there are real dangers, both the real world kind and certainly in the terms of the loss of public trust.

Mr. CLAY. And I am sure that raises the antennas of stakeholders and other committee members who know what is going on. The Federal Advisory Committee Act amendments, which I am reintroducing today, would require that advisory committee members who are appointed because of their individual expertise comply with financial disclosure and other ethics requirements. Do you believe this clarification will help ensure that agencies don't allow members with conflicts of interest to avoid disclosing their conflicts?

Ms. WEXLER. Well, it will certainly help with the problem of agencies mislabeling special Government employees who do come under the Ethics in Government Act and representatives who are considered stakeholders and, therefore, their financial disclosure is not required. They are presumed, in a way, to advocate for a specific agenda. So to the extent that it clarifies that agencies must not use this kind of classification system to evade those kind of disclosure requirements, yes, it would be helpful.

Mr. CLAY. The FACA amendments also include a provision which was recommended in part by the Union of Concerned Scientists. That provision would require that agencies provide an opportunity for members of the public to suggest potential committee members.

How do you believe public participation in the selection of advisory committees will reduce conflicts of interests on these committees?

Ms. WEXLER. Well, I think that it means that you are essentially engaging the services of the public to enrich the activities of agencies. Agencies often feel burdened about filling these slots on advisory panels, and I think sometimes justifiably so. So basically what you are saying is let's consult the public about experts we may not know about. It would diversify the pool; you would be much more likely to get people without financial ties because you would just go to a larger arena. It is a very good idea, I think.

Mr. CLAY. Mr. Schuman, any comments?

Mr. SCHUMAN. I agree with that. I also think that the provision in there that covers the subcommittees, which is one of the major loopholes, as you know, since, of course, it is your legislation. For the subcommittees, of course, oftentimes work is pushed down to that level so that there is no disclosure that occurs for meeting minutes, for records. And, relatedly, when we have looked at the federal advisory committees, we found that many of them have simply never held a public meeting. In the entire time that they have existed, they have never had a single public meeting.

One thing that we spend a fair amount of time doing is looking through the FACA database that contains a list of all of the committees, all the meetings they have had, whether public or private, and all the members, and we have integrated that into a Web site that we have called Influence Explorer that allows you to see how organizations and entities that are lobbying on an issue, that are giving campaign donations on an issue will also try to place people on advisory committees and then, of course, those committees don't necessarily meet in public. So this is tremendous legislation and I think it is great.

Mr. CLAY. Thank you so much, Mr. Chairman. My time is up.

Mr. MEADOWS. [Presiding.] Thank you.

The Chair recognizes the gentleman from Kentucky, Mr. Massie, for five minutes.

Mr. MASSIE. Thank you, Mr. Chairman.

In 2008, Bloomberg News had to file a lawsuit to force the Federal Reserve Responder Request to reveal the identities of the firms for which it had provided guarantees during the late 2000s, during the financial crisis. Nearly three years later, and after considerable expense to the taxpayer and use of our court system, the Federal Reserve finally relented and disclosed those names. Should the Freedom of Information Act be updated to clarify unambiguously that the Federal Reserve is subject to FOIA?

And anybody is welcome to respond to that.

Ms. CANTERBURY. Yes, I agree. And I think that there are other loopholes. Of course, Congress is not subject to FOIA either.

Mr. MASSIE. Mr. Harper?

Mr. HARPER. Yes, the Fed should be subject to FOIA. I will reserve whether Congress should be subject to FOIA because it is so very different from the federal executive branch.

Mr. MASSIE. Mr. Schuman?

Mr. SCHUMAN. I would just say that we also see, whether it is the Fed generally or with specific aspects of legislation, there are oftentimes riders that are put into bills that work their way

through Congress that create exemptions to FOIA, and we see this with spending by entities like the Fed or we see this with national security or with matters that are entirely unrelated to sensitive issues whatsoever, and we believe, and I think others do as well, that these attempts to create loopholes in FOIA are often too large or not appropriately vetted, and we think this is another issue that should go through regular channels within Congress to make sure these loopholes aren't put in a way that is either unintentionally large or defeats the purpose of FOIA.

Mr. MASSIE. Ms. Wexler?

Ms. WEXLER. Yes. And I think that there are enough exemptions now in current FOIA law that I don't think we would have to worry about inadvertently disclosing through the Federal Reserve something that really legitimately should not be disclosed.

Mr. MASSIE. So pursuing those sort of loopholes and exemptions, I am concerned, is there enough visibility into federal money after it gets, for instance, block granted to the States or when Congress otherwise passes federal dollars to municipalities or even private organizations to spend that money, do we have enough track of how that money is being spent, for instance, on agricultural subsidies or subsidies for insurance? Mr. Schuman?

Mr. SCHUMAN. The short answer is no. When you look at the data that is reported to the public, as our Clear Spending Report has found, it is unreliable. When you look at the new reporting that was required under the Recovery Act, what we found is it actually prompted States and localities to create transparency measures that they never had before. They started thinking about these issues in different kinds of ways and they actually became more open and accountable.

But as things exist now, while some States do a good job, some States do a bad job, as a general rule you really can't follow the money all the way down. You can't see where it comes from, which is what Jim was talking about before in terms of how money goes through the legislative process in the appropriations and the obligation process, and you can't see it all the way to the end. That is why you need subrecipient and subgrantee reporting, which is some of the provisions that the DATA Act contains.

Mr. MASSIE. Mr. Harper?

Mr. HARPER. I agree that there is not enough transparency in ultimate recipient information.

Mr. MASSIE. Is or is not?

Mr. HARPER. Is not enough transparency in ultimate recipient information. You want to be able to see all the way through the process; agency, bureau, program, project, the obligation grant, the outlay, the recipient, the subrecipient. Just to be clear, or head off a concern people may have, you don't want to invade privacy. That is, if it is a benefits program, we are not talking about publishing the names of people who get Social Security checks or other public benefits. But when it comes to corporate entities or organizational units that receive outlays of Federal funds ultimately, we want that data.

Mr. MASSIE. That is a good lead-in to my final question. Without violating privacy concerns, is there a role for more sunlight in disclosure for disclosing SSI and disability fraud, which we all know

exists but is hard to get our hands around? Is there a role, is there a way to expose some of that fraud without disclosing personal data? Mr. Harper?

Mr. HARPER. I would say that you don't want to give transparency to personal information of recipients of SSI disability. The way you would probably want to do it is through data mining. There are probably common forms of fraud on these systems, and once you learn to recognize those frauds in your data, you can look for them happening again. Credit cards do this. When somebody spends \$5 at a gas station and \$5,000 at the Best Buy, that is them testing a credit card to see if it is still live so they can go buy electronics. That kind of pattern is the thing you might be able to see in SSI data.

Mr. MASSIE. Thank you very much. My time has expired. I yield back.

Chairman ISSA. [Presiding.] I thank the gentleman.

We now go to the gentleman from Illinois.

Mr. CLAY. Can I go again?

Chairman ISSA. No, you may not go again, not unless you want the gentleman from Illinois to chastise you.

Mr. DAVIS.

Mr. DAVIS. Thank you very much, Mr. Chairman. We often accede to the request of the gentleman from Missouri, but we will go right ahead.

Chairman ISSA. If you have any time left over, you can give it to him, right?

Mr. DAVIS. All right.

Let me thank our witnesses for being here. I think this is a very important topic of discussion.

Ms. Canterbury, under FOIA, an agency must waive or reduce the fees for responding to a FOIA request if a requester can show that disclosure of the records being sought will contribute to the public understanding of the operation of activities of the Government.

The Associated Press published an article on Monday, "U.S. Citing National Security in Censoring Public Records More Than Ever Since President Obama's Election." The article highlights the fact that the CIA denied every request for fee waivers in 2012. According to the CIA's FOIA report, it received nine requests for waivers. It seems kind of difficult to believe that not one of those requests warranted a fee waiver. Does this raise any concerns in your mind?

Ms. CANTERBURY. It certainly does. I think that you are absolutely right that it couldn't possibly be that only at the CIA there is no public interest in the disclosure. So it is part of the larger pattern that I mentioned in this national security state, where there is a real imbalance and illegitimate secrecy that is growing. So I think that it is important to look really carefully and I think for Congress to stand up and to not allow claims of national security to just blanketly cover what should be public, what Congress should have a right to. So I think that there needs to be far more oversight.

Mr. DAVIS. FOIA also allows requesters to obtain expedited processing of a request if the requester can show a compelling need for a quick response. The CIA failed to grant a single request for an

expedited FOIA response in 2012, although it received 33 such requests. Do you believe that there should be additional oversight into the CIA's denial of expedited urgent FOIA requests and fee waivers?

Ms. CANTERBURY. Yes. I think they should be asked to show their justifications. I think also we have seen a problem with expedited requests. Now, these are requests when there is some urgent need based on health and safety issues or other concerns, so it is asking the agency to expedite that request, and yet, at the State Department, they have an average of more than 900 days in response to expedited requests.

Mr. DAVIS. It seems as though there are some people who might think that the CIA should have a certain amount of exemptions because of the nature of their work and the nature of what they do. Do you still hold to your notion and your idea that, yes, they should be responding a bit more because this is information that the public should be aware of?

Ms. CANTERBURY. Congressman, it seems that there is a sense of impunity. There certainly are legitimate secrets and there is intelligence work at the CIA which should be withheld, and there are adequate exemptions and exclusions under FOIA to allow for them to classify and keep our national secrets that are legitimate. However, fee waivers and delays in responding to requests do not comport with their practical use and proper use of the exclusions they have.

Mr. DAVIS. Well, let me just say I agree with your assessment and I too recognize that there is information that must be kept secret in the arena of national security, but they also should be more forthcoming. My time has expired, so I thank you very much.

And I yield back, Mr. Chairman.

Chairman ISSA. And I thank the gentleman for making that point about justice delayed is justice denied, as we all know.

We now go to the gentleman from Tennessee, Mr. Duncan.

Mr. DUNCAN. Thank you very much, Mr. Chairman, and thank you for calling this hearing.

Ms. Canterbury, I appreciate and agree with your testimony that secrecy has grown with the growth of the national security state. This committee has done some great work through all the various inspectors general, but I recall that a few months after 9/11 The Wall Street Journal had an editorial in which they noticed that every department and agency had sent up new requests based on security or national security, and The Wall Street Journal said a wise legislative policy from now on would be to give twice the weight and four times the scrutiny to any request that had the word security attached to it because we seem to excuse things that perhaps we shouldn't excuse just because they throw in the words national security.

Mr. Schuman, I appreciate your endorsement of my bill on the Presidential Library Disclosure Act. I remember President Clinton, on his last day in office, pardoned Mark Rich, who had fled the Country to evade \$40 million in taxes, and it turned out that was done just after his ex-wife had given a \$400,000 contribution to the Clinton presidential library. My bill would not restrict contributions in any way.

I think there was some later information about a foreign government giving a contribution also in return for some favorable treatment, but it wouldn't restrict contributions, but it would at least provide for disclosure of contributions, and I think that is a very important thing and I think maybe we are going to take that up again here in a few days. It was passed by the House once, and passed overwhelmingly by a very large bipartisan vote.

Ms. Wexler, let me ask you this. I heard what the chairman said about not using the words revolving door, and I understand his point that you don't want to limit these advisory commissions and keep people off who maybe have some good knowledge, but it seems to me that far too many federal contracts, almost all of them, seem to be some sort of sweetheart insider deal because all the Defense contractors hire all these retired admirals and generals, the big giant drug companies hire these former high level FDA officials, and it seems to go on in every department and agency.

Do you think there should be, if not along with disclosure, maybe a requirement that these departments and agencies should be required to also include on these panels some people that definitely do not have these conflicts of interest, or they should be required to disclose if they give a contract to somebody that is a former high level employee? It seems to me there needs to be some sort of restrictions or limitations on this in some way.

Ms. WEXLER. Representative Duncan, I think the idea of mandating a certain number of non-conflicted experts on advisory panels is a wonderful idea. It runs the gamut, but too often we do have advisory panels doing important and substantive work, and too many members with financial ties to the entities that they review are on those panels. So I think the idea that you would sort of have a bar for including non-conflicted experts makes a lot of sense.

Mr. DUNCAN. Does your group, have they done studies of federal contracts and how many conflicts there are in all of those federal contracts?

Ms. WEXLER. No, we have not.

Ms. CANTERBURY. Sir?

Mr. DUNCAN. I think that would be something you should look into, possibly.

