

Why Critics of Transparency Are Wrong

By Gary D. Bass, Danielle Brian and Norman Eisen¹

INTRODUCTION

Gary D. Bass is executive director of the Bauman Foundation and affiliated professor at Georgetown University's McCourt School of Public Policy. He founded and ran OMB Watch (now called Center for Effective Government) for three decades.

Danielle Brian has been executive director of the Project On Government Oversight (POGO) for over twenty years, and is chair of OpenTheGovernment.org. POGO regularly utilizes FOIA and works with whistleblowers to accomplish public policy reforms.

Norman Eisen is a visiting Fellow at the Brookings Institution. He comes to Brookings after almost six years of service in the Obama administration, most recently as the U.S. Ambassador to the Czech Republic and before that as President Obama's ethics czar.

A number of commentators and academics have recently made the attention-grabbing assertion that excessive openness and transparency are one of the causes of our country's governance woes. For example, *The Atlantic's* David Frum claims that transparency and accountability reforms in government "have weakened political authority...[and] yielded more lobbying, more expense, more delay, and more indecision."² The Bipartisan Policy Center's Jason Grumet urges that "it's time to revisit...the reforms inspired by the mistrust of government that Watergate helped engender...aimed at transparency, openness and the monitoring of decision-making."³ Jonathan Rauch, a Senior Fellow at Brookings, advocates in favor of a return to "honest graft,"⁴ including reversing transparency rules to make government work better.⁵ Noted academic Francis Fukuyama, decrying the current dysfunction of our democratic processes, concludes that, "The obvious solution to this problem would be to roll back some of the would-be democratizing reforms, but no one dares suggest that what the country needs is a bit less participation and transparency."⁶

Critics like these assert that transparency results in government indecision, poor performance, and stalemate. Their arguments are striking because they attack a widely-cherished value, openness, attempting to connect it to an unrelated malady, gridlock. But when you hold the "transparency

¹ A shorter version by Bass and Brian of some of the arguments made herein appeared as "Transparency: A Means to Making Government Work Better," *Roll Call*, Aug. 21, 2014 at http://www.rollcall.com/news/transparency_a_means_to_making_government_work_better_commentary-235794-1.html?pg=1&dczone=opinion.

² Frum, David. "The Transparency Trap," *The Atlantic*, Aug. 13, 2014, at <http://www.theatlantic.com/magazine/archive/2014/09/the-transparency-trap/375074/>. Accessed Oct. 15, 2014.

³ Grumet, Jason. "When Sunshine Doesn't Always Disinfect the Government," *Washington Post*, Oct. 2, 2014 at http://www.washingtonpost.com/opinions/laws-aimed-at-transparency-have-hindered-serious-debate/2014/10/02/7c5eb022-48dd-11e4-b72e-d60a9229cc10_story.html?wprss=rss_opinions. Accessed Oct. 15, 2014.

⁴ Rauch, Jonathan. "The Case for Corruption," *The Atlantic*, Feb. 19, 2014, at http://www.theatlantic.com/magazine/archive/2014/03/the-case-for-corruption/357568/?single_page=true. Accessed Oct. 26, 2014.

⁵ Brennan Center for Justice. "The Governing Crisis: Exploring Solutions." Feb. 12-13, 2014, pg. 26. Accessed Oct. 15, 2014 at <http://www.brennancenter.org/sites/default/files/publications/dysfunction%20V7%2005%2012.pdf>.

⁶ Fukuyama, Francis. *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy*, NY: Farrar, Straus and Giroux, pg. 504, 2014 and <http://www.foreignaffairs.com/articles/141729/francis-fukuyama/america-in-decay>.

is the problem” hypothesis up to the sunlight, its gaping holes quickly become visible. As we demonstrate below, the evidence shows that transparency does not kill deal-making in Congress or impair executive branch functioning, and has not caused the struggles now faced by our democracy. Accordingly, there is no reason to abandon transparency or the hard-won advantages it has gained us: empowering citizens to hold government accountable, preventing crises and safeguarding communities, increasing effectiveness while reducing waste, and engaging the public in democratic decision-making.

To be clear, we are not transparency absolutists. We believe that transparency should be balanced with the appropriate secrecy that government needs to function—but ... there is already more than enough of the secrecy the critics call for. If anything, the balance tips too far in that direction, and more transparency is needed, not less.

In this paper, we respond to the principal myths about transparency that are cropping up in books, academic journals and newspapers across the country, and demonstrate the enduring value of open government. In fact, transparency is actually one of the areas today where Congress can find common ground to help make government work better. To be clear, we are not transparency

absolutists. We believe that transparency should be balanced with the appropriate secrecy that government needs to function – but as we demonstrate below, that balance is already being struck. When one looks beyond the rhetoric at the actual facts of government operations, there is already more than enough of the secrecy the critics call for. If anything, the balance tips too far in that direction, and more transparency is needed, not less.

RESPONDING TO THE TRANSPARENCY CRITICS

MYTH 1: TRANSPARENCY KILLS DEAL-MAKING IN CONGRESS

Open government critics claim that transparency has made it impossible for Congress to get anything done. For example, Professors Sarah Binder and Frances Lee argue, as part of an otherwise incisive recent analysis of legislative cooperation, that when it comes to Congress, transparency “often imposes direct costs on successful deal making” and “interferes with the search for solutions.”⁷ They cite Congress’s inability in 2011 and 2012 to develop “grand bargains on deficit reduction,” which “were undermined each time by successful leaks about potential elements of a deal.”⁸

But Binder and Lee fail to account adequately for the fact that the Super Committee, the congressional ad-hoc committee tasked in 2011 with developing a \$1.5 trillion deficit reduction deal, operated almost entirely in secret. Its members had few open meetings and did not share with whom they met behind closed doors. In the end the Super Committee, composed of six Republicans and six Democrats, could not reach a majority for any plan put before it. The problem wasn’t too much transparency; rather it was differing views about taxes, which served as a proxy for “two dramatically competing visions of the role [of] government,” said Jeb Hensarling, the committee’s

⁷ Binder, Sarah A. and Frances E. Lee. “Making Deals in Congress,” in *Negotiating Agreement in Politics* (eds. Jane Mansbridge and Cathie Jo Martin), pg. 63, Dec., 2013. Accessed Oct. 15, 2014 at http://scholar.harvard.edu/files/dtingley/files/negotiating_agreement_in_politics.pdf.

⁸ *Ibid*, pg. 64.

Republican co-chairman.⁹ The key point is that operating in secret did not result in the passage of deficit reduction plans: it wasn't the setting in which the Super Committee operated that kept problems from being solved, it was the substantive issues that created stalemate.

Grumet, too, argues that "there is a dark side to sunlight. Deliberation, collaboration and compromise rarely flourish in front of TV cameras or when monitored by special interests."¹⁰ Rauch makes a similar claim.¹¹ These critics seem to think working in Congress has become like being on a reality TV show, with participants being followed around by the camera twenty-four hours a day, unable to meet in private or have any discussions that aren't broadcast to every living room in America.¹²

The reality is far different. Back-room wheeling and dealing is just as possible now as it ever was. As Katherine McFate, a leader in the open government movement and the president of the Center for Effective Government points out, "Members of Congress have plenty of opportunity to work with each other, behind closed doors, if they want to. Ask them. They do it all the time. Too much transparency is not the problem."¹³

There are no laws or rules that place limitations on private conversations between Members of Congress or their staffs over a meal, on a golf course, in the members-only elevator, or even just walking down the halls of Congress. The only restrictions governing private meetings cover exchanges of money or gifts.¹⁴ Moreover, core openness laws, such as the Freedom of Information Act (FOIA), do not even *apply* to Congress. It is true that over the past fifteen years or so, Congress has decided on its own to become a more open institution, where the public can obtain proposed legislation and monitor hearings and other official actions, but this openness has little to do with government gridlock or with poor performance.

Nor do experts drawn from the ranks of those who worked in Congress see transparency as the problem. *Esquire* recently assembled a bipartisan commission of six former senior Members of Congress and staff who developed 22 recommendations for addressing dysfunction in government. After reviewing all options, these experts recommended various changes to the way Congress operates. Not one of their reforms called for reducing transparency.¹⁵

The transparency critics, furthermore, suffer from historical myopia. Under essentially the same rules of today, the Congress of 2009-10 was one of the most productive in recent years. Lawmakers passed three historic legislative packages in the form of the stimulus bill, the Patient Protection and Affordable Care Act, and financial regulatory reform, as well as a plethora of other important legislation such as the Lilly Ledbetter Fair Pay Act, a major education overhaul, and an omnibus public land bill (the most sweeping in almost two decades). They also ratified the new START treaty and confirmed two Supreme Court Justices.

