

## **Big Data and Government Accountability: An Agenda for the Future**

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### I. ACCOUNTABILITY OF BIG DATA

Recently released data about Medicare payments to doctors showed that just 2 percent of 880,000 physicians received nearly a quarter of the \$77 billion in payments in 2012.<sup>1</sup> The disclosure also showed disparity in payments for the same services, in some cases because the system provides financial incentives for using more expensive drugs even when the effectiveness of less expensive drugs is the same. This disclosure will likely result in a review of underlying Medicare policies to determine whether the disparity in billing is justified. In any case, all physicians are now on notice that if they break the rules, or game the system, they will be held accountable for it.

This “data dump” permits the public and government to use data analytics to uncover patterns of improper payment, saving taxpayers money and potentially increasing quality of services. However, there is a potential downside to the new availability of the Medicare payment data: it may require disclosure of personal information about doctors and possibly their patients.

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<sup>1</sup> Jason Millman, “Everything You Need to Know about Today’s Unprecedented Medicare Pricing Data Dump,” *Washington Post*, April 9, 2014, Accessed May 15, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/09/everything-you-need-to-know-about-todays-unprecedented-medicare-pricing-data-dump/>.

Consumers and corporate executives are excited about Big Data. Consumers can now have “smart” homes where thermostats, refrigerators, and other appliances can make internal adjustments to reduce energy costs based on the behavior of people in that home. Cars can record information about your driving patterns and suggest the best routes to travel to avoid congestion or promote driving methods to be the most economical. From the corporate perspective, companies can track nearly all your purchasing and Internet activity to present targeted ads to you, and auto insurers can track where and how you drive, potentially using that data to set insurance premiums that reduce fees for safe drivers.

However, the excitement about the emerging capabilities of Big Data can quickly turn to concern when the implications of the collection process become clear and the public realizes that Big Data can mean that Big Brother – whether government or private companies – is watching us. In fact, the Obama White House recently released a report on Big Data noting both the positives and the perils.<sup>2</sup> They emphasize that if properly implemented, Big Data “will become an historic driver of progress.”<sup>3</sup> But they also warn of the dangers, including the potential for discrimination: it can “eclipse longstanding civil rights protections in how personal information is used in housing, credit, employment, health, education, and the marketplace.”<sup>4</sup> Such sophisticated profiling is now not just possible, but is very real.

New survey research also raises similar concerns. The Pew Research Center’s Internet Project is collaborating with Elon University’s Imagining the Internet Center on eight reports about the growth and future of the Internet that are scheduled for release in 2014. One report already released covers the “Internet of Things,” a term that describes the array of devices, appliances, vehicles, wearable material, and sensor-laden parts of the environment that connect to each other and feed data back and forth – and is a key source of Big

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<sup>2</sup> Executive Office of the President, “Big Data: Seizing Opportunities, Preserving Values,” May, 2014, [http://www.whitehouse.gov/sites/default/files/docs/big\\_data\\_privacy\\_report\\_5.1.14\\_final\\_print.pdf](http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf). In January 2014, President Obama asked White House counselor John Podesta, in coordination with Commerce Secretary Penny Pritzker and Energy Secretary Ernest J. Moniz and other White House directors, to prepare a report on the transformative nature of Big Data. On May 1, the President’s Council of Advisors on Science and Technology released the report.

<sup>3</sup> Ibid. Cover letter to President Obama.

<sup>4</sup> Ibid.

Data.<sup>5</sup> In the over 1,600 responses to their survey of experts and stakeholders about the future of the Internet many responders were bullish, claiming by 2025 the Internet will be “like electricity,” an inextricable part of all of our lives. Even as the experts agreed on the technology change that lies ahead, they disagreed about its ramifications.

Many raised caution about surveillance and tracking. As one expert said, “Our surveillance society feels oppressive, not liberating.”<sup>6</sup> Another noted, “Embedded technologies take the problems of consumer protection to a whole new level, given the dramatically increased opportunities they create for surveillance and commercial data collection...”<sup>7</sup> With today’s technology, data analytics allow experts to aggregate disparate datasets to form a mosaic about people that previously was not possible. Recognizing these concerns, the Federal Trade Commission has been carefully monitoring the use of Big Data, challenging misuse, and recommending changes in law that Congress should consider.<sup>8</sup>

When it comes to government accountability, it is nearly axiomatic that Big Data is essential. But it is equally as true that accountability demands a watchful eye on Big Data. All too often Big Data is associated with issues that impact privacy and civil liberties, and with government spying on its people. Recent scandals such as intelligence agencies gathering bulk phone data from companies, theft of credit

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<sup>5</sup> Janna Anderson and Lee Rainie, “The Internet of Things Will Thrive in 2025,” Pew Research Center, May 14, 2014, accessed May 24, 2014, [http://www.pewinternet.org/files/2014/05/PIP\\_Internet-of-things\\_0514142.pdf](http://www.pewinternet.org/files/2014/05/PIP_Internet-of-things_0514142.pdf).

<sup>6</sup> *Ibid.*, 12.

<sup>7</sup> *Ibid.*, 45.

<sup>8</sup> See for example: the Federal Trade Commission’s “Data Brokers: A Call for Transparency and Accountability,” May 27, 2014, <http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>. See also two recent speeches by FTC commissioners, including Chairwoman Edith Ramirez. Edith Ramirez, “Protecting Consumer Privacy in a Big Data Age,” speech at The Media Institute, Washington, DC, May 8, 2014, accessed May 27, 2014, [http://www.ftc.gov/system/files/documents/public\\_statements/308421/140508mediainstitute.pdf](http://www.ftc.gov/system/files/documents/public_statements/308421/140508mediainstitute.pdf); Julie Brill, “Big Data and Consumer Privacy: Identifying Challenges, Finding Solutions,” address at the Woodrow Wilson School of Public and International Affairs, Princeton University, February 20, 2014, accessed May 27, 2014, [http://www.ftc.gov/system/files/documents/public\\_statements/202151/140220princetonbigdata\\_o.pdf](http://www.ftc.gov/system/files/documents/public_statements/202151/140220princetonbigdata_o.pdf).

card information, or data brokers selling family medical information all have Big Data to thank.<sup>9</sup>

Federal Trade Commissioner Julie Brill recently asked about the impact of Big Data on consumers:

“Will consumers know that connected devices are capable of tracking them in new ways, especially when many of these devices have no user interface? Will companies that for decades have manufactured appliances and other ‘dumb’ devices take the steps necessary to keep secure the vast amounts of personal information that their newly smart devices will generate? And how will the new data from all of these connected devices flow into the huge constellation of personal data that already exists about each of us? ... In some instances, these entities track consumers’ online behavior. In other instances, these entities merge vast amounts of online and offline information about individuals, turn this information into profiles, and