Ms. CANTERBURY. We have done quite a bit of research on the revolving door as an issue of too much coziness between the regulated and the regulator, between those who are receiving Government money and those who are in the Government, and most recently we did a report on this issue at the Securities and Exchange Commission, where there is some information that is not easy to obtain but through FOIAs we were able to get more information than is available at other agencies about who was coming and going from the SEC. It is a particular problem with contracts.

I think your suggestion is an excellent one. I think that showing the leadership there, it would be really probably not surprising to the American people to see how many people come in and out of government, so I agree with the chairman that transparency is a very good way to deal with that issue initially, and we have a long way to have adequate disclosure, but then also having some limits. It is reasonable. In many other contexts we have a cooling off period for Government employees, so I would suggest that we should

have that in the context of contracts and also regulated entities as well.

Mr. DUNCAN. Could I ask one last thing that would just require a one-word answer?

Chairman ISSA. The gentleman may have an additional 30 seconds.

Mr. DUNCAN. Is there anyone on the panel who thinks there is less secrecy now than when FOIA was passed in 1966?

[Laughter.]

Ms. CANTERBURY. Absolutely yes, there is less secrecy than in 1966, and part of that is a function of the technology that is available today, so a lot of the proactive disclosure that we are seeing is just something that was not possible in 1966, yet the concern of the national security state growing.

Mr. DUNCAN. All right. Thank you.

Thank you, Mr. Chairman.

Chairman ISSA. I never thought I would see so much silence on a question like that.

We now go to the gentlelady from New York for five minutes, Mrs. Maloney.

Mrs. MALONEY. I thank all the panelists and I do want to comment on the project, Ms. Canterbury, on government oversight, which identified FOIA online as a best practice in the report you released last week entitled, Best Practices for Openness and Accountability. I was pleased to see that was a bill that I authored many years ago and to see that you support it, and also the work that we are doing with pilot projects on it.

I wanted to follow up on Mr. Duncan's question. Members of Congress and our staff, there is a two-year cooling off period. I thought agencies had the same law, don't they? If you work in a high position in an agency, don't you have a revolving door requirement that you cannot go right back into that industry within two years? That was my understanding.

Ms. CANTERBURY. There are various restrictions, particularly with regard to lobbying and particularly with regard to specific interests, so if it is something that you worked on personally or substantially. So there are many different ways in which people can evade having to have a real cooling off period. There are also waivers that are given by ethics officers on a regular basis, and those waivers are not made public in many cases.

Mrs. MALONEY. And following up on his other question about contracts being "rigged," couldn't you just require that everything be competitively bid, and the low bidder who is qualified get the contract? Why do you have to have these negotiated contracts that have, shall we say, shadows on them?

Ms. CANTERBURY. It has been a particular problem in our contingency programs, so our work in Afghanistan and Iraq there has been, as you know, a real dearth of competitiveness in contracts.

Mrs. MALONEY. Well, I tell you, I began this week by going to a company that was opening up in my district to combat cybersecurity, and cybersecurity, in my opinion, is the biggest threat to our homeland security, to our economic security, and we have to do something about it, and, Mr. Ranking Member and Mr.

Chairman, we should have some hearings on cybersecurity and what we can do about it.

But, in any event, there are stories that they are hacking into major corporations, stealing our intellectual property, hacking into the military, hacking into members of Congress. Could you each comment on what you think we could do to protect the privacy of our American firms and, really, American citizens from this ongoing threat?

Ms. CANTERBURY. Just a word of caution on cybersecurity and those initiatives and finding a good balance between the need to have, obviously, more collaboration, more information sharing, a better system to prevent cybersecurity threats that are significant to our Country and to individuals. But that must be balanced with a real concern for privacy, civil liberties, whistleblower protections, and the people's right to know.

So, like in other contexts that we have discussed today in the national security sphere, there is a knee-jerk reaction to then make secret anything that has to do with information related to secrecy, and the cybersecurity bills that were proposed in the last Congress, and the one that has just been reintroduced in the House, have an unacceptable level of secrecy and encroachments on rights.

Mrs. MALONEY. Well, I just want to say we have to find the balance. The real wealth of this Nation is the ideas of our people, our research. We had a meeting with NASDAQ and they were telling us that people are not only hacking into accounts and trading people's accounts, totally falsifying. It is out of control.

So this is an incredible challenge for our Country and I think it should be something we can agree on, Mr. Chairman, that we don't like this hacking and we have to stop it, and I think this is one thing we could pass in this Congress if we could figure it out. So I would like to hear your ideas on it, on how we should go forward and what we should be doing.

Mr. HARPER. For my part, I agree with Ms. Canterbury's point about the privacy concerns that are evident in much of the legislation we have seen last year. For me, cybersecurity is really thousands of different problems that will be handled by hundreds of thousands of different actors over decades. We will never get to perfect security, just like we don't have perfect physical security.

So what I think Congress could best do is really actually assign responsibility to the entities that can handle cybersecurity problems. So I don't think that the Federal Government should actually provide security for the private sector. When a business has failed to secure its own assets and it loses those assets, that is an illustration of poor management on the part of that business and that business should pay the cost.

In general, with so much of our cyber infrastructure held in the private sector, it should be the responsibility of the private sector to secure those assets and it should pay the costs when it fails. Obviously, the Government has a good deal of information, being a large entity itself and a buyer of technology, so it has a role and it can foster cybersecurity and good cybersecurity practices, but I would place the onus on the private sector to secure its assets.

Mrs. MALONEY. Well, may I have an additional 30 seconds?

Chairman ISSA. Of course.

Mrs. MALONEY. And time for the other two to answer?

Private firms want to secure their assets, and I am not saying that Government should. They should secure them; they just don't know how to do it. We don't have the technology to help our private sector or our Pentagon or our individual citizens to secure their information.

Anyway, I would like to hear other ideas. Thank you so much; it is very helpful.

Mr. SCHUMAN. Just very briefly. So our colleague, Tom Blanton, often talks about the idea of the way we try to protect national security now is that we have a lot of secrets and we try to build a wall around them. But with so many things, it is very difficult to protect. What we need to do is figure out what is critical and protect that, and the other things that are less critical, it is not worth devoting the resources to and it runs into these problems.

In terms of how to help the private sector, some of it is the same way. We look at government and we have government systems technologies that are 30 or 40 years old, where the system infrastructure isn't capable; where we have inflexible hiring practices, so it is difficult to bring in people who are capable and competent to handle these issues.

Within Government we need to look at hiring, we need to look at being able to retain the best and the brightest. When it comes to the private sector we need to look at providing models, providing examples, showing private sector folks part of the way in which they need to protect themselves. It is not something Government can do for them.

Mrs. MALONEY. I have talked to some members of the military. They tell me the private sector is way ahead of us, meaning Government; that the private sector is doing a better job than we are. That was at a meeting where they were learning from the private sector how to better secure our situation and our information.

Thank you.

And Ms. Wexler?

Ms. WEXLER. You know, I agree with Mr. Harper and I agree with all of the panelists. I think this is a very important problem. It is going to take more than one way of solving it. Certainly, the private sector does have a responsibility to protect its own assets, but there is nothing wrong with the Government learning from the private sector as they develop innovative new ways to protect, nor is there anything wrong with the Government developing technology that can then be used by the private sector for the purposes of protection, but always with the idea that civil liberties and privacy are also respected.

Mrs. MALONEY. Thank you. I yield back.

Chairman ISSA. I thank the gentlelady.

We now go to the gentleman from Illinois, Mr. DeSantis.

Mr. DESANTIS. Florida.

Chairman ISSA. Oh, I am sorry.

Mr. DESANTIS. Appreciate it, Mr. Chairman. We are enjoying some better weather now.

Chairman ISSA. We have been doing real well with Illinois on this side, but, yes, the gentleman from Florida.

Mr. DESANTIS. We have a better record with our teams in the World Series than Chicago does.

Mr. Harper, from Cato's perspective, are you guys interested in transparency for transparency's sake? Well, I guess that is obviously good, but do you believe that more transparency will help actually reduce the size and scope of Government?

Mr. HARPER. I do. It is my belief that it will. When people see where the dollars are going, they will realize this can be better handled in our States, it can be better handled in our localities, or we can just handle it ourselves.

Now, I characterize the transparency issue as sort of a bet between myself, libertarians, conservatives, and liberals and progressives because if transparency causes government programs to work better and it actually rings waste, fraud, and abuse out of programs, that is fine. I will take a better running government over a government that is large and failing.

So that is how I view transparency as a pan-ideological issue. I do think that it will result in things that we want as advocates of limited government. But if I am wrong, I think I still win.

Mr. DESANTIS. Absolutely. In terms of the CFPB with Dodd-Frank, have you looked at how effective FOIA or some of these other mechanisms will be? Because it seems like a lot of the financial information can be exempt. And then this is an institution that purports to not really be accountable to Congress and they have a different source of funding. I am just worried that this is an agency that is not going to be held accountable.

Ms. CANTERBURY. We have done some work looking at the Consumer Financial Protection Bureau, and they have actually been a model for openness in different initiatives that they have had. They made meetings that they were having with outside interests, whether they were regulated interests or public interest groups like ours, they made all of those meetings public; they created a credit card complaints database that has been lauded as very helpful to consumers. So we really appreciated the amount of openness that they have there.

We also have been concerned that they were required, essentially, to adopt the same confidentiality procedures and rules that you mentioned that are used by the other financial regulators in order to receive information, and this was something that we were made aware of when they were standing up the agency, and we have raised concerns about the extraordinary claims of confidentiality that are in financial regulated information. I think that it is an area of an overreach. There is really another system that is outside of FOIA and outside of classified information, so that if a company simply says I would like for this to be confidential, they are granted it.

Mr. DESANTIS. Great.

Mr. Harper, in your testimony you talked about the grant-making reform, how there was, like, a counter-argument about peer review, and you said that the transparency was more important. When I read that, and I hadn't been that familiar with this, to me, I didn't see that that was even a decent argument, but I probably don't know enough about it. So what is this argument about more

transparency in the grant-making process will have negative effects on independent peer review?

Mr. HARPER. Well, the argument, and it is not my argument, but it is one I will try to give credit to. The argument is that peer review is often done anonymously, so colleagues who have professional relationships will review each other's papers, but do so anonymously so that they can speak their minds about the quality of research without threatening the professional relationship.

So I take it that the argument is that if there is transparency as to who is doing reviews, then you are sort of upsetting longstanding traditions with regard to peer review. So that is a real issue; it is definitely something to think through. There might be a solution. I don't know the field that well, but there might be a solution where they use an identifier so that we can know that the same person did 500 reviews in a year, to take an exaggerated case, but nobody knows exactly who that was.

So I think there are probably ways of solving that problem. So it is a genuine thing to talk through, the balance between transparency and anonymity.

Mr. DESANTIS. And then just, finally, you mentioned the need for an organizational chart for the Federal Government. Do we know how many actual offices and agencies exist within the Federal Government? I guess where are we falling short? Why hasn't this been done so far?

Mr. HARPER. It is boggling to me that there isn't a machine readable Federal Government organization chart. We should be able to see what agencies exist, what bureaus exist, what programs, and what projects so that we can tie legislation to all those things when you in Congress are trying to effect something; so that we can tie spending to those things so we can know this happened because of a certain program in a certain bureau in a certain agency. That doesn't exist.

There are at least four different representations of how the Government is organized. Each is different; each is published in PDF, so I can't use a computer on it. Now, the best we have is from NST, which produced a pretty darn good organization chart that just goes to the bureau level, just the simplest stuff, agencies and bureaus. That is what we are using for our legislative markup now, but there should be a complete Federal Government organization chart.

Mr. DESANTIS. Absolutely. Thank you.

Chairman ISSA. Would the gentleman yield?

Mr. DESANTIS. Yes.

Chairman ISSA. There is a story that I think says a lot from the private sector. Until a few years ago, taxi drivers would hear on a radio that there was somebody who wanted to be picked up at a certain address, and the most aggressive taxi driver would get it by saying I am right around the corner. As taxi companies began putting GPS systems in the taxis, they could figure out who was actually the closest and it dramatically changed the response to the consumer.

I think, to a certain extent, the Government's willingness to have us actually be able to see what they are doing, versus the printed

org charts that say what they say they are going to do, would probably be equally illustrative.

Ms. CANTERBURY. I hope that improves safety on the roads, too.

Chairman ISSA. I think it has. As a taxi town where you just walk out and get one, we are not as aware of what it is like when you have to call for a taxi, but some of us are.

With that, would the gentleman from Virginia seek to be recognized?