⁹ The Economist. "The Last Best Hope: Why the Supercommittee Failed," Nov. 26, 2011, at <http://www.economist.com/node/21540277>. Accessed Oct. 21, 2014.

¹⁰ Op. Cit., fn 3.

¹¹ Op. Cit fn 4 ("Congress should do more business through back channels, off camera.")

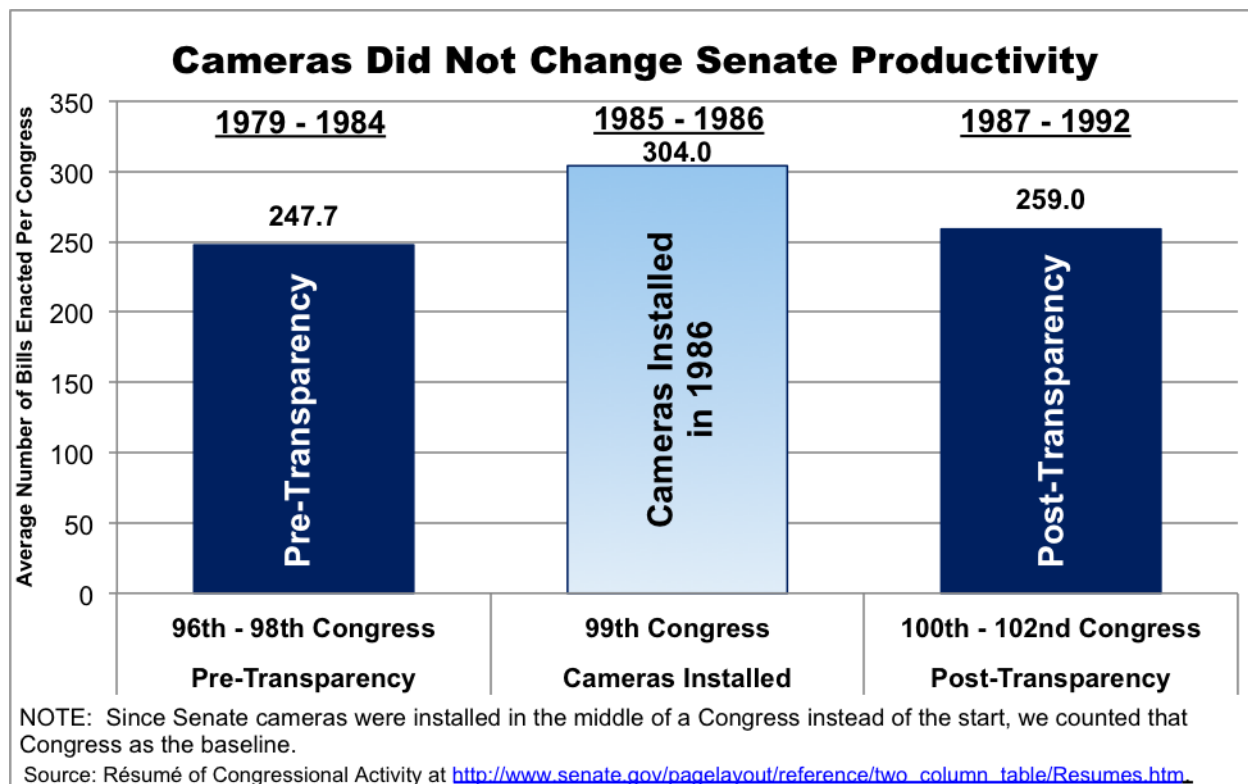
¹² We would like to thank Ryan Alexander, President of Taxpayers for Common Sense, for sharing this analogy with us.

¹³ Personal communication, Oct. 14, 2014.

¹⁴ See <http://ethics.house.gov/gifts/house-gift-rule> for House rules and <http://www.ethics.senate.gov/public/index.cfm/gifts> for Senate rules.

¹⁵ Dorment, Richard. "22 Simple Reforms That Could #Fixcongress Now," *Esquire*, Oct. 15, 2014 at <http://www.esquire.com/blogs/politics/congress-the-report-reforms-fixcongress-1114>. Accessed Oct. 27, 2014. Indeed, to the extent transparency is mentioned, it is supported by the commission. See Reform XXII.

Quantitative analysis further rebuts the critics. They point to the presence of cameras in Congress as a hindrance to congressional productivity - but the empirical evidence is to the contrary. The Senate installed cameras in 1986, ushering in its era of transparency.¹⁶ Comparing its productivity (as measured by enactment of laws) before and after the cameras were installed shows little change. Senate productivity was nearly the same for the three Congresses after the cameras as it was for the three Congresses before (see chart below). The critics are correct in observing a long-term trend of lower productivity over recent decades, but that trend began long before the installation of cameras, which suggests other factors are at play. We do note, however, since 2011 there has been a dramatic drop in Senate bills enacted into law: from an average of 88 laws per year between 1986 and 2010 to just 30 per year since 2011, when the Tea Party was swept into office.¹⁷



The same situation applies to the House, where cameras were installed in 1979.¹⁸ Like the Senate, the trend in the House was towards lower productivity even before the cameras were turned on. Between 1973 and 1978 the House enacted an average of 492 laws per Congress; for an equal period after the cameras were installed (1979 to 1984), there was an average of 399 laws passed. Interestingly, in the following three Congresses, the average number of bills enacted went up to 411. Also like in the Senate, there has been a dramatic drop in productivity starting in 2011 to an average of 164 laws.¹⁹

¹⁶ The U.S. Senate, "The Senate in Session," at http://www.senate.gov/visiting/common/generic/Senate_in_session.htm. Accessed Oct. 15, 2014.

¹⁷ Analysis derived from the U.S. Senate, "Résumé of Congressional Activity," at http://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm. Accessed Oct. 15, 2014.

¹⁸ U.S. House of Representatives. "Speaker Martin's Television Debut: The House and Television," at <http://history.house.gov/Exhibitions-and-Publications/Electronic-Technology/Television/>. Accessed Oct. 15, 2014.

¹⁹ See footnote 17.

Thus, the empirical information does not seem to support the hypothesis that televising Congress is contributing to congressional gridlock. In fact, the data suggests that transparency has little to do with the recent (2011-present) drop in congressional productivity.

Rather than blaming transparency for congressional inaction, we need to look instead at the complex and intersecting roles of political parties, partisan groups, and social (and mainstream) media. Overlay the influence money plays in politics, a primary system that gives a vocal minority an outsized voice, election procedures that attempt to limit who votes, and congressional party leaders who can control committee actions and capitalize on existing congressional rules, and the result is a set of circumstances that makes it hard to change the status quo, perpetuates today's gridlock, and creates cynicism about our government's ability to solve problems.

Rather than blaming transparency for congressional inaction, we need to look instead at the complex and intersecting roles of political parties, partisan groups, and social (and mainstream) media.

One obvious reason there have been numerous threats of government shutdowns since 2011 isn't that transparency is getting in the way of deal-making, as Binder and Lee suggest, but that leaders regularly fail to take bipartisan proposals to the Floor for a vote. In the House, a relatively small group of members was able to shut down the government for 16 days from October 1 to October 16, 2013, by threatening to vote against a stopgap spending bill sent over from the Senate.²⁰ As a result, House leadership did not have a majority of their own party to pass the spending bill. Accordingly, House leadership would not allow a vote on the Senate bill, even though there was a solid majority in support of it when Democrats aligned with more moderate Republicans.²¹ That produced a government shutdown - which took a \$24 billion bite out of the economy and slowed economic growth, according to Standard and Poor's²² - before a bipartisan vote was finally allowed and government reopened - the same outcome that that the House could have achieved much earlier *without* the government shutdown.

This is not unique to the House. In the Senate we have also seen the phenomenon of leadership refusing to allow nearly any bill from going to the Floor,²³ no matter how widely supported, in order to avoid allowing members of the opposing party to add amendments or take over the Floor in a filibuster, which in turn thwarts bills with a coalition of majority party and minority party members.