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<sup>9</sup> The Government Accountability Office warned that federal agencies “were inconsistent and needed improvement” in responding to data breaches. (pg. 1) The GAO also found that “the number of reported information security incidents involving personally identifiable information (PII) has more than doubled over the last several years.” (pg. 1) ( Gregory C. Wilshusen, “Information Security: Federal Agencies Need to Enhance Responses to Data Breaches,” *Government Accountability Office*, Testimony Before the Senate Committee on Homeland Security and Governmental Affairs, GAO-14-487T, April 2, 2014, <http://gao.gov/assets/670/662227.pdf>; The Senate Commerce Committee examined the data broker industry in December, 2013, and in a staff report concluded data brokers: “collect a huge volume of detailed information on hundreds of millions of consumers... sell products that identify financially vulnerable consumers.. [and] operate behind a veil of secrecy. Staff Report for Chairman Rockefeller. “A Review of the Data Broker Industry: Collection, Use, and Sale of Consumer Data for Marketing Purposes,” Senate Committee on Commerce, Science and Transportation, December 18, 2013, pg. ii-iii, [http://www.commerce.senate.gov/public/?a=Files.Serve&File\\_id=0d2b3642-6221-4888-a631-08f2f255b577](http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=0d2b3642-6221-4888-a631-08f2f255b577).) The Commerce Committee report and the Wall Street Journal painted a picture of data brokers collecting and using data about consumers’ health that is completely outside the regulatory structures to protect health information. (See also Joseph Walker, “Data Mining to Recruit Sick People,” *Wall Street Journal*, December, 17, 2013, [http://online.wsj.com/news/article\\_email/SB10001424052702303722104579240140554518458-1MyQjAxMTA0MDAwNjEwNDYyWj](http://online.wsj.com/news/article_email/SB10001424052702303722104579240140554518458-1MyQjAxMTA0MDAwNjEwNDYyWj). As a May 27, 2014 FTC report notes, data brokers know more about you than your family or friends (see footnote 8).

market this information for purposes that may fall outside of the scope of our current regulatory regime.”<sup>10</sup>

More broadly, to promote effective accountability of Big Data we need to know:

- What information is being collected, especially when it is about us;
- Whether that information was legally collected (and whether the laws are clear and written for the digital age);
- Where that information is being stored and that it is secure;
- What that information will be used for; and
- How various segments of the public can access that information and whether there are rules for such use.

Government has a key responsibility to not only ask these questions, but also to establish a regulatory framework that protects the rights of the public and to serve as the public’s advocate in protecting our civil liberties and privacy. The way the private sector collects and uses Big Data must be addressed by any such regulatory framework. Government must also be open about what information it collects and why, and ensure that information with personal identifiers is protected. Moreover, we need to ensure that the laws that permit the collection of such information are fair and balanced in a way that allows social and economic progress while protecting the rights of individuals.

## II. HOW BIG DATA RELATES TO GOVERNMENT ACCOUNTABILITY

Many of us who advocate for greater government accountability are less focused on Big Data than on access to timely, quality

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<sup>10</sup> Julie Brill, “Big Data and Consumer Privacy: Identifying Challenges, Finding Solutions,” Address at the Woodrow Wilson School of Public and International Affairs, Princeton University, February 20, 2014, accessed May 27, 2014, [http://www.ftc.gov/system/files/documents/public\\_statements/202151/140220princetonbigdata\\_o.pdf](http://www.ftc.gov/system/files/documents/public_statements/202151/140220princetonbigdata_o.pdf).

information regardless of its size or complexity. To understand this distinction, it is important to define “Big Data,” “accountability,” and “transparency.”

Big Data is best defined as data sets that are too large and complex to manipulate or interrogate with conventional methods or tools. By that definition, the Medicare payment data, described above, would not be Big Data: it can be manipulated with commercially available databases or even an Excel spreadsheet. But does that matter to those who are concerned about government accountability? Generally, the answer is no.

While there is no official definition of “government accountability,” it is generally accepted that accountability requires the rule of law, strong enforcement, and access to information (i.e., transparency) to ensure the rule of law is followed. Government accountability is best achieved when there is open access to information that can:

- Identify waste, fraud and corruption in government;
- Strengthen government efficiency, effectiveness, responsiveness;
- Monitor enforcement of laws and regulations;
- Neutralize unequal power dynamics, leveling the Playing field between powerful institutions and other special interests and the public; and
- Empower civic engagement such as through elections and other democratic processes.

This means that accountability involves information collected by the government from corporations, regulated entities, and individuals as well as information generated by the government itself. It also covers information that government regulates but may not collect, such as labelling and collection of information by companies.

There are many examples of information that meet the above accountability objectives, from disclosure of government spending, performance information, and compliance and enforcement data, to increased disclosure on the relationship between special interests and our elected leaders. New technologies make it possible to collect and disseminate far more information than ever before, enabling the creation of new accountability tools.

For example, today there are real time monitoring devices that record and track the local effects of hazardous chemicals being released into the air by companies. Such data could be collected and used to certify that companies are in compliance with clean air laws and regulations. Much like a speed camera, a constant data stream would ensure that companies consistently comply with the law, rather than limiting releases of chemicals when government officials make inspections. With today's analytical tools, the overwhelming amount of data real time monitoring would create is now manageable, and new dissemination tools would make it possible to share such data publicly.

Today it is also possible to link contractor spending data with: information about the tasks required under the contract; how the contractor performed; data on the amount of money the contractor spends on lobbying and political contributions; and the company's regulatory compliance record. The amount of data may not be very large by Big Data standards, but merging these distinct datasets creates an accountability matrix that ensures government isn't doing business with scofflaws, poor performers, or those who are using special influences to win awards.

With mapping technology, it is possible to use graphics to help the data tell its own story. For example, mapping data about bridge deficiencies and overlapping it with data detailing the destination of government funding for bridge repairs can quickly show when funding is not going to high priority needs. The same can be done for funding intended to reach specific audiences, such as those below the poverty line.

There are hundreds of examples of how data can help with government accountability. Making logs of visitors to political officials in federal agencies public permits insight into whether these officials' schedules are dominated by campaign contributors or others paying to play. Disclosure of data about hospital care allows consumers to pick their hospitals.<sup>11</sup> And linking vast datasets can support the research and development of new inventions or products such as crops engineered for drought resistance. Inevitably, the Millennial "digital natives" – a generation that came of age in a world

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<sup>11</sup> This is an excellent example to demonstrate the importance of how disclosure is done. Comparing an urban hospital to a suburban research hospital is like comparing apples to oranges. In service delivery, there is a problem with certain organizations servicing the hardest to serve, but then comparing to other institutions that choose to service easier to serve. Thus, disclosure requires providing meta-data, as well as warnings about limitations of the data. More on this later in this article.

of Internet, mobile technology, and social media – will look to data as a tool to hold government and corporations accountable, and will come to expect access to that data.