Mr. CONNOLLY. I would.

Chairman ISSA. I recognize you.

Mr. CONNOLLY. Thank you, Mr. Chairman. I knew you would. Thank you so much and thanks for holding this hearing, because I think it is a really important one.

Let me pick up on my colleague's comments, the last questioner, on grants, because obviously the desire to have more transparency in the award of grants and to make sure that it is an open and competitive process is a legitimate concern. This committee considered some legislation previously called the Grant Act designed to do that, but I think it had some unintended consequences.

Ms. WEXLER, have you looked at that Act and does it, I think unintentionally, raise some flags for the academic community and for the competitive process itself?

Ms. WEXLER. Yes, that is true, and we understand the goal here, and the goal is commendable. Let me use the only analogy I can. When I have written a book; I have submitted my book proposal to the publisher, who has accepted the book. I do not want my book proposal to be part of the public record because it is the recipe I have for writing a book that is uniquely mine, that was a product of my imagination and my work.

So I think what we want to make sure is that even for those grant proposals that are accepted by the NSF, by the National Science Foundation, that in the interest of transparency we don't violate someone's rights to intellectual property. I think that would discourage innovation and it would not work.

I think it is very important, and I think we can manage this and work with this so that, I think you have suggested, abstracts would be available. As you know, there is an abstract database that the NSF has and it is pretty comprehensive. You look at those abstracts and they tell you quite a bit. I don't think we are ever going to get in a situation where the American public looks at a bunch of abstracts or even full proposals from the NSF and says, you know, this one is great and you should really not do this one.

However, I do think that Congress has a legitimate oversight role here, and we would welcome working with you on ways to figure this out to ensure the intellectual property rights of those who submit proposals, as well as make sure that there is enough transparency for Congress to have the legitimate oversight role that it should have. As for the same thing of the identity of peer reviewers, that we be very careful about ensuring that no one particular grant is linked to any particular peer reviewer. Again, it is the whole notion of that person thinking that that identity will be revealed, may go easy on that applicant; may go hard, depending on their personal relationship.

I think what we are most interested in is what Mr. Harper mentioned, really, the patterns. Are particular institutions being overly represented on peer review panels in general? Are particular professions over-representative; particular regions?

Mr. CONNOLLY. I am going to have to interrupt you because my time is short.

Ms. WEXLER. I am sorry.

Mr. CONNOLLY. But thank you, Ms. Wexler. I share your concern. I also hope we could work it out so that actually we can get at the goal here, which is transparency, more openness to ensure this fair competition without compromising proprietary information, intellectual property, and, frankly, without always showing some of our proprietary research to other watching eyes with whom we may not want to share that kind of scientific research.

The Supreme Court had a ruling last year, the Milner decision, or in 2011, that significantly narrowed the scope of Exemption 2 in FOIA. Some in the IG community, particularly, have raised concerns that that decision may hinder certain critical operations, for example, with respect to FISMA. And the chairman has reintroduced a FISMA reauthorization I am proud to support, along with the ranking member, Mr. Cummings, and they have expressed some concerns that that would preclude the sharing of vulnerabilities in the Federal IT system among agencies.

Ms. Canterbury and Mr. Schuman, I wonder if you want to comment real quickly.

Ms. CANTERBURY. We don't always disagree; we often agree with the IG, but in this case we disagree. We think that they have the exemptions that they need to withhold the information that they must when they are doing the reports under FISMA. We have had conversations with them about this.

Mr. CONNOLLY. So you are not worried about Milner?

Ms. CANTERBURY. Not with respect to their FISMA reports. There have been recent reports issued by inspectors general in response to FISMA which they were able to make redactions and also provide mostly public information.

Mr. CONNOLLY. If the chairman would just indulge just one brief, brief followup.

Anyone concerned about Milner?

[No audible response.]

Mr. CONNOLLY. No one. All right.

Thank you, Mr. Chairman.

Chairman ISSA. Thank you.

We now go to the gentleman from Michigan, Mr. Amash.

Mr. AMASH. Thank you, Mr. Chairman, and thanks to our panel for being here today.

Ms. Canterbury, you brought up the cybersecurity bills and you mentioned CSPA. I don't know if you mentioned the name CSPA, but CSPA is the cybersecurity bill that was recently introduced. I view it as a tremendous threat to our Fourth Amendment protections because it is the Government subsidizing privacy violations, and it does this by providing immunity from liability for businesses and other organizations to share your personal data with the Government. And I wanted to ask you to elaborate and give your perspective, and anyone else on the panel as well.

Ms. CANTERBURY. So I am not as familiar with the immunity aspects of the bill, that is not a particular area of expertise for my organization or for me, but our concern has been that there are overly broad and extensive statutory exemptions to FOIA and that those were not necessary but were perhaps just being provided to create assurances that really should be had by these entities under the law in any case. We are also very concerned that there be some sort of equity for the public's right to know, for civil liberties, for whistleblower protections so that there aren't encroachments on those rights with these new proposals.

Mr. HARPER. I have not read the new CSPA, though I read every single cybersecurity bill in the last Congress. I tried to swear off the reading of cybersecurity bills, but it looks like I will have to get back into it.

What really, really stuck in my craw about nearly all of those bills is that in the area of information sharing they said, notwithstanding any other law, information sharing may happen. Well, that means that the Privacy Act of 1974 is out the window. That means that the E-Government Act is out the window. That means that your contract law, your State contract is out the window. That means tort law is out the window. The health information law is out the window; financial privacy law is out the window.

So if the phrase notwithstanding any other law appears in the new CSPA, it is as bad as the old CSPA. And it is really offensive to me that because there might be some regulatory impediments to information sharing, Congress would come along and sweep aside all the law that exists, including all the laws that protect our privacy. So it stands out to me, CSPA does, as a real offense to privacy and to, frankly, good law making.

Mr. SCHUMAN. This isn't an area of focus for The Sunlight Foundation.

Mr. AMASH. Sticking to the topic of legislative transparency, I served in the State legislature in Michigan before I came to Congress and one of the things that I noticed when I arrived here was how lousy the bills were in the way they were written. Everything was cross-referenced as, you know, on page 7, line 6 of whatever act, insert such and such.

So when I was in the State house, the way it worked was when you have a bill that amends existing law, you actually put the law in front of you and you cross things out and you insert things. It is like a Track Changes in Word. So I introduced recently the Readable Legislation Act, it is H.R. 760, and I wanted to get your perspectives on this, whoever might have an opinion on it, because I think it is very important that legislators know what they are voting on, they can read the bills and then the public can actually follow what we are doing. I think it would make us a lot more efficient as a Government.

Mr. HARPER. I have read the bill, and I could read it through and through and understand what it said, and that is important, and I think that is the essential goal of your legislation. And for the WashingtonWatch.com audience, a site that I run in my spare time, I actually showed an example, I took another piece of law, which is just a cut and paste law, it says section such and such is amended so and so, and I did a redline version of it and said

this is what the law would look like under Mr. Amash's bill. Read the bill is a stand-in for a lot of demands of the public to understand what is going on in Washington, but taking it literally and having Congress write bills that are literally readable is an important and simple amendment to your process, so I recommend it.

Ms. CANTERBURY. I agree with that; it is a very sensible approach and we support it.

Mr. SCHUMAN. The Sunlight Foundation actually wrote a little article called The Read The Read The Bill Bill, something like that. It was a terrible name but it emphasized the point that it is important to understand the legislation. And it is not just how bills would change the law, of course, but it is how amendments would change bills and how amendments would change other amendments, and starting to draw the connections, because it is not just how a bill would change the law, and it is very complex with the way that Congress engages in this, but it is also what are the bills that are identical or are virtually identical that existed in the same Congress or in previous Congresses, what are the other ideas that are along these lines that have happened.

The more that you can wrap these things together, if we can say the axis to Congressionally Mandated Reports Act in the 113th Congress is identical or virtually identical to the one from the 112th that had this hearing, all of a sudden you can create contextual awareness in a way that is not possible. And what you are trying to do with this legislation is spot on.

Ms. WEXLER. And I too support and have the experience of being a lobbyist in the New York State legislature and being shocked to see that I couldn't figure out the bills that I was reading here. I also believe that Congress is supposed to be under the mandate of the plain writing law, so we are supposed to be already reading bills that are a little bit easier to understand.

Mr. AMASH. Thanks.

Mr. Chairman, I will be very brief. Mr. Schuman?

Mr. SCHUMAN. I will be very brief. There is also a related rule in the House that already exists, and there is one in the Senate, it is the Ramsey rule in the House, which is that reports that come out of committees are supposed to have basically Track Changes so you can see what has changed. This rule isn't always followed, not because folks don't want to, but because it is actually technologically difficult to do this. What you are proposing is extending it broader to all bills that are introduced and, again, it is an incredibly helpful thing to do.

Mr. AMASH. Thanks for your comments. I can say, again, from my experience, it makes a big difference to have the context of the bills. It makes us much more efficient as legislators and it allows our people at home to really follow what we are doing in a way that doesn't exist right now. So thank you so much and I yield back.

Chairman ISSA. I thank the gentleman.

We now recognize the patient gentleman from Georgia, Mr. Woodall.

Mr. WOODALL. I thank you for the courtesy, Mr. Chairman, but I don't have any questions.

Chairman ISSA. Okay, then I will recognize myself for a closing quick round.

This has been very, very important to me to try to hear some of the comments, particularly from questions including Mr. Amash's just now.

Ms. Wexler, I want to make sure I understood in context. Grant applicants, that is an industry; I mean, people pay a lot of money to write good grants. You weren't suggesting that the prevailing grant is proprietary intellectual property, were you? I wanted to understand that.

Ms. WEXLER. I was suggesting that there are certain types of grants, proposals, for example, proposals submitted to the National Science Foundation, that do reflect the intellectual property of the applicant. I am not saying that that is the universe of all grants by any means.

Chairman ISSA. Because if I can put it in layman's terms, if I ask for a job and I submit you my resume, other than my Social Security number, wouldn't you say that my resume, if the Government hires you, to a great extent should be available? In other words, an honest review by those who would be critical of what was in there or, if you will, the right of the public to say, geez, how did this person get hired? Wow, they wrote a clever resume, one that might get me hired the next time. Wouldn't we be stepping up the game if we made at least the prevailing applications with appropriate redactions, but limited, always available?

Ms. WEXLER. I think the redactions would be difficult to do and would require on the part of something like the NSF to put a lot more manpower into it. What we don't want is to in any way violate people's own ideas and intellectual property before they are hatched.

Chairman ISSA. And I agree with you. You said before they are hatched, and maybe for everyone there I am making the assumption that we have granted the application, Federal funding has flowed to that entity. At what point would any of you believe that substantially all of that material belongs to the public for purposes of honestly figuring out whether or not we are spending that money properly? Ms. Canterbury? Because it is an important balancing act. We can all see it if I am applying, for example, to provide computers for the IRS, a current investigation of our committee. But when you get into science, often it becomes a little murkier. Do you see it as that difficult?

Ms. CANTERBURY. No. I think we can solve this. I think that we do it within the context of proprietary commercial information that is not scientific. I think we can do it for science too. I think that Ms. Wexler had some good recommendations. I also think we should err and appreciate that the chairman and ranking member err on the side of transparency, but that you are also open to fixing areas where privacy or competition might be used against the entity that would be applying.

Chairman ISSA. And the current redactions are initiated first by the applicant, so I appreciate it is burdensome, but I don't think it is particularly burdensome for the applicant to know what they believe is most necessary to protect. So the first argument does appear as though it is not burdensome on the agency.

Mr. Harper?

Mr. HARPER. Well, I guess I don't feel expert enough in this area to comment on specifics, but what you are talking about is striking a balance and a balance that deals with values: privacy, intellectual property on the one hand and transparency, the administration of taxpayer funds on the other; and I guess there are delicate balances to be struck here. I, like Ms. Canterbury, agree that, as you might expect on this panel, we would favor the transparency side of things.

Basically, everything we are talking about in grant making, this is taxpayer money, so to the extent anyone thinks that there is a right to have taxpayer money, no. We can make it part of the deal that you have to share this information if you want to be a part of the grant.

Chairman ISSA. And one of the reasons that I am so concerned is that often what happens in IT development, in any other part of Federal dollars being spent is people come with proprietary information that was previously developed at the taxpayers' expense. They then proceed to get a new grant or contract at taxpayers' expense in which they then have yet another proprietary group that they can go and do it again.