Some scholars have argued that the partisanship that the public sees is "asymmetric" in nature, most prominently Thomas Mann and Norman Ornstein, authors of *It's Even Worse than It Looks*.²⁴ The book describes a bloc of current legislators as "an insurgent outlier - ideologically extreme; contemptuous of the inherited social and economic policy regime; scornful of compromise; unpersuaded by conventional understanding of facts, evidence,

²⁰ Keith, Tamera. "Why A Handful Of Hard-Liners Has A Hold On Boehner," NPR. Oct. 3, 2013, at <http://www.npr.org/blogs/itsallpolitics/2013/10/03/228708153/why-a-handful-of-hard-liners-have-a-hold-on-boehner>. Accessed Oct. 31, 2014.

²¹ Sargent, Greg. "John Boehner Doesn't Have to Let the Tea Party Paralyze Whole Government," Sept 30, 2013, at <http://www.washingtonpost.com/blogs/plum-line/wp/2013/09/30/john-boehner-doesnt-have-to-let-the-tea-party-paralyze-whole-government>. Accessed October 31, 2014.

²² Johnson, Luke. "Government Shutdown Cost \$24 Billion, Standard & Poor's Says," Huffington Post, Oct. 16, 2013, at http://www.huffingtonpost.com/2013/10/16/government-shutdown-cost_n_4110818.html. Accessed Oct. 15, 2014.

²³ Editorial. "Harry Reid's Senate Blockade," *Wall Street Journal*, May 13, 2014 at <http://online.wsj.com/articles/SB10001424052702304081804579560251530777852>. Accessed Oct. 31, 2014.

²⁴ Mann, Thomas E. and Norman J. Ornstein. *It's Even Worse than It Looks: How the American Constitutional System Collided With the New Politics of Extremism*, Basic Books, 2013.

and science; and dismissive of the legitimacy of its political opposition.”²⁵ In this environment, Mann and Ornstein argue, there is no interest in the private conversations that are required for deliberation. But that is no fault of transparency. It is neither imposed on these members nor is there any evidence that transparency has scuttled otherwise pending deals between them.

“Watching congressional sausage-making isn’t pretty. But then again democracy isn’t intended to be pretty. Transparency ensures our democracy works well and helps to make Congress work better for the public by bringing greater accountability.”

Whatever the causes of Congress’s recent low productivity, both data and common sense show that transparency is not the cause of congressional gridlock or dysfunction. Moreover, for those who maintain that transparency and dysfunction are connected, what is their solution? More secrecy in Congress? Would critics have unrecorded, “private” votes in committee or on the Floor? If elected officials’ actions are cloaked in secrecy, how do voters hold them accountable? The “good old days” when Members of Congress could get perks in the form of gifts from special interests often resulted in bad policy for the public. That is one reason Congress became more open. That is why a special ethics office was created in

the House. And that is why if there are changes to the way Congress operates today, they should include greater transparency while still preserving the right for private conversation and deliberation that already exists.

As Patrice McDermott, the executive director of OpenTheGovernment.org, notes, “Watching congressional sausage-making isn’t pretty. But then again democracy isn’t intended to be pretty. Transparency ensures our democracy works well and helps to make Congress work better for the public by bringing greater accountability.”²⁶

MYTH 2: EXECUTIVE BRANCH TRANSPARENCY IMPAIRS GOVERNMENT FUNCTIONING

Grumet writes in his book, *City of Rivals*, “Our government is more open, more transparent, and less functional than ever before.”²⁷ He suggests that there may be too much transparency, what he calls the “dark side to sunlight,” and adds in *The Washington Post* that, “[w]hile clearly well-intended, the requirements of open meetings are ironically driving serious discussions further underground.”²⁸ While Grumet addresses all branches of government, a large concern of his is that open government has impaired executive branch functioning. “The balance between transparency and deliberation has come undone, and we need to find a new equilibrium.”²⁹

In response to Grumet, Mark Tapscott, executive editor of the *Washington Examiner*, wrote that the balance has, if anything, tipped in the direction of non-public deliberation. He points out that “there were at least 81,752

²⁵ Ibid, pg. 103. And at <http://www.msnbc.com/morning-joe/excerpt-thomas-mann-norman>.

²⁶ Personal communication, Oct. 21, 2014.

²⁷ Grumet, Jason. *City of Rivals: Restoring the Glorious Mess of American Democracy*, Guilford, CT: Lyons Press, pg. xvii, 2014.

²⁸ Op. Cit. fn 3.

²⁹ Op. Cit., fn 27, pg. 103.

'deliberative moments' in the federal government last year [2013], according to the Associated Press."³⁰ That means the records associated with such moments are exempt from disclosure under the FOIA. Tapscott points out "that's the most ever [of] such denials."

"In other words, federal officials can have their deliberations behind closed doors at will and not have to worry that the records of those deliberations will ever see the light of day. Grumet is erecting a straw man to justify turning off the sunshine in government."³¹

In addition to the FOIA exemptions that Tapscott writes about, too many documents are unnecessarily classified - not too few. According to the government's Information Security Oversight Office, there were more than 80 million decisions to classify U.S. documents in 2013 alone.³² As Nate Jones, the FOIA Coordinator at the National Security Archive, writes, "[I]t's so easy to classify new secrets that government classifiers joke that they can find the authority to classify a ham sandwich. These secrets tend to be permanent.... There are so many new secrets created, and so few old secrets released, that the runaway US classification regime has become a menace to American democracy."³³

In other areas of executive branch action, it is not uncommon for agencies to find ways around transparency requirements. For example, under the Government in the Sunshine Act, multi-member agencies such as the Federal Communications Commission, Federal Elections Commission, or Federal Trade Commission, are required to disclose information about meetings and to allow the public to attend. But the Administrative Conference of the United States (ACUS) reports agencies use various techniques to avoid the requirements. The ACUS research "shows that some boards and commissions dispose of a significant amount of business via means that are not subject to the Sunshine Act, relying especially heavily upon notational voting."³⁴ Notational voting is when commission or board members communicate with one another and reach a decision via the exchange of written documents, avoiding a "meeting." While this is not a particularly desirable outcome, the ACUS findings demonstrate that public meeting laws are not preventing deliberations from taking place.

The other significant open meeting law is the Federal Advisory Committee Act (FACA), enacted post-Watergate to ensure advice given to executive branch agencies from advisory committees is open and without bias. But too often, agencies find ways to circumvent the fundamental purpose of the FACA - to bring accountability to the advisory and consultative role that government seeks and often needs. In fiscal year 2010, for instance, fully 72 percent of the meetings subject to FACA were either completely or partially closed pursuant to one of the FACA exceptions.³⁵

30 Tapscott, Mark. "Transparency Critics are Peddling Public Ignorance to 'Fix' Government," *Washington Examiner*, October 4, 2014 at <http://washingtonexaminer.com/transparency-critics-are-peddling-public-ignorance-to-fix-government/article/2554376>. Accessed Oct. 15, 2014.

31 Ibid.

32 2013 Report to the President, Information Security Oversight Office, National Archives and Records Administration, June 2, 2014, at <http://www.archives.gov/isoo/reports/2013-annual-report.pdf>. Accessed Oct. 15, 2014.

33 Jones, Nate. "The Menace of Overclassification," *National Security Archive*, March 20, 2014, at <http://nsarchive.wordpress.com/2014/03/20/the-menace-of-overclassification/>. Accessed Oct. 15, 2014.

34 Administrative Conference of the United States. "Recommendation 2014-2: Government in the Sunshine Act," Adopted June 5, 2014, at <http://www.acus.gov/sites/default/files/documents/Recommendation%202014-2%20%28Sunshine%20Act%29.pdf>. Accessed Oct. 15, 2014. In discussing notational voting, the recommendation states, "For instance, of 32 agencies surveyed in connection with that research, 14 (approximately 40%) reported that they disposed of more than 75% of matters using that procedure, though the frequency with which it is used varies significantly from agency to agency."

35 Bull, Reeve T. "The Federal Advisory Committee Act: Issues and Proposed Reforms." *Administrative Conference of the United States*, Sept. 12, 2012, pg 25, fn 181. Accessed Oct. 15, 2014 at <http://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf>.

There have been many complaints that agencies cannot function effectively under FACA. Some complain that committee members cannot have candid conversations and that decision-making is stymied. Others complain that the public notice process is cumbersome, costs too much money, and is too time consuming. Although there are certainly improvements that could be made to FACA, the restrictions the law imposes do not actually prevent serious discussions from taking place. FACA committees are allowed to have subcommittees meet without complying with many of the rules required of full committees. These subcommittee meetings can be as candid as the members or chair choose.