Just as the axiom “information is power” states, the above examples suggest that government accountability is often about data – and the ability to act on the information. Thus, to achieve meaningful accountability, there must be a transparent, open government where access to information becomes the norm. There must be strong openness laws and equally strong implementing policies to obtain what Joel Gurin calls Open Data, that is, access to freely used, reused and redistributed data to help make data-driven decisions or solve other problems.<sup>12</sup>

Since government accountability is also about “Little Data,” there is also a need to ensure open meetings and access to individual records so that the public can monitor and understand government actions and decision-making. The foundation for access to records (and larger datasets) is the Freedom of Information Act. If an organic statute does not contain specific right-to-know requirements, the public needs to turn to FOIA to obtain the records or data. As described later in this paper, FOIA is out of date and needs an overhaul to achieve meaningful accountability.

In sum, transparency for accountability includes Big and Little Data; it covers information about the government as well as the information it regulates and collects from companies and regulated entities. When it comes to transparency for accountability, size and complexity of the data is irrelevant: the key information used to promote accountability may be a single record or something said at a meeting. Timeliness and accuracy of the information is far more important than whether it qualifies as Big Data. In the end, an essential ingredient to accountability is an open and transparent government, whether or not it involves Big Data.

### III. STRONG OPPOSITION TO OPENNESS

In *Connecting Democracy*, Peter Shane describes Agora, a mythical country where the government is highly transparent, and the public is engaged in governmental decisions.<sup>13</sup> Since Agoran

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<sup>12</sup> Joel Gurin, “Big Data and Open Data. How Open Will the Future Be?” *ISJLP* 10 (2015).

<sup>13</sup> Peter M. Shane, “Online Consultation and Political Communication in the Era of Obama: An Introduction,” in *Connecting Democracy: Online Consultation and the Flow of Political Communication*, ed. Stephen Coleman and Peter M. Shane (Cambridge, MA: The MIT Press, December 2011), 1-20.

technology is available today, why, Shane questions, have we not achieved Agoran levels of transparency and engagement? One key reason is that forces that oppose openness will always exist, especially when openness shines a light on the way government or corporations – or their leaders – operate.

In May, 2014, Vermont became the first US state to require disclosure of genetically modified foods, joining more than 60 countries. Starting in 2016 the law will require companies to notify consumers on the label if a product contains genetically modified ingredients. Hours after the governor signed the bill into law, the Grocery Manufacturers' Association, headed by Monsanto and DuPont, announced that they plan to sue Vermont to prevent the bill from being implemented.<sup>14</sup>

In the face of overwhelming support for labeling GMO foods, trade groups have begun presenting a host of arguments opposing the Vermont law: increased cost to consumers, unnecessary burden on industry, First Amendment infringement, and preemption of federal law are only some of the arguments put forth. Yet the *New York Times* found 93 percent of respondents in a national poll say that foods that have been genetically modified or engineered should be labeled as such.<sup>15</sup> And another poll found that 79 percent of registered voters in Vermont support labeling foods containing such ingredients.<sup>16</sup> Despite this public support that cuts across all political parties, Vermont Attorney General Bill Sorrell told the *VT Digger* that it will likely cost the state \$1 million to win a lawsuit and \$5 million to lose.<sup>17</sup> He acknowledged that the state will need to fight corporate interests that oppose disclosure.<sup>18</sup>

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<sup>14</sup> John Herrick, "Trade Group Vows to Sue over Vermont's GMO Labeling Law," *VT Digger*, May 12, 2014, accessed May 15, 2014, <http://vtdigger.org/2014/05/12/trade-group-vows-sue-vermonts-gmo-labeling-law/>.

<sup>15</sup> Allison Kopicki, "Strong Support for Labeling Modified Foods," *New York Times*, July 27, 2013, accessed May 15, 2014, [http://www.nytimes.com/2013/07/28/science/strong-support-for-labeling-modified-foods.html?\\_r=1&](http://www.nytimes.com/2013/07/28/science/strong-support-for-labeling-modified-foods.html?_r=1&).

<sup>16</sup> Hilary Niles, "VT Digger Poll Shows Overwhelming Support for GMO Labeling Law," *VT Digger*, April 11, 2014, accessed May 15, 2014, <http://vtdigger.org/2014/04/11/vtdigger-poll-shows-overwhelming-support-gmo-labeling-law/>.

<sup>17</sup> John Herrick May, "Trade Group Vows to Sue Over Vermont's GMO Labeling Law," *VT Digger*, May 12, 2014, accessed May 15, 2014, <http://vtdigger.org/2014/05/12/trade-group-vows-sue-vermonts-gmo-labeling-law/>.

<sup>18</sup> This example fits the definition for accountability because the information will empower the public and help to level the playing field between the public and powerful companies.

This type of opposition to meaningful disclosure is quite common. As the examples below demonstrate, companies will fight tooth and nail to limit disclosure. Even the seminal Toxics Release Inventory, an environmental right-to-know program requiring companies to annually disclose information about toxic chemicals released to air, water and land, has faced enormous industry opposition over the years. Companies have advocated changing the thresholds that trigger reporting, streamlining the content provided to the government, limiting the number of chemicals covered, and more.<sup>19</sup>

Fortunately, the program has endured thanks to the advocacy of environmental and health groups, along with first responders, and has produced enormous benefit. The EPA's data show that since the TRI program started in 1988, the simple process of making pollution information public has helped drive a 70 percent reduction in total releases of the initial 300 toxic chemicals the program first starting collecting data on, a remarkable achievement.<sup>20</sup> As other chemicals and industry sectors have been added to the TRI program, they too have shown dramatic reductions in toxic releases. This has made families, workers and communities safer. For example<sup>21</sup>, families have

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<sup>19</sup> See for example, Earthworks, "Toxics Release Inventory - Mining Industry Opposition," at [http://www.earthworksaction.org/issues/detail/TRI\\_industry\\_opposition#.U71auLFfRmI](http://www.earthworksaction.org/issues/detail/TRI_industry_opposition#.U71auLFfRmI); Joseph Miller, "Community Right-to-Know About Toxics Under Attack," CommonDreams, December 17, 2005, <http://www.commondreams.org/views05/1217-21.htm>; Matthew Madia, "TRI Changes are Major Issue at EPA Oversight Hearing," OMB Watch, February 6, 2007, at <http://www.foreffectivegov.org/node/3173>.

<sup>20</sup> Environmental Protection Agency, "TRI Explorer: Release Trends Report," accessed April 17, 2014 at [http://iaspub.epa.gov/triexplorer/tri\\_release.trends](http://iaspub.epa.gov/triexplorer/tri_release.trends).