And the cycle of entities using taxpayer dollars to develop the ability to get taxpayer dollars, at some point you look and say, well, wait a second, the term crony capitalism is used all over the place, but I am very concerned sometimes with the pharmaceutical companies, sometimes with universities that we can in fact find ourselves constantly creating barriers to entry because you can only get through this barrier if you have already gotten the Government's money. And that is part of my concern.

I want to do a couple more quick questions.

Would you all agree that when it comes to, for example, an attack or a mining activity from China, North Korea, Syria, Iran, that in fact this is not the private sector's take care of yourself responsibility, but a classic, fundamental, constitutional responsibility of the Government to secure and defend for both our private and our commercial activities?

In other words, in cybersecurity we all understand we have certain responsibilities, but my understanding is some of the most aggressive and most egregious piercing are done by some of the most advanced techniques not available to the normal hacker in a basement in Silicon Valley. Wouldn't you all agree that that is uniquely the Federal Government's primary responsibility, just as it would be if someone was coming with muskets to our border?

Mr. Harper, let's go back to muskets and the border, if you will.

Mr. HARPER. Yes. So I think certainly when cyber attacks originate from overseas there is a Government role, but it is more along the lines of diplomacy. And I don't mean going and being friendly; I mean leaning hard on governments that are sponsoring or themselves committing cyber attacks or producing cyber weapons. We will have more to say on this.

I have commissioned a paper from a guy who is younger and smarter than me to really handle the cybersecurity issue, but one of the unique problems or one of several unique problems in the cybersecurity area is attribution; you don't necessarily know where

it came from. Once a form of attack originates, it can be propagated across the globe very quickly, so you don't know who is really responsible in the first instance.

The response, as it should be in so many areas, should be phlegmatic. By that I mean measured, careful, calibrated, equivalent to the form of attack. So the thing that I think we should worry about most is the U.S. Government bringing all of its force in response to cyber attack, because cyber attack is relatively limited; it has limited ability to do physical damage. It can do real economic damage.

There are definitely concerns here. Nothing I should say would be to dismiss the concerns, but we shouldn't respond to economic harms to our Country with physical harms to other countries. Let's not escalate and talk of cyber war. That phrase I don't like because it suggests escalating to physical war from the cyber snooping, the cyber espionage that is certainly going on.

Chairman ISSA. Well, as somebody who has an opinion on this, I will express it quickly. You don't go to kinetic war over cyber war, but you do respond in like, potentially.

Ms. Canterbury, one question that I have for you, just as with the FOIA wanting to have an ombudsman, when we are looking at cybersecurity, do we need to have an ombudsman that is not behind the cloak of the Director of National Intelligence or the CIA when we are looking at balancing the commercial protection in cyber and the government protection?

Do you, or any of you, see the inherent conflict of if we essentially say cyber will be taken care of by the very people who, quite frankly, probably are doing cyber attacks and spying on our adversaries using some of the same techniques, or do we need to have somebody who is not part of that game deciding whether or not the Bank of America or Chase Manhattan is protected by what we know or tipped off to what we know before there is an economic loss to we, the consumer?

Ms. CANTERBURY. So I am not a cybersecurity expert.

Chairman ISSA. You better get up to speed. It sounds like it is the new issue.

Ms. CANTERBURY. Well, except to say that it might not surprise you that my organization agrees that, in most cases, having independent oversight is going to produce better policies and a better public interest response.

Chairman ISSA. Anyone else?

[No response.]

Chairman ISSA. Okay.

Mr. Cummings?

Mr. CUMMINGS. Mr. Chairman, I just want to thank the witnesses for being here today. Your testimony has been extremely helpful. Thank you for shedding light on our legislation. We appreciate that.

With that, Mr. Chairman, I yield back.

Chairman ISSA. Thank you.

I will allow five legislative days in which to have additional comments made.

Ms. Canterbury, you get the last word.

Ms. CANTERBURY. Well, I just wanted to make a minor clarification. Congressman Connolly has already departed, but I wanted him to know that in our community, in response to Milner and the Supreme Court, the case that he cited, we have talked a lot about the impacts on FOIA, that court case, and we might agree that there is very, very limited information, specifically passwords to security systems, in the Government that may be a gray area. But I just wanted to clarify that.

Chairman ISSA. Okay.

Ms. CANTERBURY. For the record.

Chairman ISSA. I appreciate that. You know, my Social Security number is probably more gettable than my passwords, and I am hoping it stays that way.

I want to thank all of our witnesses. You have been excellent. Again, if you want to revise or extend, the record will be held open for five days.

With that, we are adjourned.

[Whereupon, at 12:09 p.m., the committee was adjourned.]



DELIVERING ON OPEN GOVERNMENT

*The Obama Administration's
Unfinished Legacy*



Center for
**EFFECTIVE
GOVERNMENT**

Formerly OMB Watch

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To ensure government is effective and responsive to the priorities of the American people, we conduct policy research and develop policy proposals; create tools to encourage citizen participation and government accountability; and build broad-based coalitions to advance these values. To ensure the American people understand the vital role of government, we produce and disseminate educational tools and communications materials.

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EXECUTIVE SUMMARY

The Obama administration has dedicated more effort to strengthening government transparency than previous administrations. The president entered office offering a grand vision for more open and participatory government, and this administration used its first term to construct a policy foundation that can make that vision a reality, issuing an impressive number of directives, executive orders, plans, and other actions aimed at bolstering government openness. With the notable, glaring exception of national security, the open government policy platform the Obama administration built is strong. However, the actual implementation of open government policies within federal agencies has been inconsistent and, in some agencies, weak.

This report examines progress made during President Obama's first term toward open government goals outlined in a comprehensive set of recommendations that the open government community issued in November 2008, titled *Moving Toward a 21st Century Right-to-Know Agenda*.¹ We examine activity in the three main areas of the 2008 report: creating an environment within government that is supportive of transparency, improving public use of government information, and reducing the secrecy related to national security issues.

The administration's strongest performance was in its use of technology to make information more available to the public and more user-friendly. Officials encouraged agencies to use more social media, launched new websites, created mobile apps, and overhauled older online tools. More detailed information about federal spending was made available to the public. Agencies are now required to transition to electronic records management, although they have been given a long timeframe for the shift. Administration policy raised the bar for delivering information under the Freedom of Information Act (FOIA). These were long overdue steps that will modernize how government communicates to and shares information with the public.

However, despite policy guidance from the White House, the implementation of open government reforms at the agency level has been uneven, and few agencies appear to have embraced the practice of open government enthusiastically. Some agencies produced very vague open government plans for themselves. Many have not followed the White House's lead in making information about basic operations open to the public or even posting visitor logs. Several produced weak policies to protect the integrity of scientific information and the rights of government scientists to share their work. Protections for whistleblowers were strengthened, but the administration has also taken an aggressive approach to prosecuting leaks.

¹ *Moving Toward a 21st Century Right-to-Know Agenda: Recommendations to President-elect Obama and Congress*, November 2008. <http://www.foreffectivegov.org/files/21strtkross.pdf>.

The administration's most glaring open government shortcomings involve national security secrecy. The Obama administration has relied on state secrets or secret laws as heavily as the previous administration, to the disappointment of open government advocates and civil liberties defenders. Good policies were established on declassifying documents, but without changing the process for declassifying documents or significantly increasing staff, it will take years to get through the time-consuming process of reviewing all classified documents. The new framework for controlled unclassified information (CUI) contains critical reforms but remains at an early stage of implementation.

While the Obama administration deserves praise for the important work it has done to build a platform for open government in its first term, the job is unfinished.

To secure its legacy as "the most transparent administration in history," the Obama administration must encourage agencies to establish environments that embrace openness; improve the accessibility and reliability of public information; and dramatically transform its policies on national security secrecy. In each area, we offer detailed recommendations that build on the accomplishments and efforts of the first term and address the highest-priority issues for the second.

Specifically, we recommend that in its second term, the Obama administration:

Create an environment that supports open government

1. The administration should assign a senior official in the White House to oversee the implementation of open government policies and ensure that individual has the authority to carry out the attendant responsibilities of implementation.
2. Agency heads should develop and make public implementation plans for key open government policies and assign a senior official the responsibility for overseeing the implementation of the agency plan. Additionally, the interagency Open Government Working Group should serve as a central forum to explore ways to improve overall implementation of open government policies.
3. Congress should play a more active role in supporting open government practices by passing legislation to codify open government reforms, such as the DATA Act and reforms of FOIA and declassification. Relevant committees should improve oversight of current open government policies and implementation. Transparency needs to be established by law.

Improve the accessibility and reliability of public information

4. Agencies should modernize their IT systems to create and manage information digitally, and the administration should establish benchmark requirements for electronic records that all agencies must achieve over the next four years.
5. The administration should launch an aggressive effort to improve agency compliance with its guidance on fulfilling Freedom of Information Act (FOIA) requests – speeding up processing, reducing backlogs, and increasing disclosure. The Justice Department should work with agencies to avoid FOIA litigation whenever possible and argue positions that are consistent with the president’s transparency principles when in court.
6. The administration should make proactive disclosure of public information the norm and establish minimum standards for disclosure that all agencies should adhere to, such as releasing communications with Congress and posting FOIA request logs. Additionally, agencies should continue to expand the datasets posted online and release inventories of data holdings.

Reduce national security secrecy

7. The administration should establish a White House steering committee on classification reform, initiate an oversight review of agency classification guides, and pursue policy and statutory reforms to streamline the declassification process.
8. The administration should revise its state secrets policy to require independent court reviews of secret evidence and work with Congress to permanently reform the state secrets privilege through legislation. Additionally, the Department of Justice should issue a public report on Inspector General investigations into complaints of wrongdoing that were dismissed because of state secrets claims.
9. The Justice Department should renounce the use of criminal prosecution for media leaks and protect the First Amendment rights of employees.
10. The administration should order an end to secret legal opinions, memos, and directives that are used to shield controversial decisions from oversight and legal challenge.



"Transparency and the rule of law will be the touchstones of this presidency."

President Barack Obama, remarks, Jan. 21, 2009²

INTRODUCTION

The First Term

Four years ago, when Barack Obama assumed the office of the President of the United States, he signaled his commitment to make his administration "the most transparent in history."³ In his inaugural address, he pledged his administration would "do our business in the light of day – because only then can we restore the vital trust between a people and their government."⁴ On his first full day in office, the president issued a Presidential Memoranda calling for increased transparency throughout the federal government, another calling for greater disclosure under the Freedom of Information Act, and an executive order strengthening access to presidential records. Never before had an incoming president made open government such a high priority. Expectations for transparency in the new administration rose to greater heights.

To realize these commitments, White House officials and agency personnel have invested thousands of hours laying a policy framework for transparency. In the months following the inaugural address, the White House established new policies tightening the standards for

² "President Obama Delivers Remarks at Swearing-In Ceremony," Jan. 21, 2009, <https://www.fas.org/spp/news/2009/01/obama012109.html>.

³ Macon Phillips, "Change has come to WhiteHouse.gov," *The White House Blog*, Jan. 20, 2009, http://www.whitehouse.gov/blog/change_has_come_to_whitehouse.gov.

⁴ President Barack Obama's Inaugural Address, The White House, Jan. 21, 2009, http://www.whitehouse.gov/the_press_office/President-Barack-Obamas-Inaugural-Address.

classified information and speeding declassification, protecting the transparency and credibility of scientific information, and reforming the system of controlled unclassified information.

The White House sought to lead by example by putting its visitor logs online and making them searchable. The money spent under the Recovery Act was characterized by unprecedented transparency. The Obama administration aggressively adopted Internet technologies, launching new websites and redesigning others, engaging citizens on social media, and making public databases more accessible. As a result, cloud computing, social media tools, and “apps” are now common parlance and in common use throughout government. During the Hurricane Sandy crisis, agencies successfully used these new tools to push out storm warnings, updates on its predicted path, and instructions on how to prepare for its impact.

However, at the agency level, implementation of the policies that the president established has been uneven. In response to a White House mandate, some agencies developed detailed blueprints for strengthening open government, while others failed to make concrete commitments. Some have embraced a shift to electronic records and have plans on how to manage electronic information, while others lag. Some developed strong policies to protect scientific information from political interference, while others mustered only vague guidelines. But across-the-board improvements have been rare due to inconsistent enforcement, staff turnover, congressional inaction, and uncertain funding. We have not seen a new “culture of openness” firmly embedded in the executive branch.