In fact, one of the co-authors of this paper, Danielle Brian, currently sits on the U.S. Extractive Industries Transparency Initiative federal advisory committee, which brings members of government, civil society and the oil, gas and mining industries together to reach consensus on reporting revenues from natural resource extraction on public lands. This FACA committee has not only been able to accomplish difficult decision-making while following open meeting rules, but has had productive and candid conversations while following open meeting rules. The committee willingly has gone beyond FACA rules by posting subcommittee meeting minutes online.

Grumet and others make the argument that the demands of transparency are simply too great today. “Most government staff now operate under the principle of ‘don’t write that down’ and avoid raising concerns and challenging questions altogether for fear that they will be publicly revealed to embarrassing effect.”³⁶ The solution, according to Grumet, is that “transparency must be balanced against candor and efficiency.”³⁷

But the need for that balance is already widely agreed upon and it has by and large been struck (all too often with a decided tilt towards secrecy). In responding to Grumet, Ellen Miller, co-founder of the Sunlight Foundation, wrote, “No one has called for the kind of ‘dark side to sunlight’ [of absolute transparency] Grumet describes. At Sunlight, we actually agree on his main point: Deliberation in front of the cameras doesn’t always produce the best public policy. We know the delicate nature of finding consensus, but we also believe that transparency is vital to hold government accountable for what it does in our name.”³⁸

Critics will always find individual examples where transparency interfered with executive decision-making, but on the whole, transparency has helped make agency operations be far more accountable to the public, Congress, and other executive branch agencies. Even if some of the executive branch transparency laws need to be realigned with 21st century modes of operating, it is hard to fathom how critics make the leap that these laws are the cause of dysfunction in our democracy. It simply doesn’t add up. The reality is that the executive branch could still use a good dose of additional sunlight.³⁹

36 Op. Cit. fn 3.

37 Op. Cit. fn 27, p. 105.

38 Miller, Ellen. “There’s No Sunlight in the Shadows,” *Sunlight Foundation*, Oct. 3, 2014, at <http://sunlightfoundation.com/blog/2014/10/03/theres-no-sunlight-in-the-shadows/>. Accessed Oct. 15, 2014.

39 To be clear, our reflections in this section are not intended as a criticism of any particular administration, but rather an analysis of trends transcending administrations. Indeed, the vast majority of decisions regarding secrecy are made by career officials whose tenure spans multiple administrations of both political parties.

MYTH 3: “HONEST GRAFT” WILL GET GOVERNMENT WORKING AGAIN

Another assault on transparency comes from the proponents of so-called “honest graft,” as Tammany Hall politician George Washington Plunkitt called it. Their argument is that we need to go back to the days of horse-trading in the proverbial smoke-filled back room, when pork, patronage and political contributions were swapped in secret.

The Atlantic's Frum glorifies these former eras because politicians purportedly got things done that “the more honest government of today cannot.”⁴⁰ Embracing Frum's nostalgia, Rauch argues in favor of reversing transparency rules along with reviving earmarks, ending campaign contribution limits and giving more power to party bosses.⁴¹ Making the case for corruption, Rauch claims good political leaders need “good followers” and “they don't come cheap...Political machines need to exist.” He concludes, “Sometimes that will look sleazy, undemocratic, or both, but it is often better than the alternatives.”⁴²

Thomas Edsall of *The New York Times* also questions the distinction between “good” and “bad” corruption, examining the importance of “honest graft” in a column entitled “The Value of Political Corruption.”⁴³ Grumet too attempts to defend closed-door deal-making, going so far as to argue that “The opposite of transparency is privacy, not corruption.”⁴⁴ Even theorist Francis Fukuyama is getting in on the act, claiming that current problems with democracy are due in part to excess transparency.⁴⁵ His argument, as summarized by a commentator, is that “[a] political culture that believes more transparency and public accountability are the solution to the democratic impasse only makes that impasse worse. Politicians need privacy and discretion - smoke-filled rooms - to get the business of government done.”⁴⁶

This clamor to reduce transparency is as wrong-headed as Fukuyama's famous proclamation about the end of history.⁴⁷ A return to secrecy and to the methods of Tammany Hall may get our government working again, but that is a government that we do not want. We are all for deal-making in order to get things done - and as we have noted, we do not oppose private communications - but we should recognize that secrecy brings serious risks, and that transparency is required to hedge against those risks. Those smoke-filled back rooms have repeatedly been shown to cause cancer in the body politic.

A return to secrecy and to the methods of Tammany Hall may get our government working again, but that is a government that we do not want ... Those smoke-filled back rooms have repeatedly been shown to cause cancer in the body politic.

⁴⁰ Op. Cit. fn 2.

⁴¹ Op. Cit. fn 5, pg. 26.

⁴² Op. Cit., fn 4.

⁴³ Edsall, Thomas B. “The Value of Political Corruption,” *The New York Times*, Aug. 5, 2014, at http://www.nytimes.com/2014/08/06/opinion/thomas-edsall-the-value-of-political-corruption.html?_r=0. Accessed Oct. 16, 2014.

⁴⁴ Op. Cit., fn 3.

⁴⁵ Op. Cit. fn 6, chapters 34-36. See for example: “The solution to the problem of improving democratic accountability therefore does not necessarily lie in the proliferation of formal accountability mechanisms or in absolute government transparency...Citizens must trust the government to make good decisions reflecting their interests most of the time, while governments for their part must earn that trust by being responsive and delivering on their promises.” pg. 522

⁴⁶ Ignatieff, Michael. “Doubling Down on Democracy,” *The Atlantic*, Sept. 17, 2014, at <http://www.theatlantic.com/magazine/archive/2014/10/doubling-down-on-democracy/379340/2/>. Accessed Oct. 31, 2014.

⁴⁷ Fukuyama, Francis. “The End of History?” *The National Interest*, Summer 1989, at <http://ps321.community.uaf.edu/files/2012/10/Fukuyama-End-of-history-article.pdf>. Accessed Oct. 31, 2014.

It is because closed-door deals can be so “sleazy, undemocratic, or both,” as noted by Rauch, - and therefore result in policy that is bad for the public - that there needs to be a healthy dose of sunlight. “Good” corruption also allows for “bad” corruption. We do not want a governing system that is predicated on benefiting those who pay to play, particularly when there are still so many back rooms left, as we explain in the discussion above in Myth 1.

One recurring theme of the critics is nostalgia for congressional earmarking. Some of the proponents of bringing earmarks back blame transparency for their demise. That attack on openness is, however, unsupported by evidence and logic. If anything, the recent history of earmarks suggests that transparency actually enhances them, rather than impairs them.

Public backlash about deals like the notorious “Bridge to Nowhere,” and the rising number of earmarks prompted Congress to make changes to earmarking. When the Democrats took control of both chambers of Congress in 2007, they required lawmakers to put their name next to earmarks they sought - a disclosure effort never before

imposed. This new transparency did not reduce the number of earmarks, however. By 2010, earmarking had shot to new levels - at least 11,000 earmarks worth \$39 billion - as hundreds of lawmakers stuffed bills with pet projects.⁴⁸

Earmarking continued to grow each year after the reforms until the GOP imposed an outright two-year moratorium on new earmarks in early 2011, which has been extended through today. Transparency did not frighten or discourage lawmakers from earmarks. On

the contrary, the number of earmarks grew during the time of increased sunlight. What is the point of bringing home the pork if you can't brag about it? If you like earmarks, you should love transparency.

The ultimate question of whether and to what extent to restore earmarking is beyond the scope of this paper, which is focused on the anti-transparency aspect of the “honest graft” case. Earmarks may or may not need to be restored to make government work better - but to be clear, that is not an argument against open government or transparency. And if earmarks are restored, it should be done in the sunlight to bring accountability to the process and to allow future “Bridges to Nowhere” to be debated publicly.

Transparency - and the accountability it brings - is even more important when it comes to another typical aspect of “honest graft”: campaign contributions. The nexus of political contributions and official action is fraught with corruption risk, and so openness is particularly needed here.