<sup>21</sup> U.S. Environmental Protection Agency, "The Toxics Release Inventory in Action: Media, Government, Business, Community and Academic Uses of TRI Data," July, 2013, [http://www2.epa.gov/sites/production/files/documents/tri\\_in\\_action\\_final\\_report\\_july\\_2013.pdf](http://www2.epa.gov/sites/production/files/documents/tri_in_action_final_report_july_2013.pdf). This report provides numerous examples of putting TRI to use. For example, the Center for Health, Environment and Justice provides examples of how TRI data have helped emergency responders, researchers, workers, public health officials, environmentalists, community residents, and federal and state officials. See "TRI Success Stories" Center for Health, Environment and Justice, 2006, <http://bit.ly/1aUVisR>. National Public Radio developed an interactive map displaying levels of risk from toxic chemicals at "Poisoned Places," NPR, 2012, at <http://www.npr.org/news/graphics/2011/10/toxic-air/#4.00/39.00/-84.00>. The Center for Effective Government operates RTK NET at <http://www.rtknet.org>, which provides access to TRI, RMP, and other data. The organization provides various updates on how people are using the data. Diane Wilson describes her use of TRI data to identify the source of many of the contaminants impacting the people and economy of Seadrift, Texas, a town on the Gulf of Mexico in "An Unreasonable Woman: A True Story of Shrimpers, Politicos, Polluters, and the Fight for Seadrift, Texas." *Reviews*, Chelsea Green Publishing, 2012, <http://bit.ly/Tk6LvM>. Organizations such as the Louisiana Environmental Action Network produce maps using the TRI data to help residents learn about dangers in their parish (see <http://data.leanweb.org/maps.html>).

used these data (along with another EPA database called Risk Management Plans under the Clean Air Act) to decide which day care facilities and schools to send their children based on their proximity to companies that are releasing toxic chemicals or could produce a dangerous plume if there were an explosion. Unions have used the TRI data in workplace negotiations, and community groups have worked with companies to institute good neighbor agreements to reduce the use of dangerous chemicals. Some companies have used these data to demonstrate the reducing toxic releases into communities where they have factories. And the news media regularly use the TRI data to report on the amount of chemicals being released in local communities. Despite these successes, industry still maneuvers when opportunities arise to undermine the program.

Even the example of the recent release of Medicare payment data, described at the beginning of this article, faced strong opposition from physicians. A 1979 federal injunction, based on the Privacy Act, that was sought by doctors kept the government from releasing the data. In 2011, Dow Jones went to court to make the data publicly available, facing off with the American Medical Association. The court ultimately decided in favor of disclosure.

The fight over public access to information is not solely with corporations and powerful institutions. It is with the government itself. Too often, government officials eschew right-to-know principles because information is perceived as power, because transparency can be embarrassing, or because it is simply easier not to disclose.

In the case of disclosure of campaign contributions it may be a bit of all of the above. There is strong public sentiment that money in politics is a corrupting force<sup>22</sup> and equally broad support for improved disclosure of contributions, with 85 percent of voters supporting disclosure laws and nearly two-thirds feeling strongly about this.<sup>23</sup>

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<sup>22</sup> An April Reason-Rupe poll 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. Emily Ekins, “April 2014 National Survey,” *Reason-Rupe*, April 3, 2014, accessed on April 12, 2014, <http://reason.com/poll/2014/04/03/reason-rupe-april-2014-national-survey>.

<sup>23</sup> Stan Greenberg, James Carville, Erica Seifert, and David Donnelly, “Voters Push Back Against Big Money Politics,” *Democracy Corps and Public Campaign Action Fund*, November 13, 2012, pg. 9, accessed May 19, 2014, <http://www.democracycorps.com/attachments/article/930/dcor.pcaf.postelect.memo.111312.final.pdf>. “This cuts across party lines – 86 percent of Obama voters (66 percent strongly) and 83 percent of Romney voters (63 percent strongly) say they would support mandatory disclosure laws for outside groups. And Congress would be wise to listen – 87 percent of those who voted for Democratic representatives as well as 83 percent of those who voted for Republican representatives support disclosure laws.”

This support is across all sectors: nine in ten business leaders support disclosure of all individual, corporate and labor contributions to political committees.<sup>24</sup> And it covers all types of campaign contributions: 80 percent of voters support stronger disclosure laws for judicial campaigns, and this level of support is consistent among Democrats, Republicans, and independents.<sup>25</sup> More than one million people signed a petition for the Securities and Exchange Commission to require that public companies disclose their political activities.<sup>26</sup> Still, sunshine in the campaign finance arena remains elusive because of concerted opposition from self-interested powerbrokers.

Politicians and columnists like Charles Krauthammer attack transparency in the campaign arena as having a chilling effect on speech and claim it can lead to harassment based on who someone gave money to. According to Krauthammer:

“[L]et transparency be the safeguard against corruption. As long as you know who is giving what to whom, you can look for, find and, if necessary, prosecute corrupt connections between donor and receiver. This used to be my position. No longer. I had not foreseen how donor lists would be used not to ferret out corruption but to pursue and persecute citizens with contrary views.”<sup>27</sup>

Krauthammer’s arguments echo those of numerous politicians, none more directly than Senate Minority Leader Mitch McConnell.<sup>28</sup>

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<sup>24</sup> Committee for Economic Development, “American Business Leaders on Campaign Finance and Reform,” July 24, 2013, a poll conducted by Hart Research Associates and American Viewpoint, accessed on April 12, 2014, <http://www.ced.org/reports/single/survey-american-business-leaders-on-campaign-finance>.

<sup>25</sup> Center for American Progress, <http://www.americanprogress.org/issues/civil-liberties/news/2013/06/21/67224/voters-overwhelmingly-support-judicial-election-reforms/>.

<sup>26</sup> U.S. Securities and Exchange Commission, “Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the use of Corporate Resources for Political Activities” File No. 4-637, <http://www.sec.gov/comments/4-637/4-637.shtml>.

<sup>27</sup> Charles Krauthammer, “The Zealots Win Again,” *Washington Post*, April 17, 2014, accessed May 15, 2014, [http://www.washingtonpost.com/opinions/charles-krauthammer-the-zealots-win-again/2014/04/17/ac0b6466-c654-11e3-8b9a-8e0977a24aeb\\_story.html](http://www.washingtonpost.com/opinions/charles-krauthammer-the-zealots-win-again/2014/04/17/ac0b6466-c654-11e3-8b9a-8e0977a24aeb_story.html).

<sup>28</sup> Mitch McConnell, “How Political Disclosure Could Threaten Free Speech,” *Washington Post*, June 22, 2012, accessed July 9, 2014, <http://www.washingtonpost.com/opinions/mitch-mcconnell-how-political-disclosure-could-threaten-free->

McConnell's powerful position in the Senate as majority leader – and previously as minority leader – has quashed discussion of campaign finance reform issues within the Republican Party and its allied partners. The result has been stalemate on any type of federal disclosure law on political spending.