In the national security arena, the open government community and civil liberties advocates have been especially disappointed. The White House adopted minor reforms on the state secrets privilege, which allows the government to seek dismissal of lawsuits that could reveal sensitive security information, and failed to include better court review of state secrets claims. The administration has continued to use secret “laws” to make controversial decisions without oversight, to disallow legal challenge, and to withhold key decisions and memoranda that have the force of law from public scrutiny.

To secure its legacy as a champion of transparency, the administration will need to do more to ensure that agencies actually implement the transparency policies it established, address gaps left in its policy reforms, and improve its record on national security-related secrecy.

The Challenge of Implementation

Establishing open government policies takes work. While it may sound like a straightforward task to make more information available to the public, successful open government reforms require breaking long-ingrained habits and changing agency norms and practices. Open government requires a good policy foundation, active leadership, and staff engagement. New

technologies and operating practices may require new investments of resources, as well. Some of these reform elements may require the support of other agencies and branches of government. And, since every agency has its own discrete mission to carry out, open government reforms must be enacted as new leadership seeks to improve its performance overall.

In its first four years, the Obama administration provided a strong vision for open government and invested resources and staff to advance its goals. Specifically, the administration initiated a set of activities designed to shift the culture of the federal government. The Open Government Directive established a new requirement that every agency develop and maintain an Open Government Plan tailored to its mission and audience. An interagency working group has met regularly to discuss progress made and challenges encountered on open government issues. White House staff was assigned to shepherd the process. The White House issued executive orders on presidential records, classified information, and controlled unclassified information, as well as presidential memoranda on FOIA implementation, managing government records, and digital government. These actions signaled to individuals within federal agencies and to the public that transparency was a high priority for the administration.

But implementing reforms takes time, oversight, and effort. While we typically think of transparency as an element of effective government, it is clear that effective governance is required to achieve transparency. In fact, improvements in transparency depend on the same factors that effective public administration in any context requires: commitment from top leadership; responsive staff; incentives for performance; meaningful accountability measures; adequate resources; and an environment that supports ongoing experimentation and learning. Delays in confirming qualified agency leaders have slowed implementation of presidential directives in some agencies, and the budget uncertainty of the past two years has created an additional hurdle to the successful execution of open government reforms. The hyper-partisan character of political relations in Washington since the 2010 elections has also made it difficult to advance transparency legislation.

This Assessment

This report assesses the progress made on the major open government recommendations collaboratively developed by transparency advocates and delivered to President-elect Barack Obama and Congress in November 2008. Those recommendations, compiled in a report titled *Moving Toward a 21st Century Right-to-Know Agenda*, were developed over a two-year period with input from more than 100 groups and individuals and were endorsed by more than 300 organizations and individuals from across the political spectrum.⁵ A senior White House official called the recommendations an unofficial “blueprint for the Obama administration.”

⁵ *Moving Toward a 21st Century Right-to-Know Agenda: Recommendations to President-elect Obama and Congress*, November 2008. <http://www.foieffectivegov.org/files/21stkrkrecs.pdf>.

The report organized most of the recommendations into three main areas:⁶

Creating an Environment that Supports Open Government recommended policies and practices that would encourage a culture of openness within executive agencies and create incentives for agency staff to embrace transparency reforms.

Improving the Accessibility and Reliability of Government Information focused on using interactive technologies to make information more easily accessible to the public and on using the best formats and tools to make data management more efficient and reliable.

Reducing Secrecy in National Security outlined the need for more public oversight of defense and intelligence decisions, without undermining legitimate national security concerns.

This report examines activity in these three main areas, using the “bar” of the 2008 recommendations, without assessing specifics on every recommendation.⁷ Interviews were conducted with various open government advocates (see list on page 50). However, those interviewed and quoted in the report have not endorsed the substance of this report; judgments are those of the staff at the Center for Effective Government.

Moving Forward in the Next Four Years

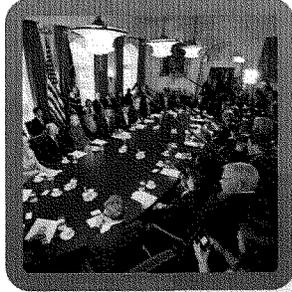
As its second term begins, the Obama administration has the opportunity to re-commit itself to the vision the president offered when he took office in 2009. The administration has established a policy foundation for improved transparency and accountability. An update to guidance on implementing the Freedom of Information Act instructed agencies to disclose whenever possible to improve the processing of information requests. All agencies have developed formal scientific integrity policies to protect scientific information from political interference. Significant progress has been made to use websites, online tools, and social media to communicate with the public more effectively. And recently passed improvements to whistleblower protections will make it easier for federal employees to disclose problems without fear of retribution.

But actual implementation of many of the policies established has lagged in key agencies, so the final section of this report recommends ways the administration can build on the progress of the first four years and reclaim missed opportunities.

⁶ An additional chapter laid out recommendations for the first 100 days of the administration, which were assessed separately. OMB Watch (now Center for Effective Government), *Obama at 100 Days - 21st Century Right-to-Know Agenda*, April 2009. <http://www.foreffectivegov.org/files/obamaat100daysrik.pdf>.

⁷ A previous report assessed progress on each recommendation at the midpoint of President Obama’s first term. OMB Watch (now Center for Effective Government), *Assessing Progress Toward a 21st Century Right to Know*, March 2011. <http://www.foreffectivegov.org/21strikreassessment>.

If these recommendations are put in place, we believe we will see a fundamental and lasting change in how government operates, ensuring the president's commitment to be "the most open and transparent administration in history" becomes a lasting legacy of his time in office.



CREATE AN ENVIRONMENT THAT SUPPORTS OPEN GOVERNMENT

Government leaders should foster a culture of openness, with the right incentives and sufficient resources to support transparency.

Creating an environment in federal agencies that encourages openness is a tough goal. No one likes to have their work scrutinized by external parties, so it is not surprising that public officials do not naturally embrace openness and the resulting accountability it brings. Improvements in transparency depend on the same factors that any effective reform effort requires, including commitment from top leadership, responsive staff, incentives for performance and consequences for poor performance, adequate resources, and an environment that supports ongoing experimentation and learning.

While the president's commitment to open government has been unwavering, at the agency level, staff responsiveness, incentives, and resources have often been lacking.

Leadership and Vision

President Obama brought together many of the necessary components for change. The president offered a powerful vision for open government and challenged agencies to think creatively, particularly about the use of technology. The administration also signaled its commitment to transparency by playing a leadership role in creating the international Open Government Partnership.

Strong policy improvements were put in place for FOIA, classification/declassification, scientific integrity, whistleblower protections, and general open government. The White House set an example with visitor logs. Rather than continue to fight a lawsuit started during the Bush administration around certain presidential records, Obama settled it and created a searchable website of logs of visitors to the White House – the first time the White House ever disclosed such information. In March 2011, the White House directed agencies to post staff directories, testimony, and reports to Congress.⁸ However, a review of 29 agencies conducted in July 2011 found that only six were posting all the information required by the directive.⁹



“We came to Washington to change the way business was done, and part of that was making ourselves accountable to the American people by opening up our government.”

President Barack Obama, Statement on Sunshine Week, March 16, 2010¹⁰

During the first two years of the first term, several high-level White House staff were engaged on transparency reforms. For instance, Norman Eisen served as Special Counsel for Ethics and Government Reform and worked closely with transparency advocates to develop the administration's open government agenda. His senior position and his commitment of a significant amount of his time to government reform issues seem to have played a critical role in the policy successes evident during that period. However, subsequent staff departures from the White House have left no one clearly in charge of implementing the president's open government directives. Instead, a few staff have worked intermittently on open government while handling multiple other responsibilities. There appears to be no clear alignment of authority and responsibility for implementing open government reforms among White House staff.

⁸ Steve Croley, “The Freedom of Information Act: Building on Steady Progress,” *The White House Blog*, March 14, 2011. <http://www.whitehouse.gov/blog/2011/03/14/freedom-information-act-building-steady-progress>.

⁹ “Agencies Not Meeting Administration's Sunshine Week Commitments,” *OpenTheGovernment.org*, July 8, 2011. <http://www.openthegovernment.org/node/3161>.

¹⁰ “Statement from the President on Sunshine Week,” *The White House, Office of the Press Secretary*, March 16, 2010. <http://www.whitehouse.gov/the-press-office/statement-president-sunshine-week>.

Agencies also experienced confusion over leadership and authority on open government issues. Many agencies included some hierarchy of the officials responsible for transparency in their open government plans, but not all clarified staff responsibilities. Additionally, we have seen senior officials assign responsibility for open government issues to lower-level staff who do not always have the authority to establish strong agency-wide policies or force changes in the activities of agency divisions.

An interagency Open Government Working Group convened by the White House meets regularly, but there are no records of the issues addressed or the agencies and officials attending. While the need for some degree of non-public dialogue is understandable, it is disappointing that a working group on open government hasn't figured out a way to inform the public about its work and accomplishments.

Implementation Struggles

There is a noticeable gap between the White House's policies and agencies' implementation thereof. Ultimately, the administration will be judged on the transparency it delivered, not the transparency it envisioned or promised – and there is widespread agreement that the delivery has lagged.

To its credit, the administration has taken some steps to ensure its transparency policies are enacted. The administration required agencies to create open government plans – encouraging them to take ownership of the openness initiative and to reflect critically on transparency in agency operations. To foster leadership, the administration directed each agency to appoint a senior-level representative to an interagency Open Government Working Group. To bolster accountability, Chief FOIA Officers in all the agencies were assigned new reporting requirements on agency implementation efforts. It isn't clear why these efforts proved insufficient to generate consistent implementation across the federal government.

“We are only seeing a few agencies enthusiastic about the Open Government Directive. Maybe it's because there aren't penalties for failure, nor rewards for initiative and excellence. Participation is voluntary, and there isn't a real infrastructure across the government to ensure openness is a priority,” commented Danielle Brian, executive director of the Project On Government Oversight (POGO).

Some agencies embraced the challenge of developing Open Government Plans and offered bold and innovative changes. For instance, the National Aeronautics and Space Administration's (NASA) plan scored the highest in a review by open government advocates and was noted as

“exceptional for its level of detail for each project and initiative.”¹¹ NASA’s open government plan included more than 80 specific milestones, with deadlines for three months, six months, one year, and two years for most project areas. The plan also featured innovative projects such as an online status dashboard, increasing access to scientific data, and crowdsourcing greater public involvement in research.¹² Other agencies only scratched the surface with overly general terms and few details or timeframes. The Department of Justice’s plan, which scored lowest in the review, offered practically no significant expansions in transparency or innovative open government projects, instead focusing primarily on FOIA and preexisting public relations efforts.

NASA’s plan included more than 80 specific milestones for innovative projects.

Likewise, agency performance has been mixed on implementing the Obama administration’s FOIA policies. For instance, the 2009 Open Government Directive instructed agencies with a significant backlog of FOIA requests to reduce their backlogs by 10 percent each year. But of the 11 cabinet agencies with more than 500 backlogged requests in fiscal year (FY) 2009, only three met the 10 percent reduction goal each year: the Departments of Health and Human Services, the Interior, and the Treasury. Three other agencies met the goal in two years out of three, while the remaining five agencies met their goal in only one year. There was no year in which every agency met the assigned goal. As of the end of FY 2012, nearly 60,000 backlogged requests remained in these 11 agencies – a total reduction of 8.8 percent compared to FY 2009.¹³

¹¹ *Evaluating Open Government*, OpenTheGovernment.org. <https://sites.google.com/site/opengovtplans/home>.

¹² “NASA Open Government Plan,” National Aeronautics and Space Administration. <http://www.nasa.gov/open/plan/>.

¹³ Data from agency annual FOIA reports. See <http://www.justice.gov/oip/reports.html>.

Agency Progress in Reducing FOIA Backlogs				
<i>Agency</i>	<i>FY 2010</i>	<i>FY 2011</i>	<i>FY 2012</i>	<i>Total</i>
<i>Agency reduced FOIA backlogs by 10 percent in all three years</i>				
Health and Human Services	Yes	Yes	Yes	3 / 3
Interior	Yes	Yes	Yes	3 / 3
Treasury	Yes	Yes	Yes	3 / 3
<i>Agency reduced FOIA backlogs by 10 percent in two years out of three</i>				
Defense	Yes	No	Yes	2 / 3
Homeland Security	Yes	No	Yes	2 / 3
Labor	Yes	No	Yes	2 / 3
<i>Agency reduced FOIA backlogs by 10 percent in one year out of three</i>				
Agriculture	Yes	No	No	1 / 3
Justice	No	Yes	No	1 / 3
State	No	Yes	No	1 / 3
Transportation	Yes	No	No	1 / 3
Veterans Affairs	No	No	Yes	1 / 3
Total agencies that reduced FOIA backlogs	8 / 11	5 / 11	7 / 11	

Resources were also a frequent problem for agency implementation of open government policies. Despite the fact that these efforts often result in saved money and were popular with the public, agencies typically have to invest some resources upfront. Tight and unpredictable budgets contributed to agency reluctance to make the investment in key open government activities. This has meant that bigger, broader reforms were scaled back or not considered.