Rauch, thankfully, supports disclosure of campaign contributions, but not everyone is as attuned to the perils that come when you combine secrecy, back-room deals and big campaign money. Some have proposed less disclosure.⁴⁹ Others, such as Senate Majority Leader Mitch McConnell (R-KY) and columnist Charles Krauthammer, oppose any disclosure at all, claiming that transparency has a chilling effect on speech and that it can lead to

⁴⁸ See Taxpayers for Common Sense database on earmarks at <http://www.taxpayer.net/library/article/earmark-data>. Accessed Oct. 27, 2014.

⁴⁹ Lewis, Lindsay Mark. “The Easiest Fix for Dark Money: Disclose Less Often,” *The Atlantic*, July 16, 2014, at <http://www.theatlantic.com/politics/archive/2014/07/easiest-Fix-for-Dark-Money-Disclose-Less-Often/374500/>. Accessed Oct. 16, 2014.

harassment based on whose campaign a donor supported. According to Krauthammer, "I had not foreseen how donor lists would be used not to ferret out corruption but to pursue and persecute citizens with contrary views."⁵⁰ Supporting a similar position as McConnell, he adds that he no longer supports letting "transparency be the safeguard against corruption."⁵¹

The Roberts Court - no friend of campaign finance regulation - has considered and rejected arguments against disclosure. Although the Court found that the First Amendment prohibits the government from restricting independent political expenditures by corporations in *Citizens United*, it affirmed disclosure requirements. The U.S. Court of Appeals for the District of Columbia Circuit also ruled in *SpeechNow.org v. FEC* that while disclosure and reporting requirements do impose a burden on First Amendment interests, they "impose no ceiling on campaign related activities" and "do not prevent anyone from speaking."⁵²

Disclosure will always be a balancing act of protecting anonymous free speech and identifying corruption. However, the benefits of identifying wrongdoing outweigh those of anonymous campaign contributions. Take a recent example from Wisconsin as a case for why disclosure is so important.

The potential for bad corruption - whether through earmarks, campaign contributions, patronage, or other forms of "grease" - is precisely why sunlight is needed and, indeed, should be expanded.

On August 22, the U.S. 7th Circuit Court of Appeals in Wisconsin temporarily made public a number of documents as part of ongoing litigation over alleged illegal coordination between Governor Scott Walker's campaign, the Wisconsin Club for Growth, and other groups. These documents were only available for a few hours before the court sealed them again, although they have been preserved by the *Milwaukee Journal Sentinel*.⁵³

One email from a Walker campaign consultant in 2011 said, "The Governor is encouraging all to invest in the Wisconsin Club for Growth. Wisconsin Club for Growth can accept Corporate and Personal donations without limitations and no donors [sic] disclosure." Shortly after that email, Wisconsin Club for Growth received \$700,000 from a company trying to build a massive open-pit iron mine in northern Wisconsin. The *Milwaukee Journal Sentinel*

⁵⁰ Krauthammer, Charles. "The Zealots Win Again." *Washington Post*, April 17, 2014. Accessed Oct. 16, 2014 at http://www.washingtonpost.com/opinions/charles-krauthammer-the-zealots-win-again/2014/04/17/ac0b6466-c654-11e3-8b9a-8e0977a24aeb_story.html.

⁵¹ Ibid. For Senator McConnell's position, see: McConnell, Mitch. "How Political Disclosure Could Threaten Free Speech," *Washington Post*, June 22, 2012. Accessed Oct. 16, 2014 at http://www.washingtonpost.com/opinions/mitch-mcconnell-how-political-disclosure-could-threaten-free-speech/2012/06/22/gJQApe2vV_story.html. "Selective disclosure would be used to harass people who have participated in the political process or to scare others from doing so." See also Donnelly, David. "Sen. McConnell's Position on Money in Politics is About Power, Not Ideology," Public Campaign Action Fund, June 3, 2014. Accessed on Oct. 16, 2014 at <http://campaignmoney.org/blog/2014/06/03/sen-mcconnells-position-money-politics-about-power-not-ideology>. Bolton, Alexander. "McConnell Pushes Back Against Campaign Finance Reform Efforts," *The Hill*, Dec. 6, 2012. Accessed on Oct. 16, 2014 at <http://thehill.com/homenews/senate/271343-mcconnell-pushes-against-campaign-finance-reform->.

⁵² United States Court of Appeals for the District Of Columbia Circuit, *SpeechNow.org v. Federal Election Commission* (No. 1:08-cv-00248-JR), March 26, 2010, Pg. 17, at http://www.fec.gov/law/litigation/speechnow_ac_opinion.pdf. Accessed Oct. 16, 2014. The Supreme Court's views are found in *Citizens United v. Federal Election Commission*, 558 U.S. ___ at 52-55 (2010).

⁵³ *Milwaukee Journal Sentinel*. "Documents: Walker Encouraged Donations to Wisconsin Club for Growth," Aug. 22, 2014, at <http://www.jsonline.com/news/statepolitics/documents-governor-scott-walker-encouraged-donations-to-wisconsin-club-for-growth-john-doe-272369371.html>. Accessed Oct. 16, 2014.

reported, "Soon after the 2012 recall and general elections, Walker and Republicans eased environmental regulations, helping the firm."⁵⁴

Walker has asserted that he supported the mine because it would generate jobs - that is, good corruption. The court documents raise questions about whether contributions to the Wisconsin Club for Growth gave donors a way to make unlimited, secret contributions to Walker, and about whether those donors were getting something in return - that is, bad corruption.

The Wisconsin example highlights the tension between "good" and "bad" corruption, concepts that are not well defined. The public, however, has consistently and correctly judged that the ability of special interests to rig the

Grumet is, therefore, wrong when he says that "[t]he opposite of transparency is privacy, not corruption." The opposite of transparency is secrecy, and secrecy often leads to corruption. We have been there and done that, and should not go back again.

system is a real problem. An April Reason-Rupe poll, for example, found that American adults believe 75 percent of all politicians are "corrupted" by campaign donations and lobbyists, and that 70 percent of politicians use their political power to help their friends and hurt their enemies.⁵⁵ It is this behind-the-scenes, secret pay-to-play form of governing that is precisely the type of special interest influence the public finds appalling - and that is certainly far worse than the loss of anonymity of campaign contributors.

The potential for bad corruption - whether through earmarks, campaign contributions, patronage, or other forms of "grease" - is precisely why sunlight is needed and, indeed, should be expanded. Grumet is, therefore, wrong when he says that "[t]he opposite of transparency is privacy, not corruption." The opposite of transparency is secrecy, and secrecy often leads to corruption. We have been there and done that, and should not go back again.

MYTH 4: TRANSPARENCY JUST HELPS LOBBYISTS

Some critics, such as Frum, argue that transparency results in more lobbying. Horror of horrors, congressional "committees now open their proceedings to the public," exclaims Frum.⁵⁶ Even worse, "many are televised." He thinks such openness provides a feeding frenzy for lobbyists. He doesn't seem to understand that lobbyists always had access to committee proceedings; it was the rest of us who were left out.

Back before C-SPAN and webcasting, the only way to see what was happening inside congressional committees was to literally stand in line outside a hearing room - often for hours - before a hearing was scheduled to begin. Who stood in those lines? They invariably included paid "line-holders" who held spots for their lobbyist employers who could then waltz into the hearing room as the gavel came down. Few regular citizens or even public interest

⁵⁴ Marley, Patrick, Daniel Bice and Lee Bergquist. "Walker Wanted Funds Funneled to Wisconsin Club for Growth," *Milwaukee Journal Sentinel*, Aug. 22, 2014, at <http://www.jsonline.com/news/statepolitics/walker-wanted-funds-sent-to-wisconsin-club-for-growth-b99336519z1-272364371.html>. Accessed Oct. 16, 2014.

⁵⁵ Reason-Rupe Polls. "April 2014 National Telephone Survey," April 3, 2014, at <http://reason.com/poll/2014/04/03/april-2014-national-telephone-survey>. Accessed Oct. 16, 2014.

⁵⁶ Op. Cit. fn 2.

advocates had the time or money to invest in waiting for hours in those lines. Now the public has equal access, and anyone can sit at their desk or at home to see what Congress is doing.