Though many politicians speak affirmatively about the public's right-to-know, probably because it is a popular concept, when push comes to shove, they often do not vote this way. Many politicians will either do little to support transparency or attack it because it could uncover embarrassing actions on their part, both in terms of campaign contributions and official actions. Their reluctance is potent, but unpersuasive. Yet it is part of the overall pattern of resistance to disclosing information that is meaningful for accountability.

Secrecy in government not only thwarts accountability, it also reduces trust in our public institutions. Only 19% of the public say they trust the federal government to do what is right just about always or most of the time, a level that is near the historical rock bottom.<sup>29</sup> However, a recent report found that those who are satisfied with a government agency's website are 67 percent more likely to trust the agency than those who are not satisfied with the website.<sup>30</sup> A key criterion for satisfaction is how transparent the agency website is. Additionally, 52 percent are more likely to participate with, and express their thoughts to their government if they are satisfied with the agency website.<sup>31</sup> While this study does not establish a clear proof of causation, it does suggest that increasing the flow of timely and accurate information to the public is a possible avenue toward

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speech/2012/06/22/gJQApiE2vV\_story.html; David Donnelly, "Sen. McConnell's Position on Money in Politics is About Power, Not Ideology," Public Campaign Action Fund, June 3, 2014, accessed on July 9, 2014, <http://campaignmoney.org/blog/2014/06/03/sen-mcconnells-position-money-politics-about-power-not-ideology>. Alexander Bolton, "McConnell Pushes Back Against Campaign Finance Reform Efforts," *The Hill*, December 6, 2012, accessed on July 9, 2014, <http://thehill.com/homenews/senate/271343-mcconnell-pushes-against-campaign-finance-reform->.

<sup>29</sup> "Trust in Government Nears Record Low, But Most Federal Agencies Are Viewed Favorably," The Pew Research Center for The People & The Press, October 18, 2013, <http://www.people-press.org/2013/10/18/trust-in-government-nears-record-low-but-most-federal-agencies-are-viewed-favorably/>.

<sup>30</sup> Dave Lewan and Julie Anderson, "The ForeSee E-Government Satisfaction Index (Q4 2013)," *ForeSee, February*, 2014, pg 22. [http://www.foresee.com/research-white-papers/\\_downloads/e-gov-q4-2013-foresee.pdf](http://www.foresee.com/research-white-papers/_downloads/e-gov-q4-2013-foresee.pdf).

<sup>31</sup> *Ibid.*, 22.

rebuilding trust and participation in government – key factors in strengthening accountability. These ideas can and should be further tested empirically.

Recently, some academics and pundits have made the argument that transparency is part of today's governing problems, leading to exacerbating polarization and gridlock, which, in turn, adds to the many arguments from special interests and government for more secrecy and less openness.<sup>32</sup> At a 2014 conference involving around 80 scholars, journalists, advocates, and donors regarding government dysfunction, participants voiced a theme of "skepticism about openness and transparency as an effective mode for governance."<sup>33</sup> According to the conference report, Jonathon Rauch, a journalist and fellow at the Brookings Institution, made the case for "reversing transparency rules" along with reviving earmarks, ending campaign contribution limits, and giving more power to party bosses.<sup>34</sup> And *The Atlantic* senior editor David Frum argued that reducing the power of political parties and "creating more transparency, have not necessarily turned out to be such great ideas."<sup>35</sup> Of course, the implication is with less openness comes less access to data and less accountability.

Academics, such as Professors Sarah Binder and Frances Lee, have also argued that when it comes to Congress, transparency "undermines" its legitimacy and "imposes direct costs on successful deal making" and "interferes with the search for solutions."<sup>36</sup> They make the point that greater openness means members of Congress will adhere to party messages over solving problems. As an example, they describe a private Senate session held in the summer of 2013 in the historic old Senate Chamber to discuss possible changes to the

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<sup>32</sup> This topic is discussed more fully in Gary D. Bass, Danielle Brian, Norman Eisen, "Why Critics of Transparency Are Wrong," *The Brookings Institution*, November 24, 2014, at <http://www.brookings.edu/research/papers/2014/11/24-why-critics-transparency-wrong-bass-brian-eisen>.

<sup>33</sup> "The Governing Crisis: Exploring Solutions," *Brennan Center for Justice*, May 15, 2014, accessed May 24, 2014, <http://www.brennancenter.org/sites/default/files/publications/dysfunction%20V7%2005%2012.pdf>.

<sup>34</sup> *Ibid.*, 26.

<sup>35</sup> *Ibid.*, 29.

<sup>36</sup> Sarah A. Binder and Frances E. Lee, "Making Deals in Congress," in *Negotiating Agreement in Politics*, eds. Jane Mansbridge and Cathie Jo Martin, December, 2013, accessed July 9, 2014, [http://scholar.harvard.edu/files/dtingley/files/negotiating\\_agreement\\_in\\_politics.pdf](http://scholar.harvard.edu/files/dtingley/files/negotiating_agreement_in_politics.pdf).

Senate's filibuster rule. They cite Senator John Boozman (R-AR), who upon leaving the closed-door session said, "There was no rancor at all. I think if the American people were watching, the whole tone would have been different. It's different when the TV cameras are on. That might be part of the problem."<sup>37</sup> They also note that transparency may be the culprit in keeping Congress and the president from reaching a "grand bargain" on the federal budget.<sup>38</sup> Others have argued that the legislative "sausage-making" is not one that the public should view and that transparency adds to the challenge of bipartisan dialogue, especially when reaching across the aisle invites criticism from party stalwarts and could generate primary challenges by extremist ideologues.<sup>39</sup> Moving beyond openness in Congress, Bruce Cain raises questions about how much transparency is beneficial at the local, state, and federal level, arguing that too much transparency can disrupt democratic practice.<sup>40</sup>

The key point is that while there may be some enthusiasm for open data or use of Big Data to strengthen government accountability, it is not uniform. Powerful interests often favor secrecy over openness, resulting in the most valued data being withheld from disclosure. Moreover, there seems to be growing criticism or disenchantment with transparency from some journalists and academics. This means the starting point for using Big Data for government accountability needs to be strong advocacy for transparency and open government.

#### IV. ACCESS TO DATA MAY NOT BE ENOUGH FOR ACCOUNTABILITY

Even when government makes data available, that information alone may be insufficient for meaningful accountability. The following story about federal spending data not only reinforces the point about challenges to winning disclosure of such data – the point made in the last section – but it also demonstrates that even when the data is

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<sup>37</sup> Ibid., 63.

<sup>38</sup> Ibid., 64.

<sup>39</sup> John Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy* (New York: Cambridge University Press, 1995).