Congressional Oversight

The slow pace of secrecy reform within the executive branch has been aided and abetted by a lack of robust oversight from Congress. The legislative branch of government – co-equal under the Constitution – has largely failed to provide substantive oversight for openness efforts and to challenge secrecy claims.

Congress has numerous tools at its disposal that can help identify problems, improve agency implementation, and even highlight best practices. The most common tools used by Congress include committee hearings, formal letters of inquiry to agencies, and requests for the

Government Accountability Office to review policies and practices. Yet Congress has conducted little visible oversight in the past four years on a number of key transparency issues. The effects of several new administration policies – such as the Open Government Directive and subsequent open government plans by agencies, executive orders on classification and controlled unclassified information, the scientific integrity memo, and the state secrets policy – have gone largely unexamined. While there has been some oversight of FOIA implementation,¹⁴ this has been the exception. Congress should do more to utilize the oversight tools at its disposal to determine how well these policies are serving the public's interests.

The lack of oversight is especially evident in areas of national security and secrecy. Instead of encouraging greater transparency and accountability, members of Congress have actually supported continued secrecy. For instance, in 2011, the Senate Intelligence Committee proposed punishing unauthorized disclosures of classified information by seizing any federal government pensions the individual may possess. Such a policy, which was not requested by intelligence agencies, could have a tremendous chilling effect on potential whistleblowers. The provision was stripped out of the 2013 Intelligence Authorization Act before it was passed in December 2012.¹⁵

“Under those conditions, it was not totally realistic to expect the executive branch to restrain itself,” said Steven Aftergood, director of the Federation of American Scientists’ Project on Government Secrecy. “It’s hard for government agencies to be more transparent than Congress wants them to be.”

At the same time, the administration has not been fully welcoming of congressional oversight in the rare instances when it has occurred on open government issues. Congressional staff continue to complain about the difficulty of getting executive officials to testify before committees and that agencies are slow to respond to congressional requests for oversight information. The Justice Department’s testimony in a 2012 House hearing on using technology to improve FOIA implementation did as much to muddy the waters as it did to elucidate the issue. The department downplayed the accomplishment of other agencies in developing the FOIAOnline portal and claimed that because other agencies had FOIA webpages, there were already many such portals. When the House Judiciary Committee held hearings on the state secrets privilege in June 2009, the administration declined to provide witnesses despite the committee’s request. Rep. Jerrold Nadler (D-NY), then chair of the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, expressed disappointment in the lack of administration participation and said, “It

¹⁴ See e.g. “Congress Asking the Right Questions on FOIA,” Center for Effective Government, Feb. 12, 2013. <http://www.foreffectivegov.org/congress-asking-right-questions-foia>.

¹⁵ Steven Aftergood, “Senate Passes Intelligence Bill Without Anti-Leak Measures,” *Secrecy News*, Dec. 31, 2012. https://www.fas.org/blog/secrecy/2012/12/2013_intelauth.html.

should be possible to send someone to provide us with the Administration's views and to answer our questions to the extent that they are able."¹⁶

Scientific Integrity and Media Access

In contrast with the George W. Bush administration's political manipulation and suppression of science, President Obama issued a March 2009 memo embracing the principles of scientific integrity. Specifically, the memo directed officials not to suppress scientific findings and to adopt appropriate procedures to ensure scientific integrity. Advocates have not reported significant or consistent attempts to manipulate scientific findings in the Obama administration's first term. However, media access to government scientists remains an issue.

Despite presidential instructions to complete scientific integrity guidelines within three months, it took the Office of Science and Technology Policy (OSTP) more than 18 months to produce guidance for agencies. When it was released, the OSTP guidance was vague. OSTP's principles failed to specifically state scientists' rights to express personal views or to review the final version of scientific documents to which they contributed, did not require agencies to inform employees of their whistleblower rights or to post their communications policies online, and did not clearly define the role of public affairs officers. The OSTP memo also did little to improve the ability of journalists to speak with government experts, stating that "federal scientists may speak to the media ... with appropriate coordination with their immediate supervisor and their public affairs office."¹⁷

Despite the new policy, journalists complain that in many agencies, access to government scientists is quite limited. Reporters are not allowed to talk to scientists without a public affairs officer in the agency being present. The result is continued or worsened delays and bureaucratic hurdles in getting access to experts and documents, which makes uncovering stories more difficult. "This particular administration is very, very disciplined when it comes to information control," said Lucy Dalglish, dean of journalism at the University of Maryland.

"We continue to get calls from reporters on an ongoing basis, saying they can't get in," said Francesca Grifo, senior scientist at the Union of Concerned Scientists.

Agency policies on scientific integrity vary widely. The National Oceanic and Atmospheric Administration's (NOAA) draft policy stood out from other agencies with specific protections and

¹⁶ "State Secret Protection Act of 2009," Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary, June 4, 2005. http://judiciary.house.gov/hearings/printers/111th/111-14_50070.PDF

¹⁷ John P. Holdren, "Scientific Integrity," memorandum, Office of Science and Technology Policy, Dec. 17, 2010. <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>

detailed procedures for reporting and investigating possible instances of scientific interference. By contrast, the EPA's draft policy did not contain enforceable requirements to protect against scientific interference or detail any investigation procedures. The process for the development of agency scientific integrity policies was *ad hoc* and lacked a requirement to engage with the public

Whistleblower Protection

Whistleblowers make the public aware of lawbreaking, waste, or threats to health and safety. Protecting public servants who report problems from professional retribution helps establish a culture of transparency in government that places accountability and the public good above problem avoidance or image maintenance. However, despite the important role whistleblowers play in making sure that lawmakers and the public are informed of wrongdoing, the legal provisions put in place to protect them from retribution became riddled with loopholes from back court rulings over the years.¹⁸

A recent survey by the Merit Systems Protection Board, an independent agency that reviews whistleblower appeals, suggests that while fewer federal employees are witnessing wrongdoing and many employees do report such problems, retribution against whistleblowers still occurs. The board surveyed more than 42,000 federal employees in 2010 and found that about 11 percent reported witnessing any "wasteful or illegal activities." Of these, about two-thirds said they reported these activities, about one in five of whom said that they suffered some kind of reprisal from blowing the whistle. And a higher percentage of these reported being fired for whistleblowing in 2010 than in 1992.¹⁹

During its first term, the Obama administration worked regularly to support legislative efforts to improve whistleblower protections. The president signed into law various improvements in whistleblower protections that were included in several bills, ranging from the Recovery Act to the health care reform law.²⁰ Then in November 2012, after years of hard work by advocacy groups, Congress passed and President Obama signed the Whistleblower Protection Enhancement Act.²¹ The new law made major upgrades to the protections for federal whistleblowers by closing loopholes, clarifying protections, and strengthening the agencies charged with protecting whistleblowers. Though intelligence and national security workers

18 Report on the Whistleblower Protection Enhancement Act (P.L. 112-199), Senate Committee on Homeland Security and Governmental Affairs, April 19, 2012. <http://www.gpo.gov/fdsys/pkg/CRPT-112srpt155/pdf/CRPT-112srpt155.pdf>.

19 *Blowing The Whistle: Barriers to Federal Employees Making Disclosures*, U.S. Merit Systems Protection Board, November 2011. <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=6625038&version=664475&application=ACROBAT>.

20 Whistleblower protections were included in the American Recovery and Reinvestment Act (P.L. 111-5, Sec. 1553); Fraud Enforcement and Recovery Act of 2009 (P.L. 111-21, Sec. 4); Patient Protection and Affordable Care Act of 2010 (P.L. 111-148, Sec. 10104(j)(2)); and FDA Food Safety Modernization Act (P.L. 111-353, Sec. 402).

21 P.L. 112-199.

were excluded from the new law's protections, President Obama issued a directive in October to improve protections for these public employees.²²

In addition, Congress extended whistleblower protections to an estimated 12 million private employees of federal contractors and grantees, ensuring that these companies and organizations cannot fire or punish private employees who report misconduct among businesses receiving public funds. These provisions were included in the National Defense Authorization Act, which President Obama signed in early January 2013.²³ However, the president surprisingly issued a signing statement on the law that claimed the provisions could interfere with the executive branch's ability to manage officials and asserted that the administration would interpret the protections so that agencies could "supervise, control and correct employees' communications with Congress."²⁴ The practical effect of the signing statement is unclear, but whistleblower advocates took it as inauspicious.²⁵

Laws signed in late 2012 and early 2013 upgraded the protections for federal whistleblowers and extended protections to 12 million private employees of federal contractors.

Another contradiction to the administration's efforts to improve whistleblower protections was the unprecedented number of investigations and excessive prosecutions of leaks, which could have a chilling effect on authorized disclosures. The administration has brought six cases against government (or military) employees for leaks under the Espionage Act, compared to only three known previous cases since its enactment in 1917.²⁶ For example, after telling a reporter about warrantless wiretaps by the National Security Agency, Thomas Drake, a former official at the agency, was charged under the Espionage Act. Drake faced up to 35 years in jail for possessing, but never sharing, a handful of classified documents – several of which were either marked declassified or had been declassified. After years of investigation and prosecution, the administration's case collapsed, and they instead struck a deal with Drake to plead guilty to a misdemeanor.

22 Barack Obama, Presidential Policy Directive 19, "Protecting Whistleblowers with Access to Classified Information," The White House, Oct. 10, 2012. <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/10/11/National-Politics/Graphics/whistleblower1C.pdf>

23 P.L. 112-239.

24 "Statement by the the President on H.R. 4310," The White House, Office of the Press Secretary, Jan. 3, 2013. <http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310>

25 See e.g. Suzanne Dershowitz, "Lawmakers Sound Alarm on Obama's NDAA Signing Statement," Project On Government Oversight, Jan. 17, 2013. <http://www.pogo.org/blog/2013/01/20130117lawmakers-sound-alarm-on.html>

26 Cora Currier, "Sealing Loose Lips: Charting Obama's Crackdown on Leaks," *ProPublica*, March 9, 2012. <https://www.propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks>

“It’s never appropriate to treat a whistleblower who is trying to perform a service to his country in the same way that you would treat a traitor,” said Elizabeth Goitein, co-director of the Liberty and National Security Program at the Brennan Center for Justice.



ACCESSIBLE, RELIABLE PUBLIC INFORMATION

Public information should be accurate, timely, and easy to find, use, and understand.

In its first term, the Obama administration has shown exceptional enthusiasm in using new technologies to communicate with the public. Agencies have unveiled user-friendly websites, broadened data availability, and grown significantly bolder in their use of social media. The administration has also taken steps to better manage technology in ways that improve the longer-term outlook for transparency. As a result of its reforms and commitments, the administration has considerably raised expectations for the usability of government information.

Openness can only be meaningfully judged against the standards of the day. The Internet revolution has made it easier than ever to access, analyze, and understand information. The public expects high standards of usability in technology, and intuitive tools like visualizations have become widespread. The benefits of these improvements for better dialog and decision making have become more evident.

Websites and Data

In just four years, the online face of the U.S. government has undergone dramatic change. To some degree, this has been driven by broader social trends, as reliance on the Internet has become ubiquitous. However, the administration had options in how to respond to the technological shift, and it has clearly chosen to embrace it. On President Obama's first full day in office, he issued a memo directing agencies to "harness new technologies to put information about their operations and decisions online and readily available to the public."²⁷ The past four years have seen that rhetoric increasingly becoming reality.



"Agencies should harness new technologies to put information about their operations and decisions online and readily available to the public."

President Barack Obama, "Transparency and Open Government," Jan. 21, 2009²⁸

To help transform government's use of technology, the administration created two new federal officers, a Chief Information Officer (CIO) and a Chief Technology Officer (CTO), both of whom have played important roles in driving transparency efforts forward. The administration also proposed increasing resources for IT (through growth in the Electronic Government Fund) while emphasizing the need to get more value out of technology spending – a necessary step in making transparency innovations fiscally feasible.