When it comes to the public's attitude towards Congress, the cameras seem to have made a difference – a positive one. Confidence in Congress was apparently eroding even before the introduction of cameras. In fact, as Rep. Al Gore, who was the first person to speak to the cameras in the House on March 19, 1979, pointed out, “[The cameras are] a solution for the lack of confidence in government. The marriage of this medium and of our open debate have the potential, Mr. Speaker, to revitalize representative democracy.”⁵⁷ He proved correct. Gallup reports public approval of Congress at the time that cameras were instituted was at 19 percent. A year later, in 1980, approval jumped to 25 percent; in 1981 to 38 percent; a decade later in 1991, it was 40 percent; and in 2001 it was 55 percent. Yet in 2011, it was as low as 11 percent.⁵⁸ In other words, for more than 30 years, television proceedings corresponded with growing public approval of the way Congress handled itself – it follows that something other than television and transparency likely caused public approval to plummet.

Frum also facetiously dismisses President Obama's decision to open up White House visitor logs: “Do you see any less lobbying in Washington? Do fewer lobbyists visit the White House? No and no. In fact, transparency is a useful tool for lobbyists” to keep tabs on what the competitors are doing.⁵⁹ Once again, Frum gets it wrong. Visitor logs aren't valuable simply because they let us know how many lobbyists visit the White House, but rather because they help shine a spotlight on *who* is visiting, and the attempts moneyed interests and corporate power make to influence policymakers. And the transparency has had a positive impact; it provides the public with a bird's-eye view on activities within the White House, and deters corruption.⁶⁰

This is something we know first-hand. Because Gary Bass's name came up a number of times on the visitor logs, a reporter “checked him out.” He received a call asking whether the data were correct; when he confirmed his visits, the reporter then asked what the author “got out of them.” The reporter had already checked other databases to see Bass is not a big money person, either as a contributor or a bundler. Bass talked about his meetings to advocate for more transparency in this administration. This type of accountability could never have occurred without disclosure of the visitor logs, and their use has become a standard and welcome part of reporting on the White House. We need more, not less, of this type of transparency in government so reporters and others can do their jobs more effectively.

The critics aren't just arguing that transparency only helps lobbyists, but that it isn't much help to regular Americans. Grumet states that “the supposition that transparency uniquely empowers regular folks is quaint fantasy.”⁶¹ He does not seem to appreciate how frequently government disclosure tools are used by the public. The most frequent use of the FOIA comes from seniors and veterans – that is, “regular folks.”⁶² Also it is the intermediary groups – newspapers, nonprofits, libraries, unions, businesses – that are essential in pursuing an open, honest, well-functioning government. They are the ones who advocate for openness, whether it be for open meetings or

57 U.S. House of Representatives. “Speaker Martin's Television Debut: The House and Television,” at <http://history.house.gov/Exhibitions-and-Publications/Electronic-Technology/Television/>. Accessed Oct. 16, 2014

58 Gallup. “Congress and the Public,” at <http://www.gallup.com/poll/1600/congress-public.aspx>. Accessed Oct. 16, 2014.

59 Op. Cit., fn 2.

60 In the interests of disclosure, we note that one of the authors of this paper, Eisen, helped develop the Obama Administration policy regarding posting visitor records while serving in the White House in 2009.

61 Op. Cit., fn 27, pg. 109.

62 Adair, Kristin and Catherine Nielsen. “Effective FOIA Requesting For Everyone: A National Security Archive Guide,” National Security Archive, pg. 1, 2008, at http://www2.gwu.edu/~nsarchiv/nsa/foia/foia_guide.html. Accessed Oct. 27, 2014.

open data, and they are the ones who analyze and distill the information that is made available. Their final output is in turn consumed by the public, through reading news coverage or other products. This role will become more important with the growth in digital technologies and access to big data - even as these technologies make it easier for "regular folks" to get to the data.⁶³

As Robert Weissman, the president of the watchdog Public Citizen said, "The media, advocacy groups and other intermediary groups frequently are able to use FOIA and transparency tools to obtain complicated and technical information, as well as complicated data sets, which they are able to translate for the public, to illustrate safety and public health risks, corruption of our democracy, reckless employers and much more." He cites an example: Public Citizen established a precedent under the Federal Advisory Committee Act that has led to the Food and Drug Administration (FDA) now releasing clinical trial information in advance of FDA advisory committees considering requests for new drug approvals.⁶⁴ As a result, medical experts from Public Citizen and other organizations are able to analyze the data and make informed interventions where drug approval requests are being considered. Weissman concludes, "There's no question that, as a direct result, we've been able to influence advisory committee decisions, and help keep dangerous drugs off the market."⁶⁵

Disclosure also helps average people in ways not always obvious: the mere act of disclosing information changes negative behavior. For example, the Centers for Disease Control and Prevention has begun releasing information about infections in hospitals. The mere release of information about low-performing hospitals spurs those hospitals to action. Reducing the frequency of infections in hospitals has a direct benefit on regular folks even if they were not the ones to request or review the data.⁶⁶

MYTH 5: BIPARTISANSHIP BEHIND CLOSED DOORS IS THE ANSWER TO GETTING CONGRESS WORKING AGAIN

Bipartisan support for a bill can often signify successful negotiation between two sides with different or even opposing priorities and values but who ultimately agree on a policy change that they both see as an improvement. However, this is not *always* what bipartisanship means. Bipartisan support for a policy does not necessarily mean it is good policy or in the public interest.

While it's vitally important that official actions and business take place transparently, this doesn't mean that members and staff cannot discuss or deliberate issues in private beforehand.

Big money always attracts friends from both sides of the political aisle. The insurance, banking, defense contracting, oil and gas, big Pharma, and IT industries all have had Republican and Democratic allies pushing for their patrons' agendas. When that happens, it is even more important for the public to know as much as possible about who is benefitting financially from those proposed "bipartisan" deals.

Big money always attracts friends from both sides of the political aisle. The insurance, banking, defense contracting, oil and gas, big Pharma, and IT industries all have had Republican and Democratic allies pushing for their patrons' agendas. When that happens, it is even more important for the public to know as much as possible about who is benefitting financially from those proposed "bipartisan" deals.

⁶³ More and more voters, for example, are using websites that combine government data about candidate voting records, campaign contributions, and more to assess whether they want to vote for the candidate.

⁶⁴ Lurie, Peter and Allison Zieve. "Sometimes the Silence Can Be Like the Thunder: Access to Pharmaceutical Data at the FDA," *Law & Contemporary Problems*, 2006 Summer 69(3): 85-97, at <http://www.citizen.org/Page.aspx?pid=2500>. Accessed Oct. 21, 2014.

⁶⁵ Personal communication, Oct. 17, 2014.

⁶⁶ Rau, Jordan. "Hospitals Struggle to Beat Back Serious Infections," NPR, Oct. 21, 2014, at <http://www.npr.org/blogs/health/2014/10/21/357618079/hospitals-struggle-to-beat-back-serious-infections>. Accessed Oct. 22, 2014.

As to the “behind closed doors” part of this myth’s equation, we do not mean to suggest that deliberations shouldn’t be conducted without cameras filming them. While it’s vitally important that official actions and business take place transparently, this doesn’t mean that members and staff cannot discuss or deliberate issues in private beforehand. As we have said above, there are no rules or restrictions preventing private deliberations in Congress, nor should there be. However, at the point when official actions such as hearings, mark-ups, committee votes, and Floor actions are to be taken, the doors should be opened except in exceptional circumstances.

There is a notion that congressional committees can no longer function effectively in the open. However, even in the current gridlocked Congress, some committees conduct their official actions in public and successfully accomplish their legislative duties. For example, in recent years, the House Armed Services Committee has made important strides in enhancing transparency at the committee level and ensuring that its formal consideration of the National Defense Authorization Act is conducted in an open and transparent manner. The commendable transparency the committee has engaged in has not prevented its members from regularly coming together to offer bipartisan policy recommendations, such as an amendment offered this year by Reps. Ron Barber (D-AZ), Vicky Hartzler (R-MO), and Austin Scott (R-GA) to prevent the A-10 “Warthog’s” premature retirement.

While the House Armed Services Committee has made great progress in opening up its deliberations, the Senate Armed Services Committee cannot say the same. Its most important official actions are conducted primarily behind closed doors, the results of which are then reported out after the fact. While the Senate committee conducts its consideration of the National Defense Authorization Act in secret, once the bill goes to the Floor, the full Senate typically has had trouble passing it. On the other hand, the House committee, which conducts most of its business in the open, often brings an NDAA bill to the House Floor which is subsequently passed by an overwhelming bipartisan majority.