<sup>40</sup> "To be sure, a base level of transparency is an essential minimal condition for democratic accountability...But should the right to know and observe what governments do be as nearly absolute as possible? Some believe the answer is yes, but there are far more reasons to think the right answer is no." pg 42. Bruce E. Cain, *Democracy More or Less: America's Political Reform Quandary* (Cambridge University Press, 2014).

made available, the details about how it is done make all the difference as to whether the data is useful to hold government and recipients of federal funds accountable.

In the aftermath of Hurricane Katrina in 2005, my former organization, OMB Watch (now called the Center for Effective Government), tried unsuccessfully to get information about government spending to address the many needs of communities along the coast of the Gulf of Mexico, where the storm had travelled. Damage from the storm surge between central Florida to Texas was extensive, with numerous deaths in New Orleans, Louisiana as the levee system catastrophically failed. Families, many of whom were low-income, faced uncertainty as their homes were washed away and the physical infrastructure of their towns and cities, including roads, electricity, and communications, was severely damaged. With the government distributing more than \$100 billion in aid and emergency response, and complaints from community groups that the federal money was not reaching them, we began exploring options for the public to easily access information on government spending.

By 2006, OMB Watch had developed a plan to make all government spending searchable through a website. At the same time, Senators Tom Coburn from Oklahoma and Barack Obama from Illinois, from opposite ends of the political spectrum, were also thinking about introducing a bill to improve federal spending transparency, what they called Google for Government or “Google-like.”<sup>41</sup> It was a partnership that proved transparency can be above politics: both left and right supported access to federal spending information, albeit for very different reasons. The right wanted to use spending data to make the argument for shrinking government; the left wanted to use the data to improve the way government operates. But both wanted access to accurate information. Accordingly, we worked with the two senators to develop the bill, helped build bipartisan support for it, and then lobbied for it.

There were many challenges to passing this bill into law. Contractors opposed the disclosure. The Bush administration wasn’t officially opposed, but was not warm to the idea. There were many who argued that it was impossible to build the website and that, if it could be done, it would take many millions of dollars and many years, with internal White House and congressional estimates for launching the site in the \$15 million range. To counter these challenges, OMB

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<sup>41</sup> “Coburn, Obama, McCain, Carper Applaud Senate Committee Approval of Bill to Help Taxpayers “Google” Federal Spending,” *legistorm.com*, July 28, 2006, [http://www.legistorm.com/stormfeed/view\\_rss/307895/member/22.html](http://www.legistorm.com/stormfeed/view_rss/307895/member/22.html).

Watch began to build a website that approximated the bill, which we called FedSpending.org. We built a usable prototype in roughly six months for around \$200,000 and a final two-year cost of around \$600,000.<sup>42</sup>

While we were building the website, there was a secret “hold” placed on the bill in the Senate. A “hold” is a parliamentary procedure that allows one or more Senators to prevent a motion from reaching a vote on the Senate floor, and it can be done anonymously. Thus, the Coburn-Obama bill could not be considered until the hold was removed. The blogosphere, mostly from conservatives, was outraged and began an active campaign to identify who had the secret hold by calling every senator and placing an “X” on their picture on a much-advertised website if they confirmed they were not responsible.<sup>43</sup>

It turned out that Republican Senator Ted Stevens of Alaska, the powerful former chair of the Appropriations Committee who was known for his earmarked spending, was identified as being responsible for the hold.<sup>44</sup> Lobbying efforts then focused squarely on him, and he finally removed the hold. But to the dismay of the advocates, another secret hold was placed on the bill. The process of identifying the responsible party started anew. This time, Democratic Senator Robert Byrd of West Virginia, the longest serving Senator in history and also a powerful appropriator, was the culprit.<sup>45</sup> Once he removed his hold, the Senate acted quickly, as did the House of Representatives, after some initial hesitancy, which was induced by lobbying by the contractor community. President Bush signed the bill into law on September 26, 2006.<sup>46</sup> The law gave the Office of

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<sup>42</sup> Sean Moulton and Adam Hughes oversaw the day-to-day development, Rich Puchalsky wrote the programming code and cleaned the data, and Kathy Cashell designed the website. Sunlight Foundation provided grant support to cover about one-third of the cost. We relied on the government for data about spending. However, the data was of such poor quality that we looked for other sources. For the contract data, we relied on Eagle Eye Publishers, but for grants and loans, we had to use the government’s data.

<sup>43</sup> Some have said that the conservative blogosphere went to bat for the Coburn-Obama bill in part because they thought it would have an impact on earmarks, although the bill never addressed that topic.

<sup>44</sup> Andrea Koppel, Ted Barrett and Abbi Tatton, “Sen. Stevens is ‘the Secret Senator’.” *CNN.com*, August 30, 2006, accessed May 24, 2014, <http://www.cnn.com/2006/POLITICS/08/30/secret.senators/>.

<sup>45</sup> Editorial, “A Political Who-Held-It,” *Los Angeles Times*, September 1, 2006, accessed on May 24, 2014, <http://articles.latimes.com/2006/sep/01/opinion/ed-hold01>.

<sup>46</sup> *Federal Funding Accountability and Transparency Act*, (2006) §31 U.S.C. 6101 note.

Management and Budget until January, 2008 to build the government's website.<sup>47</sup>

By this point, FedSpending.org had become a heavily frequented site, with around 1 million visits per month at its peak, and received widespread praise. We wrote to OMB and offered to provide advice to assuage their uncertainty about whether they could launch the website by the mandated deadline. OMB eagerly welcomed the advice and we began a series of very constructive meetings about how to implement the website. Robert Shea, the OMB Associate Director for Administration and Government Performance, provided steady leadership for the Bush administration on building the website, which was called USAspending.gov. In the end, OMB and OMB Watch agreed to use the FedSpending.org website as the basis for the USAspending.org website that the government was required to build.<sup>48</sup> Both Coburn and Obama agreed to this arrangement, and USAspending.gov was launch in December, 2007 just ahead of the deadline.

This story is important because some identify “the birth date of the transparency movement” (often associated with the growth of Big Data) with the creation of FedSpending.org and its offshoot, USAspending.gov.<sup>49</sup> Because of this experience with making spending data available to the public in searchable formats, OMB Watch and other transparency advocates became intimate with all the challenges associated with the data and with using a searchable website as an accountability tool. Here are five lessons about the utility of using data for accountability that also apply beyond the spending data:

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<sup>47</sup> This story only tells part of the challenges in getting the Coburn-Obama law (FFATA) passed – and it is not unique. On May 9, 2014, President Obama signed into law the Digital Accountability and Transparency Act, or DATA Act, which builds on FFATA to add data standards for improved machine readability of spending data. That bill also went through an odyssey before being passed and that story is effectively told by Vox news reporter Andrew Prokop. Andrew Prokop, “Beating the odds: Why one bill made it through a gridlocked Congress – and so many didn’t,” *vox.com*, May 22, 2014, <http://www.vox.com/2014/5/22/5723878/how-a-bill-becomes-a-law-in-2014>.