These investments yielded important benefits. An early project, the IT Dashboard, tracked underperforming and over-budget IT projects within agencies, which led to the cancellation of some \$3 billion in failing technology projects. PaymentAccuracy.gov identifies possibly improper federal payments that cost billions of dollars each year. Challenge.gov established a low-cost platform to help agencies bring the public into agencies' deliberations on how to solve government problems.

"Thinking about information differently, as something that is not just the public's right to ask for, but that agencies have an obligation on their own to make it more accessible to the public – I think that is a huge step," said Anne Weismann, chief counsel for Citizens for Responsibility and Ethics in Washington (CREW).

²⁷ Barack Obama, "Transparency and Open Government," memorandum, The White House, Jan. 21, 2009. <http://www.whitehouse.gov/the-press-office/2009/01/21/transparency-and-open-government>.

²⁸ *Ibid.*

Improving access to government data has been a particular accomplishment of this administration. In May 2009, the administration launched Data.gov to provide a central repository for agencies to make data available to users and to facilitate interactions among data users

and providers.²⁹ The Data.gov program became the centerpiece of the administration's efforts to encourage agencies to make data more widely available to the public. The website now features more than 350,000 datasets, 1,200 data tools, and more than 130 mobile applications from agencies across the federal government. The website has organized data on different topics into 16 issue-area "communities," including ethics, health, law, and energy. But agencies have lagged at releasing inventories of their datasets, which prevents users from knowing what important datasets might still be missing from Data.gov.

The Data.gov website features more than 350,000 datasets, 1,200 data tools, and more than 130 mobile applications from agencies across the federal government.

There has also been progress on building a government-wide infrastructure for the Freedom of Information Act (FOIA) process. Several agencies collaborated to develop FOIAOnline, which launched in October 2012.³⁰ The multi-agency portal, long a goal of open government campaigners, allows the public to submit and track FOIA requests, receive responses, and search others' requests through a single website. The platform is also expected to improve the efficiency of agency processing of requests.

The administration has also improved the tracking of rulemaking within the executive branch that determines how laws are implemented. The Obama administration has improved Regulations.gov, the government-wide e-rulemaking portal, to make the site more user-friendly. The site received an aesthetic redesign, upgrades to its search capabilities, easier docket navigation, and better access to regulatory data. In addition, President Obama issued a memorandum directing agencies to publish more data about their regulatory enforcement activities.³¹ Nevertheless, rulemaking dockets are still complex to navigate, and important information such as cost-benefit analyses can be difficult for even experienced users to find.³²

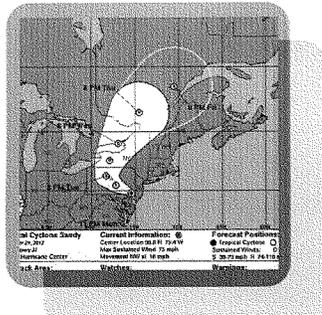
Many agencies and the White House have begun to make wider use of social media, such as Twitter and Facebook. As Hurricane Sandy approached the East Coast, the Federal Emergency

²⁹ "Data.gov to Bring Unprecedented Access to Government Information," press release, Office of Management and Budget, May 21, 2009. http://www.whitehouse.gov/omb/news_052109_data.

³⁰ "National Archives Joins Federal Agencies to Launch New Freedom of Information Act (FOIA) Online System," press release, National Archives and Records Administration, Oct. 1, 2012. <http://www.archives.gov/press/press-releases/2013/nr13-01.html>.

³¹ Barack Obama, "Regulatory Compliance," memorandum, The White House, Jan. 18, 2011. <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-compliance>.

³² "Highlighting the Benefits in Cost-Benefit Analysis," OMB Watch, Sept. 11, 2012. <http://www.forsffectivegov.org/highlighting-the-benefits-in-cost-benefit-analysis>.



Management Agency (FEMA), the National Weather Service, and other federal agencies used Facebook and Twitter feeds to keep the public informed and help them prepare for the storm.³³ The administration has taken several steps to facilitate the use of social media, including publishing guidance in several areas to facilitate agency adoption and signing government-wide contracts with several popular services.

One of the latest steps the administration took to improve government websites and online tools was the Digital Government Strategy, released in May 2012.³⁴ The document is an ambitious

and forward-looking plan with the potential to make government more transparent, efficient, and accessible. The strategy requires agencies “to adopt new standards for making applicable Government information open and machine-readable by default.” The strategy requires agencies to develop new mobile applications, to make high-value datasets easier for programmers to tap into for new uses, and to improve interoperability between agencies. In addition, the strategy created a new support office, the Digital Services Innovation Center, and an advisory group to assist and guide agencies’ modernization efforts.

Records Management

Records management is an ongoing challenge for every administration due to the sheer amount of information collected and processed at the federal level. Dozens of federal agencies, comprised of an estimated 2.8 million federal employees, exist,³⁵ each generating information every day – reports, databases, e-mails, and so on. Add to that the tens of thousands of companies filing regulatory information, as well as communications with the public, and records management quickly becomes a daunting task. Properly implemented, electronic information collection and records management will make information more accurate, faster to find, and easier to share eventually. Yet despite the importance and benefits of modernizing records management,

33 Jacqueline Baylon, “Hurricane Sandy: Authorities use social media to keep people informed,” *Denver Post*, Oct. 29, 2012. http://www.denverpost.com/digital-first-media/ci_21880815/hurricane-sandy-social-media. Also see “Hurricane Sandy Highlights Role of Government Information in Our Everyday Lives,” Center for Effective Government, Nov. 5, 2012. <http://www.foreffectivegov.org/sandy-highlights-role-of-gov-info-in-our-everyday-lives>.

34 Steven VanRoekel, “Roadmap for a Digital Government,” *Office of Management and Budget Blog*, May 23, 2012. <http://www.whitehouse.gov/blog/2012/05/23/roadmap-digital-government>. Also see “Obama Plans to Further Harness Technology for Transparency,” Center for Effective Government, May 30, 2012. <http://www.foreffectivegov.org/node/12089>.

35 Employment, Hours, and Earnings from the Current Employment Statistics survey (National), Bureau of Labor Statistics, Feb. 25, 2013. <http://data.bls.gov/timeseries/CES9091000001>.

agencies have struggled to shift from paper records or rudimentary electronic formats to modern records management.

To address this issue, the administration has made substantial progress in creating a plan and specific requirements that would move all agencies to modern and consistent management of records. In September 2011, the administration pledged to modernize the management of government records and move toward “a digital era, government-wide records management framework that promotes accountability and performance.”³⁶ In November 2011, a presidential memorandum directed agencies to create and report their plans for improving records management and to identify any obstacles to effectively managing information.³⁷

There has been “a sea change in the attention of the government ... to the problem of not just managing but preserving electronic records,” said Patrice McDermott, executive director of OpenTheGovernment.org.

In August 2012, the administration issued the Managing Government Records directive, which requires agencies to shift to electronic record keeping and develop tools to manage and preserve e-mail records electronically. Unfortunately, the directive included long timeframes for change: agencies were given until the end of 2016 to manage e-mail records electronically and until the end of 2019 to manage key records in electronic format. Overall, the directive is expected to have a genuine positive impact on records management at agencies, but many would like to see implementation deadlines shortened.

Even with these policy improvements, records management problems continue to occur. The correspondence of public officials can reveal why decisions are made and how policies are refined, including the possibility of inappropriate dealings with special interests. Yet government officials have been criticized for using personal e-mail accounts for official matters. Though regulations allow such non-agency e-mail so long as records are preserved,³⁸ the concern remains that these records will not be tracked, searched, or retained. After a problem with personal e-mail accounts³⁹ in 2010, the Office of Science and Technology Policy (OSTP) issued a new policy requiring officials to conduct communications through government accounts and to forward

³⁶ The Open Government Partnership: National Action Plan for the United States Of America, The White House, Sept. 20, 2011. http://www.whitehouse.gov/sites/default/files/us_national_action_plan_final_2.pdf

³⁷ Barack Obama, “Managing Government Records,” memorandum, The White House, Nov. 28, 2011. <http://www.whitehouse.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records> Also see “OMB Watch Praises Presidential Memo on Modernizing Records Management,” press release, OMB Watch, Nov. 28, 2011. <http://www.fordfictivegov.org/node/11924>

³⁸ 36 CFR 1236.22.

³⁹ David Perera, “Rep. Issa presses White House on Gmail,” *FierceGovernmentIT*, April 14, 2010. <http://www.fiercegovernmentit.com/story/rsp-issa-presses-white-house-gmail/2010-04-14>

work-related e-mails on personal accounts to government accounts.⁴⁰ Similarly, despite the White House blocking external e-mail systems,⁴¹ a June 2010 *New York Times* article reported that “[s]ome lobbyists say that they routinely get e-mail messages from White House staff members’ personal accounts rather than from their official White House accounts.”⁴² In November 2012, it was revealed that U.S. Environmental Protection Agency Administrator Lisa Jackson used an alias account under the name “Richard Windsor.” While the agency claims the use of such aliases is normal practice to allow for easier internal communications, it could impede complete and effective responses to requests for communication records. There have been several inquiries about this practice from Congress, and in December 2012, the EPA Inspector General launched an investigation.⁴³

Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA) has long been considered one of the most fundamental tools to ensure open government at the federal level. Requesting government information through a FOIA request is the primary way the public accesses records that aren’t proactively made available through agency websites. However, long delays in agency responses (sometimes years) due to large backlogs of requests are common. There are also concerns that some agencies overuse exemptions from the law to excessively withhold documents from disclosure. These problems have led persistent requestors to pursue lawsuits to force disclosure. This can make obtaining government information more costly for both agencies and the public, and it means that when the requested information is finally released, it may no longer be timely.

In its first term, the Obama administration demanded faster FOIA processing and tried to improve the process for obtaining access to government records. “Agencies should act promptly and in a spirit of cooperation” when processing FOIA requests, according to a presidential memorandum issued on Obama’s first full day in office.⁴⁴ “Each agency must be fully accountable for its administration of the FOIA,” wrote Attorney General Eric Holder in his 2009 memo, which

40 John P. Holdren, “Reminder: Compliance with the Federal Records Act and the President’s Ethics Pledge,” Office of Science and Technology Policy, May 10, 2010. <http://assets.fiercemarkets.com/public/sites/govit/ostp-employees.pdf>.

41 Brook Colangelo, “Letter to Meredith Fuchs and Anne Weismann,” Executive Office of the President, Jan. 15, 2010. http://www.gwu.edu/~nsarchiv/news/20100115a/WH_Letter.pdf.

42 Eric Lichtblau, “Across From White House, Coffee With Lobbyists,” *The New York Times*, June 24, 2010. <http://www.nytimes.com/2010/06/25/us/politics/25caribou.html>.

43 Based on a court order, the agency is releasing thousands of e-mails from the Richard Windsor account. See Juliet Eilperin, “EPA IG audits administrator’s private e-mail account,” *The Washington Post*, December 18, 2012. http://articles.washingtonpost.com/2012-12-18/national/35908710_1_e-mail-account-audit-transparency.

44 Barack Obama, “Freedom of Information Act,” memorandum, The White House, Jan. 21, 2009. http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

also established new reporting requirements about how agencies are implementing the law.⁴⁵ In 2009, the Open Government Directive tasked agencies with significant backlogs of FOIA requests to reduce them by 10 percent annually.⁴⁶ Another 2010 memo directed agencies to “assess whether you are devoting adequate resources to responding to FOIA requests.”⁴⁷

Despite these admonitions, overall performance on FOIA in the first term was mixed. For instance, the Obama administration had processed more FOIA requests in fiscal year 2011 than in any year since 2005, and the use of exemptions to deny requests dropped, especially the discretionary exemptions. However, agencies’ combined backlog grew by 19 percent because of an even larger surge in FOIA requests.

The Justice Department’s approach to FOIA litigation has been problematic. For instance, in *Milner v. Department of the Navy*, Justice Department lawyers argued that information about the safety of explosives stored on a Navy base in Washington State could be withheld under FOIA’s Exemption 2, which covers information “related solely to the internal personnel rules and practices of an agency.” That “odd reading” of the law, wrote Justice Elena Kagan in 2011 in the U.S. Supreme Court’s 8-1 ruling against the government, “would produce a sweeping exemption, posing the risk that FOIA would become less a disclosure than ‘a withholding statute.’” In 2011 oral arguments before the Court in *Federal Communications Commission v. AT&T*, the government argued that it does “not embrace [the] principle” that FOIA exemptions should be narrowly construed – contrary to Supreme Court precedent and the longstanding view of open government experts.⁴⁸

Spending Transparency

The federal government spends over \$1 trillion each year on salaries, contracts, grants, rent, disaster assistance, and more. Transparency around this spending is essential to increased accountability. We need to ensure the federal government, and those chosen to perform work for it, are acting in the public interest and maximizing value. Although the administration has encouraged the use of new technologies to increase the transparency of federal spending, challenges with data quality and the scope of spending data disclosed remain.