THE VALUE OF OPEN GOVERNMENT AND TRANSPARENCY

The critics also fail to adequately appreciate the indispensable benefits of transparency. The goals of open government are to empower people, to ensure that governmental institutions are responsive to the public, and to improve democratic practices and government operations. Transparency is an important tool that allows Americans to see what their government is doing, how powerful institutions are conforming to the laws of the land, and how “We, the People” can help to make it better.

Transparency helps an open society solve problems before they become crises - and at its best, avoids those problems in the first place. It also provides the public with a better understanding of who to blame when problems arise and government fails, and who to praise when things go well. That is why open government initiatives have grown over the past half century. Done properly, transparency makes governing better and less likely to be corrupt.

Transparency allows the public to see if government regulators are getting too cozy with regulated industries. Records obtained through the FOIA revealed that former Securities and Exchange Commission employees were representing corporate clients before

Transparency is an important tool that allows Americans to see what their government is doing, how powerful institutions are conforming to the laws of the land, and how “We, the People” can help to make it better.

their former colleagues, sometimes within days of leaving the agency.⁶⁷ Some senior employees were able to lobby the agency immediately after leaving because the SEC had been granted an exemption from a government-wide ethics rule. The government revoked the exemption following the release of a report that illustrated how the revolving door blurs the lines between the SEC and the corporate world.⁶⁸

Transparency also enhances public safety. For example, the Toxics Release Inventory (TRI) requires the Environmental Protection Agency (EPA) to make information about toxics released to the air, water and land publicly available through the Internet. EPA's data show that since the disclosure program started in 1988, there has

Transparency helps an open society solve problems before they become crises - and at its best, avoids those problems in the first place.

been a *70 percent reduction* in total releases of the initial 300 toxic chemicals the program targeted.⁶⁹ This is a remarkable achievement, and reinforces the powerful impact disclosure can have on communities. Families have also used these data to choose day care facilities and schools for their children based on whether those locations are close to companies that release toxic chemicals or could produce a dangerous plume if there was an explosion. Reporters regularly use the TRI data to report on the amount of chemicals released in local communities.

Government whistleblowers - a key element of a transparent government - have also played a role in making us safer. In 2004, FDA whistleblower Dr. David Graham finally went public at a Senate hearing after his management allegedly pressured him to suppress his evidence that a popular arthritis pain-relief drug was responsible for thousands of fatal heart attacks.⁷⁰ That drug is no longer on the market.

Transparency increases government efficiency and prevents the waste of taxpayer dollars. When the economic stimulus package was passed in February 2009, many feared the huge \$840 billion infusion of expedited federal funding would result in equally huge waste, fraud and abuse. Earl Devaney, the chair of the Recovery Accountability and Transparency Board, told Congress he expected as much as 7 percent of the stimulus, around \$55 billion, to be lost to fraud. With 97 percent of the funds spent, federal investigators instead found only \$57 million in fraud, or roughly 0.01 percent of overall spending.⁷¹ Out of more than 190,000 contracts, grants and loans, fewer than 0.2 percent have been under investigation.⁷² According to Devaney, transparency was as a key reason for this remarkable efficiency.⁷³ He was referring to Recovery.gov, a website that allowed the public and investigators to track federal contracts and grants down to the local level. In discussing his book, *The New New Deal*, with Slate's David

⁶⁷ See Project on Government Oversight's "SEC Revolving Door Database," at <http://www.pogo.org/tools-and-data/sec-revolving-door-database/>. Accessed Oct. 16, 2014.

⁶⁸ Smallberg, Michael. "SEC Finally Finalizes a Revolving Door Rule," *Project on Government Oversight*, Jan. 7, 2014, at <http://www.pogo.org/blog/2014/01/20140107-sec-finally-finalizes-a-revolving-door-rule.html>. Accessed Oct. 16, 2014.

⁶⁹ U.S. Environmental Protection Agency. *TRI Explorer*, at http://iaspub.epa.gov/triexplorer/tri_release.trends. Accessed Oct. 16, 2014.

⁷⁰ Graham, David J. "Testimony of David J. Graham, MD, MPH," before the Senate Finance Committee, November 18, 2004, at <http://www.finance.senate.gov/imo/media/doc/111804dgttest.pdf>. Accessed Nov. 3, 2014.

⁷¹ Korte, Gregory. "Five Years Since Stimulus: Many Fraud Cases, Few Losses," *USA Today*, Feb. 16, 2014, at <http://www.usatoday.com/story/news/politics/2014/02/16/recovery-act-stimulus-fraud-convictions/5400705/>. Accessed Oct. 21, 2014.

⁷² Grunwald, Michael. "It's Official: The Stimulus Isn't a Waste of Money," *Time*, Oct. 1, 2010, at <http://content.time.com/time/nation/article/0,8599,2022781,00.html>. Accessed Oct. 21, 2014.

⁷³ Personal communication, April 12, 2014.

Plotz, Michael Grunwald, who has carefully studied the stimulus program, adds that the efficiency was achieved through “unprecedented transparency, unprecedented scrutiny, and unprecedented competition for the cash.”⁷⁴

Transparency also reduces fraud by helping the public understand how government programs operate. Disclosure of Medicare Part B payments to doctors showed that just two percent of 880,000 physicians received nearly a quarter of the payments in 2012.⁷⁵ Records also revealed disparity in payments for the same services, in some cases because the system provides financial incentives for using more expensive drugs even when less expensive drugs are equally effective. This disclosure will likely result in a review of underlying Medicare policies to determine whether the billing disparity is justified. In any case, physicians are now on notice that if they break the rules or game the system, they will be held accountable. In essence, the disclosure has empowered all of us to become citizen watchdogs, and will likely save taxpayers billions that would have been lost to waste and fraud.

Stephen Goldsmith, the former mayor of Indianapolis and former deputy mayor of New York City for Operations, recently wrote of the virtues of open government at the local level: “By providing residents with the tools to visualize and work with government data to meet their individual needs, financial data visualization is not only increasing government transparency and accountability but also enhancing the ability of local governments to be more responsive to citizens’ needs.”⁷⁶ He describes several innovations where local governments are providing more access to budget information. In Atherton, California, the city manager described their open government platform as “saving us hundreds of work hours” and increasing interest from people wanting to know “how local government operates.”⁷⁷

These examples are just the tip of a much larger iceberg demonstrating the value of open government, transparency, and open data. Harvard University Professor Archon Fung provides four principles that can guide how to determine when transparency is necessary and how to apply it: 1) availability; 2) proportionality; 3) accessibility; and 4) actionability.⁷⁸ First, information needs to be available to the public, but it should be “in proportion to the extent to which that information enables citizens to protect their vital interests.” It must also be accessible; that is, the public – both individuals and intermediary organizations – should be able to find the information and make sense of it. Finally, there must be the “economic, political, and social structures that appropriately facilitate action based on that information.” (We might add that the information needs to be timely and accurate in defining the meaning of “available” and “accessible.”) Following these four principles, transparency can be an empowering tool.

Building on these principles, here are some proposed next steps to make the government stronger, more effective, and more open. First and foremost, core laws need to be updated to further the affirmative government obligation to disclose information and to better utilize technology to make information widely available to the public in timely, accurate and useful formats. Strikingly, government openness can breed bipartisanship. For example,

⁷⁴ Plotz, David. “The New New Deal: An Interview with Michael Grunwald,” *Slate*, Aug. 14, 2014, at http://www.slate.com/articles/news_and_politics/interrogation/2012/08/the_new_new_deal_a_book_argues_that_president_obama_s_stimulus_has_been_an_astonishing_success.html. Accessed Oct. 21, 2014.

⁷⁵ Millman, Jason. “Everything you need to know about today’s unprecedented Medicare pricing data dump,” *Washington Post*, April 9, 2014, at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/09/everything-you-need-to-know-about-todays-unprecedented-medicare-pricing-data-dump/>. And Reed Abelson and Sarah Cohen. “Sliver of Medicare Doctors Get Big Share of Payouts.” *The New York Times*, April 9, 2014, at <http://www.nytimes.com/2014/04/09/business/sliver-of-medicare-doctors-get-big-share-of-payouts.html>

⁷⁶ Goldsmith, Stephen. “City Finances and the Promise of Data Visualization,” *Governing*, Aug. 20, 2014, at <http://www.governing.com/blogs/bfc/gov-city-finances-data-visualization.html>. Accessed Oct. 16, 2014.