<sup>48</sup> A summary of the OMB and OMB Watch partnership is described. Elizabeth Williamson, “OMB Offers an Easy Way to Follow the Money,” *Washington Post*, December 13, 2007, [http://www.washingtonpost.com/wp-dyn/content/article/2007/12/12/AR2007121202701.html?nav=rss\\_politics/fedpage](http://www.washingtonpost.com/wp-dyn/content/article/2007/12/12/AR2007121202701.html?nav=rss_politics/fedpage).

<sup>49</sup> Michael Hiltzik, “These Crusaders Bring Transparency to Government,” *Los Angeles Times*, September 28, 2009, <http://articles.latimes.com/2009/sep/28/business/fi-hiltzik28>.

1. *The Right Information May not be Collected or if Collected it May not be Disclosed.*

In the case of USAspending.gov there was no information about products and deliverables required by the contracts government entered into (or access to the contract itself); about performance data on the contractor or grantee; or about sub-recipients two or more tiers below the prime recipient.<sup>50</sup> The list could go on. But the point is that each of these data elements is essential for holding government and recipients of federal funds accountable to ensure that taxpayer dollars are being put to good use and that recipients are high performers.

In another example, on May 1, 2014, the Department of Education's Office of Civil Rights announced a new effort – promoted by the White House – to disclose complaints of sexual abuses on college campuses.<sup>51</sup> The Education Department deserves credit for experimenting with right-to-know tools to strengthen public understanding of sexual violence and harassment on campuses and demonstrating active enforcement of the law. However, the OCR effort also does not provide enough information to provide meaningful accountability. The public does not know the nature of the complaint, how many have been filed, any patterns such as location, and more. OCR could provide this type of information without divulging case sensitive information or undermining personal privacy.

The point is that open data is not always the answer: it must be the right data. Without the right information, there is no accountability.

2. *The Quality of the Data May not be Good.*

This is where the saying, “Garbage in, garbage out” applies. Large amounts of data are meaningless if the data is erroneous. There are many types of data quality issues. Three that stood out with federal spending data were inaccuracies in the reporting, syntax errors, and timeliness errors. The data came from each federal agency, which identified their respective spending obligations. However, there is no

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<sup>50</sup> If, for example, a grant goes to a state and the state subcontracts with a city and the city subcontracts with others, there is no information about those transactions below the city level on the website.

<sup>51</sup> U.S. Department of Education, “U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations,” *ed.gov*, May 1, 2014, <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

effective check on the accuracy of such agency data. For example, it is not compared with what the recipients of federal funds say they get. Most importantly, it is not compared with the most accurate data, which comes from the Treasury Department, where the check writing is done. So it is not surprising that many observers found errors in the information posted on USAspending.gov.<sup>52</sup>

There are many types of syntax errors, but even mundane ones can have large impacts on the usability of data. For example, on USAspending.gov, because entities use slightly different language in their names for various reports to government (e.g., assn, association, assoc), data may not be accurate when it is aggregated. These small discrepancies mean that something as simple as a list of the top 10 contractors in terms of overall dollars from USAspending.gov is not accurate.

### *3. Methods of Access May be Limited.*

If information cannot be found when the public is looking for it, then the agency is not truly being held accountable. The agency must make access easy and open. This not only includes an ability to find the information through search engines, but also includes allowing the user to search the database itself. Increasingly, agencies are allowing downloads or machine-readable access to the datasets. While this is essential, it should not obviate the responsibility for providing online tools to allow the public to search that database since the public cannot always count on free, third-party access to the data.

### *4. Data Standards are Essential.*

The development and use of standards for metadata is critical to facilitating the retrieval of the right information, especially as release of government datasets increases. Likewise, providing data standards

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<sup>52</sup> The Government Accountability Office “found that from a sample of 100 awards on USAspending.gov, each award had at least one data error and that USAspending.gov did not include information on grants from programs at 9 agencies for fiscal year 2008.” While GAO acknowledges that data quality continues to improve, it still has many errors. Gene L. Dodaro, “Government Transparency: Efforts to Improve Information on Federal Spending,” *Government Accountability Office*, GAO-12-913T, July 18, 2012, <http://www.gao.gov/assets/600/592592.pdf>. Also see Sunlight Foundation’s analysis at <http://sunlightfoundation.com/clearspending/results/>, which highlights weaknesses in the data.

(e.g., XML, XBRL or others<sup>53</sup>) is essential for meaningful data exchanges, which is a critical part of transparency and accountability. The data also must be structured so it can be integrated with other datasets. With the disclosure of more and more government databases, the demand to link various data increases. Governments have a responsibility to enable such use of databases by developing a system of common identifiers for companies, locations, industries, activities, etc. to be used across agencies. Without such identifiers, government data will remain constrained to operate within silos.

### *5. Releasing Gobs of Data is Not the Answer.*

Sometimes the best way to hide key information is to bury it in massive datasets. This is why it is so important that intermediary organizations, such as the news media and nonprofit groups, play a role in inspecting and analyzing the data. In many cases, the data that is released can be very technical, turning off average Americans from going through it. The key to accountability is to require release of information that is of high value to the public and ensure that intermediary organizations have the capacity to inspect the data.

## V. MOVING FORWARD TOWARDS ACCOUNTABILITY

In his first full day in office, President Obama said: “All agencies should adopt a presumption in favor of disclosure... The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.”<sup>54</sup>

This commitment and a subsequent implementing memo dealing with the Freedom of Information Act by Attorney General Eric

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<sup>53</sup> Extensible Markup Language (XML) creates a common manner for encoding documents in a format that is both human-readable and machine-readable. Its primary purpose is to structure, store, and transport information. Extensible Business Reporting Language (XBRL) is a standard like XML but designed for exchanging financial and business information.

<sup>54</sup> Barack Obama, “Freedom of Information Act,” Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009, accessed March 28, 2014, [http://www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act](http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act).

Holder,<sup>55</sup> were widely applauded by transparency and accountability organizations because they created a 180-degree shift from the Bush administration's policy on transparency.<sup>56</sup> The Bush Justice Department issued a 2001 FOIA memo that said it would defend agency decisions to withhold agency records so long as they were on a sound legal basis.<sup>57</sup> The message of the Bush administration was, in essence, where possible, withhold information; with the Obama administration's memos, the message was to disclose information wherever possible.

As stated earlier, FOIA is the foundation for openness and accountability. Unfortunately, we have not yet achieved Obama's vision of affirmative disclosure. On the contrary, implementation of the Obama transparency agenda has been greatly criticized.<sup>58</sup> As reports critical of Obama's transparency efforts have surfaced, they have overshadowed other successful efforts undertaken by the Obama administration. Regardless of whether Obama's transparency actions and legacy are viewed from a glass half full or half empty perspective, there are several things Congress and the president can tackle on the transparency front to improve accountability and access to Big and Little Data.