⁴⁵ Eric Holder, “The Freedom of Information Act (FOIA),” memorandum, Office of the Attorney General, March 19, 2009. <http://www.justice.gov/ag/foia-memo-march2009.pdf>. In 2012, the Justice Department also directed agencies to begin reporting key data quarterly rather than annually; see Melanie Ann Pustay, “New Quarterly FOIA Reporting Beginning January 2013,” *The FOIA Post*, Dec. 4, 2012. <http://blogs.justice.gov/oip/archives/952>.

⁴⁶ Peter R. Orszag, “Open Government Directive,” memorandum, Office of Management and Budget, Dec. 8, 2009. <http://www.whitehouse.gov/open/documents/open-government-directive>.

⁴⁷ Rahm Emanuel and Bob Bauer, “Freedom of Information Act,” memorandum, The White House, March 16, 2010. <http://www.archives.gov/ogis/memos/foia-memo-03-16-10.pdf>.

⁴⁸ *Federal Communications Commission, et al., v. AT&T, et al.*, Oral arguments before the U.S. Supreme Court, Jan. 19, 2011. <http://www.gwu.edu/~nsarchiv/news/20120114/FCC%20v%20ATT%2009-1279.pdf>.

One of President Obama's first tasks was developing and implementing the American Recovery and Reinvestment Act,⁴⁹ also known as the stimulus bill. The president promised that "every American will be able to go online and see where and how we're spending every dime" of stimulus money.⁵⁰ The law included requirements to post online more detailed information about grants and contracts. Within months, the administration set up Recovery.gov, an impressive website that contains information about who received stimulus funding and what they are doing with those funds. Interactive mapping, informative graphs, spending summaries, and agency profiles were added over time.

In 2010, the Obama administration upgraded USAspending.gov, the website for information about government-wide spending, with several new features that provided users with greater search capabilities, interactive summaries, and tools to analyze trends over time. However, many of the transparency innovations from the Recovery Act have not yet been applied to USAspending.gov. For example, USAspending.gov borrowed an idea from Recovery.gov and began posting information on sub-contractors and sub-grantees of federal spending, but failed to connect information about the sub-contractors and sub-grantees to data about the prime awards. USAspending.gov also has not yet replicated the usability and clarity of the Recovery.gov website.

There have been other notable attempts to improve spending data. The 2009 Open Government Directive established a process aimed at improving the accuracy of spending data.⁵¹ President Obama established the Government Accountability and Transparency Board in June 2011 and called for recommendations on how to better collect and display government spending.⁵² The board provided its recommendations in December 2011. While some suggestions are being explored, no plan to implement them government-wide has yet been proposed. Although significant problems with spending data quality remain, the administration announced in February 2013 that it would issue further guidance on improving the data.⁵³

Additionally, other significant improvements in spending transparency have faltered when proposed. For instance, several agencies proposed the possibility of posting copies of federal

49 P.L. 111-5.

50 "Opening Remarks of President Barack Obama-As Prepared For Delivery," The White House, Office of the Press Secretary, Feb. 9, 2009. <http://www.whitehouse.gov/the-press-office/opening-remarks-president-barack-obama-prepared-delivery>.

51 Peter R. Orszag, "Open Government Directive," memorandum, Office of Management and Budget, Dec. 8, 2009. <http://www.whitehouse.gov/open/documents/open-government-directive>.

52 Barack Obama, Executive Order 13576, "Delivering an Efficient, Effective, and Accountable Government," The White House, June 13, 2011. <http://www.whitehouse.gov/the-press-office/2011/06/13/executive-order-delivering-efficient-effective-and-accountable-government>.

53 Camille Tuutti, "OMB guidance promised to ensure USAspending accuracy," *Federal Computer Week*, Feb. 13, 2013. <http://fcw.com/articles/2013/02/13/omb-guidance-usaspending.aspx>.

contract documents online⁵⁴ but withdrew the idea a few months later.⁵⁵ The administration also never announced a position on the DATA Act, a bill designed to strengthen spending transparency, which passed the House in April 2012.⁵⁶

54 "Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency," Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), May 13, 2010, 75 FR 26916. <https://federalregister.gov/a/2010-11381>.

55 "Federal Acquisition Regulation: Enhancing Contract Transparency," Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), Feb. 10, 2011, 76 FR 7522. <https://federalregister.gov/a/2011-2900>.

56 H.R. 2146 in the 112th Congress.

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Opening Statement

Rep. Elijah E. Cummings, Ranking Member

**Hearing on "Addressing Transparency in the Federal Bureaucracy:
Moving Toward a More Open Government"**

March 13, 2013

Thank you, Mr. Chairman, for holding this hearing. This is Sunshine Week, when we celebrate the importance of transparency and openness in government. Sunshine Week is also an appropriate time to conduct oversight and evaluate the state of transparency in our government.

On his first day in office, President Obama made clear that open government would be a priority in his Administration. The President issued a memo on transparency that formed the basis for the Open Government Initiative, a comprehensive set of efforts to increase public access to government information.

Also on his first day in office, the President issued a memo on the Freedom of Information Act, reversing the Bush Administration's presumption against disclosure and instituting a presumption in favor of disclosure. And the Attorney General issued a memo informing agencies that the Justice Department would not defend FOIA denials in court unless agencies have a reasonable belief that there will be foreseeable harm from disclosure.

I think it is fair to say that the President jump-started transparency efforts in the Executive Branch, and there have been significant successes in the last four years. However, there are still areas in need of improvement, and we can always do better.

I ask unanimous consent to place in the record a report issued this week by the Center for Effective Government titled, "Delivering on Open Government: The Obama Administration's Unfinished Legacy." This report finds as follows:

"To secure its legacy as a champion of transparency, the administration will need to do more to ensure that agencies actually implement the transparency policies it established, address gaps left in its policy reforms, and improve its record on national security-related secrecy."

In addition, one of the criticisms in the report is aimed at Congress. The report finds that the “slow pace of secrecy reform within the executive branch has been aided and abetted by a lack of robust oversight from Congress.”

I agree that bipartisan oversight is critical to holding agencies accountable. That is why Chairman Issa and I recently worked together to send a letter to the Justice Department asking for information about several issues of concern regarding FOIA implementation.

In addition, Congress can make it easier for the American people to obtain access to government records. This week, the Chairman and I are releasing a draft bill called the FOIA Oversight and Implementation Act. In the spirit of transparency, we have made it available on the Committee’s website, and we welcome feedback before we formally introduce it. This bill would codify in law what the President has done administratively: it would establish a legal presumption under FOIA in favor of disclosure. It would also create a pilot project to give FOIA requesters a single place to make requests and access records electronically.

I appreciate the Chairman’s bipartisan work on this bill, and I hope we will take swift action to get it on its way to becoming law. I am also pleased to be cosponsoring a bill that Representative Clay is introducing this week to improve the transparency and accountability of federal advisory committees.

I look forward to hearing from the witnesses here today about these proposals and any other ideas you might have for shining light on our government’s operations.



March 20, 2013

To: Chairman Darrell E. Issa and Ranking Member Elijah Cummings, House Committee on Oversight and Government Reform

From: Angela Canterbury, Public Policy Director

Re: Request to Supplement Angela Canterbury's Testimony in the March 3, 2013 Hearing Record

Respectfully, I'd like to clarify something from my oral testimony and provide some additional recommendations sought by members of the Committee during the hearing, particularly in response to Representative Meadows' concerns about the consistent violations of the 20-day deadline for responding to Freedom of Information Act (FOIA) requests.

First, there are some consequences, though perhaps not real and substantial, in the law for violating the 20-day rule for disclosure. The "OPEN Government Act of 2007" prohibits agencies from charging fees if they do not respond within 20 days in most cases. But, unfortunately, many agencies are not following the law in this respect, and most agencies have not updated their regulations to reflect this change in the law. As we discussed, many agencies are asserting that they are meeting the 20-day deadline by simply acknowledging receipt of the request. This is also the opinion that DOJ has adopted in litigation—though we strongly disagree. Compliance with the law means producing requested materials within the deadline with some legal exceptions. During the hearing, I mentioned that agencies ought to pay for court appeals out of their own budgets. However, I must correct and clarify that the FOIA has required this since the 2007 amendments.¹ Instead, to increase consequences for agencies that withhold until forced to disclose in an appeal, Congress might consider requiring agencies pay additional penalties and damages out of their budgets to requesters who prevail in appeals.

There is another financial penalty that has been part of FOIA since 2007, but it is not yet working well. An agency cannot assess search fees if its response to a requester is untimely, unless unusual or exceptional circumstances apply to the processing of the request. Moreover, when a non-commercial requester is a news media representative or an educational or non-commercial scientific institution (a "scholarly requester"), an agency cannot assess duplication fees for an untimely response except where unusual or exceptional circumstances apply.

Agencies often flout this penalty. Some agencies still insist on requesters' agreement to pay search and duplication fees long after FOIA's time limits have expired. They do so without telling FOIA requesters about FOIA's financial penalty provision and in circumstances that are neither unusual nor exceptional, as those terms are defined in FOIA.

¹ 5 U.S.C. § 552(a)(4)(A)(viii).

Moreover, many requesters are not aware of FOIA's financial penalty provision, so they do not know to rely on it when dealing with agency fee demands or when administratively appealing fee waiver denials. According to a recent audit by the National Security Archive, 56 agencies have not updated their FOIA regulations since the Open Government Act of 2007, when Congress added the financial penalty provision.² As a result, requesters cannot look to those agencies' regulations for information about the financial penalty provision or when it applies.

The reforms proposed in H.R. 1211, the FOIA Oversight and Implementation Act of 2013 would provide opportunities to do so by mandating the agencies update their regulations and a study of how to fix FOIA. There are ways to encourage enforcement which should be explored.

Other recommendations Congress should consider requiring:

- (1) Any agency attempting to assess search or duplication fees based on a determination that occurs more than 20 days after submission of a FOIA request to provide in correspondence to the requester the basis for the agency's authority to assess such fees, that is, explain why the agency believes it is not precluded by FOIA's financial penalty provision from assessing the fees;
- (2) Agencies that fail to provide the disclosure in suggestion (1) above to waive search fees, and in the case of news media or scholarly requesters, duplication fees, regardless whether unusual or exceptional circumstances apply; and
- (3) Agencies to report the number of times they assess search fees (and in the case of news media or scholarly requesters, duplication fees) based on a FOIA determination that occurs more than 20 days after a request was submitted. Congress should also consider requiring agencies to report those same fee assessments if they are based on a determination that occurs more than 30 days after a FOIA request was submitted; such reporting would capture assessments that rely on "exceptional circumstances," as provided by 5 U.S.C. § 552(a)(4)(A)(vii).

Under current law, an agency must make a determination on a FOIA request within 20 working days (or 30 working days, in the event of unusual circumstances). If the agency fails to provide a timely determination, the FOIA requester may file a lawsuit to compel disclosure. FOIA's provision for an immediate right to seek judicial review in the face of agency delay is a critical tool to prod agencies to respond to FOIA requests.

As I mentioned in my written testimony, the D.C. Circuit is considering in an ongoing case about what constitutes an adequate determination under FOIA.³ We believe that under current law, an agency must provide a substantive response to a FOIA requester within FOIA's time limits: The agency must tell the requester whether it will grant or deny the request, provide

² National Security Archive, *Outdated Agency Regs Undermine Freedom of Information*, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB405/>.

³ *Citizens for Responsibility and Ethics in Washington v. Federal Elections Commission*, No. 12-5004 (D.C. Cir. filed Jan. 9, 2012).

reasons for its decision, and notify the requester of his right to administrative appeal if the request is denied in full or in part. However, the Department of Justice filed a brief asserting that an agency need not provide this kind of substantive response to a FOIA requester within FOIA's time limits. Rather, under DOJ's view, an agency satisfies FOIA if it tells a requester that it will provide at least some records at an indeterminate future time beyond FOIA's time limits. If the Department of Justice's position prevails in court, an amendment to FOIA will be required to make clear that agencies must provide substantive responses to requesters within the statutory time limits. However, is not necessary to amend the law at this time because it is clear that a substantive response is required. I urge you to be watchful of this decision, and take legislative action only if necessary.