⁷⁷ *Ibid.*

⁷⁸ Fung, Archon. “Infotopia: Unleashing the Democratic Power of Transparency,” *Politics & Society*, June 2013, vol. 41 no. 2, 183-212, at <http://pas.sagepub.com/content/41/2/183.short>. Accessed Oct. 16, 2014.

there is currently a strong FOIA reform bill pending in Congress with bicameral and bipartisan support (although it is in danger of languishing in the crowded last few weeks of this Congress).⁷⁹

Beyond overhauling core laws, our political leaders should take action now to start a transformative process that uses transparency as a means to strengthen public trust - and possibly their own political popularity. Here are some examples of such transformative actions that shine a light on how government operates:

- We need laws and regulations that highlight the role special interests play in politics. There should be a renewed push in Congress for more timely and complete disclosure of direct and independent campaign contributions. If Congress cannot pass such a law, then the President should consider executive action. This action should complement needed reforms to the Lobbying Disclosure Act, as well as legislation improving disclosure requirements that highlight the revolving door between government and the private sector. Finally, there need to be clearer IRS rules on what constitutes “political activity” for tax exempt organizations, how much is permissible, and what type of disclosure will be required.
- We should ensure that basic information about the operations of all branches of government is uniformly available through the Internet without the need for public request. These disclosures should include information such as organizational charts, lists of employees and how to contact them, logs of visitor meetings with top level officials (along the lines of what is already done by the White House), and calendars of top level officials.⁸⁰ The public should also be made aware of the policies that guide government actions, so they better understand how decision-making and operations occur within an agency or branch of government. More unclassified communications and reports prepared by agencies, the courts, or Congress to each other (e.g., communications to and from Congress or reports of an agency Inspector General) should also be proactively made available.

These minimum requirements could lay the foundation for an affirmative government obligation to share information, rather than a burden on the public to take initiative to find and obtain records through requests and litigation.

- We must take a fresh look at the issue of secret law, balancing transparency against legitimate security and confidentiality needs. There has been widespread news coverage about secret court decisions under

We do not accept the notion of the transparency critics that the preferred alternative to the status quo is an undemocratic, secretive, and corrupt government.

the Foreign Intelligence Surveillance Act, but press reports and other public information suggest that at any given time there are other secret promulgations of law by executive agencies that guide government decision-making, including regarding domestic policy issues in addition to national security ones. While we recognize the competing imperatives in this area, undue secrecy in government undermines our system of checks and balances and the accountability that system brings. Because the rule of law is so foundational to our democracy, keeping elements of the rule of law itself secretive comes at a particularly high cost, which needs to be carefully weighed and periodically rechecked against the countervailing benefits.

⁷⁹ S. 250, FOIA Improvement Act of 2014, co-sponsored by Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX), at <https://www.congress.gov/bill/113th-congress/senate-bill/2520>. See also <https://www.leahy.senate.gov/download/foia-section-by-section-final> for a section-by-section analysis of the bill written by the bill's co-sponsors.

⁸⁰ Taking account, of course, of adjustments needed to preserve other values, as was done with the White House visitor record release, e.g., reasonably redacting information such as regular physical movements that might threaten the safety of individuals.

CONCLUSION

A number of academics have been describing a decline in democracies, including in the United States. As law professor Alasdair Roberts laments, “Openness is now regarded as one of the factors that has contributed to the seizing-up of democratic systems.”⁸¹

This paper is our rebuttal to that proposition, and we concur with Sen. Mike Johanns (R-NE) who wrote (in describing why he is co-sponsoring legislation to improve FOIA), “Transparency in government is essential and fundamental to our democracy.”⁸² We do not accept the notion of the transparency critics that the preferred alternative to the status quo is an undemocratic, secretive, and corrupt government.

Roberts rightly sounds an alarm about recent claims that transparency is a cause of declining democracies and governmental dysfunction: “Advocates of openness have to challenge this way of thinking. In fact, transparency policies are not a key cause of democratic malaise.”⁸³ He discusses forces that militate against transparency and points to some factors such as economic globalization, the growth of terrorism, and the advent of new technologies that give critics ammunition to criticize open government.

One topic Roberts does not directly mention is the role of powerful forces that have lurked for years trying to limit the public’s right to know in areas that affect their interests.

For example, physicians opposed the release of Medicare payment data, described above. As early as 1979, doctors sought a federal injunction, based on the Privacy Act, to keep the government from releasing the data. In 2011, Dow Jones went to court arguing for public access and faced off with the American Medical Association. The court ultimately decided in favor of disclosure.

These types of skirmishes go on all the time. There have been special interests that sought to limit access to the successful Toxics Release Inventory mentioned earlier. Despite more than one million petitioners calling on the Securities and Exchange Commission to require public companies to disclose campaign contributions, special interests have urged the agency not to issue a regulation, and none has so far been forthcoming.⁸⁴ The list could go on and on.

Critics of transparency want to give government officials more opportunities to work in secret. Special interest groups in both industry and government have also clamored for years to operate under a cloak of self-serving

Simply put,
information is
power, and keeping
information secret
only serves to keep
power in the hands
of a few.

⁸¹ Roberts, Alasdair. “Making Transparency Policies Work: The Critical Role of Trusted Intermediaries,” Address to the International Seminar on Accountability and Corruption Control, Mexico City, Oct. 21, 2014, pg. 5, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2505674.

⁸² Johanns, Mike. “Transparency in Government a Must,” *Beatrice Daily Sun*, Oct. 20, 2014, at http://beatricedailysun.com/news/opinion/transparency-in-government-a-must/article_9bf0abe3-790f-58f9-btc6-89f21301f344.html. Accessed Oct. 21, 2014.

⁸³ Roberts, Alasdair. “Beware Attack on Openness,” *Winnipeg Free Press*, Oct. 15, 2014, at <http://www.winnipegfreepress.com/opinion/analysis/beware-attack-on-openness-279243322.html>.

⁸⁴ Sirotta, David. “Corporate Money In Politics: 1 Million Comments Flood SEC Over Political Spending Proposal,” *International Business Times*, Sept. 9, 2014, at <http://www.ibtimes.com/corporate-money-politics-1-million-comments-flood-sec-over-political-spending-proposal-1682142>.

secrecy, and scaling back on transparency would give such groups even more power and influence over our political system.

Simply put, information is power, and keeping information secret only serves to keep power in the hands of a few. This is a key reason the latest group of transparency critics should not be shrugged off: if left unaddressed, their arguments will give those who want to operate in the shadows new excuses.

[O]ur political leaders should take action now to start a transformative process that uses transparency as a means to strengthen public trust - and possibly their own political popularity.

Rather than demonizing transparency for today's problems, we should look to factors such as political parties and congressional leadership, partisan groups, and social (and mainstream) media, all of which thrive on the gridlock and dysfunction in Washington. Technology now allows "trackers" and other observers to capture candidate misstatements and use instant distribution channels to produce a steady stream of "gotcha" moments. Add in the corrosive influence of money in politics and non-democratic election procedures and you have a mixture that makes a functioning government challenging. To be sure, information obtained through open government is on occasion used as ammunition in those political battles, but transparency is neither the cause of the systemic problems, nor would secrecy be the cure.

Professor Roberts is correct that openness advocates need to take action to defend that value. But we should also view the growing discussion about transparency as an opportunity. It provides the possibility to educate the public about the policies and mechanics of government, including the potential for strengthened public participation in governance issues through open government tools. Where there are legitimate problems with openness laws and procedures, we should fix them. At the same time, as suggested in this paper, we should press for the next generation of right-to-know laws that adjust to the world of data analysis and visualization.

In the end, the solution to combating gridlock and government inaction in the nation's capital is not more secrecy. Like the majority of Americans, we too are frustrated with governmental dysfunction - but instead of going back to the days of Tammany Hall, let's work for a 21st century government we can be proud of.

GOVERNANCE STUDIES

The Brookings Institution
1775 Massachusetts Ave., NW
Washington, DC 20036
Tel: 202.797.6090
Fax: 202.797.6144
brookings.edu/governance.aspx

EDITING

Nick McClellan
Beth Stone

PRODUCTION & LAYOUT

Nick McClellan

EMAIL YOUR COMMENTS TO GSCOMMENTS@BROOKINGS.EDU

This paper is distributed in the expectation that it may elicit useful comments and is subject to subsequent revision. The views expressed in this piece are those of the authors and should not be attributed to the staff, officers or trustees of the Brookings Institution.