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<sup>55</sup> Eric Holder, "The Freedom of Information Act (FOIA)," Memorandum for the Heads of Executive Departments and Agencies, March 19, 2009, accessed March 28, 2014, <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

<sup>56</sup> Meredith Fuchs and Tom Blanton, "President Obama Embraces Openness on Day One, as Urged by the National Security Archive and a Coalition of More than 60 Organizations," *National Security Archive*, January 21, 2009, accessed on March 28, 2014, <http://www2.gwu.edu/~nsarchiv/news/20090121/>. See also "OMB Watch Commends Obama Administration for Open Government Memos, Urges Strong Follow-Through," *Foreffectivegov.org*, January 21, 2009, accessed on March 28, 2014, <http://www.foreffectivegov.org/node/3879>.

<sup>57</sup> John Ashcroft, "The Freedom of Information Act. Memorandum for Heads of All Federal Departments and Agencies," *Justice.gov*, October 12, 2001, accessed March 28, 2014, <http://www.justice.gov/archive/oip/011012.htm>.

<sup>58</sup> Josh Gerstein, "Obama's Albatross: Transparency," *Politico*, December 24, 2013. Accessed March 28, 2014, <http://www.politico.com/story/2013/12/barack-obama-white-house-transparency-101494.html>.

### A. *Improving the Building Blocks for Accountability*

#### 1. *Overhaul the Freedom of Information Act to Require Affirmative Disclosure of Information.*

One of the most important accountability tools is FOIA because it is the basis for access to government-held data. In 2008, Professor David Vladeck provided a review of information access laws noting several criticisms of FOIA and added as an overall concern that “FOIA’s file-a-request-and-wait-for-a-response approach is also an anachronism.”<sup>59</sup> Little has changed since that review.

FOIA is a law designed for the paper world but functioning in an electronic era. It is also a requestor-driven law, leaving it to the public to request information and to the government to determine whether it will provide access to the requested records. With regard to individual records, the government’s responsibility under FOIA as it stands is to *respond* to requests, not to *initiate* disclosure. Besides the law being out of date, it has enough ambiguity to allow presidential administrations to fundamentally shift the meaning of the law. Presidents Clinton and Obama interpreted the law as encouraging agencies to disclose; President Bush as an opportunity to withhold where possible. These policy interpretations have created major shifts from administration to administration in the way agencies implement the law. For example, under the Bush administration there was an increase in use of FOIA exemptions that give agencies more discretion to withhold records. These ping-pong policy shifts need to end.

Congress needs to overhaul the law to move it into the Internet age.<sup>60</sup> It needs to be clear that records and other information holdings

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<sup>59</sup> David C. Vladeck, “Information Access – Surveying the Current Legal Landscape of Federal Right-to-Know Laws,” *Texas Law Review*, 86 (2008): 1787.

<sup>60</sup> Even as this article is being written, bipartisan efforts are underway in Congress to reform FOIA. In the Senate, Senators Patrick Leahy (D-VT) and John Cornyn (R-TX) introduced the FOIA Improvement Act of 2015 (S. 337) and in the House, Reps. Darrell Issa (R-CA) and Elijah Cummings (D-MD) introduced the FOIA Oversight and Implementation Act of 2015 (H.R. 653). These bills are similar to a bill that was passed in the Senate in 2014, but did not receive a vote in the House before Congress adjourned. The bills introduced in 2015, while having differences between them, would both codify the Obama administration’s guidance that agencies should process requests for information under the assumption that the record should be released. This presumption of openness would stop the ping-pong policy making from administration to administration. The bills would also put a 25-year sunset on agencies’ ability to withhold records reflecting internal deliberations or other privileged communications. The bills have a number of other improvements, some that will require reconciliation between the two.

should be automatically disclosed through the Internet and other means unless the government can make a compelling argument to keep the materials secret.<sup>61</sup> The burden should be shifted to the government to justify withholding. No longer should the public need to request information; it should be proactively disseminated by the government. Of course, the file-a-request model will still be needed, but it shouldn't be the vehicle of first recourse for obtaining government information. Instead, FOIA should become the safety net, along with whistleblower protections, to ensure a transparent, accountable government and meaningful access to high-value data.

## *2. Build Disclosure Planning into the Information Collection Process.*

To ensure that the proactive disclosure model works, all federal agency information collections should include a plan for how it will make the data publicly available (unless the agency is seeking an exemption from disclosure, which should be so stated). This could be implemented through the clearance process created under the Paperwork Reduction Act (PRA). All federal agencies must submit to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget its plans for collecting information from 10 or more people.

OMB regulations define "information" as "any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media."<sup>62</sup> It includes requests for information to be sent to the government, such as forms (e.g., the IRS 1040), written reports (e.g., grantee performance reports), and surveys (e.g., the Census); recordkeeping requirements (e.g., OSHA requirements that employers maintain records of workplace accidents); and third-party or public disclosures (e.g., nutrition labeling requirements for food). The requirements of the PRA apply to voluntary collections as well as to mandatory collections and collections required to obtain a federal benefit (e.g., a job, a grant, a contract). In other words, it covers the collection of Big and Little Data that is essential to accountability.

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<sup>61</sup> Freedom of Information Act, (1966), 5 U.S.C. §552(a)(2), already mandates affirmative electronic disclosure of agency final opinions and orders, policy statements, staff manuals that affect the public, and frequently requested information. This section of the law can be more fully developed to achieve the proactive disclosure model.

<sup>62</sup> 5 C.F.R. § 1320.3 (h).

OIRA has the authority to approve or disapprove the information collection request from the agency and can approve the collection for up to three years. While OIRA has statutory responsibilities it must fulfill in reviewing the information collection requests, it can also require agencies to identify whether the information it proposes to collect will be made public; if not, to provide an explanation for withholding it from the public; and if so, to create a plan for making it publicly available.

### *3. Create an Openness Standard for Proactive Disclosure.*

Even as Congress wrestles with establishing appropriate laws to support an open and accountable government such as modifying FOIA, leaders in all three governmental branches can move quickly to begin this proactive disclosure model. Basic information about the operations of all branches of government should be made uniformly available through the Internet without the need for public request – and this core information for accountability should be uniformly available on all governmental websites.

When it comes to the executive branch, these disclosures should include at minimum information such as organizational charts, a list of key employees and how to contact them, logs of visitors meeting with top level officials, and the calendars of top-level officials. The public should 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. Unclassified communications and reports prepared by an agency, Congress and the courts, such as communications to and from Congress and reports of an agency Inspector General, should also proactively be made available. These minimum requirements could serve as the beginnings for putting an affirmative obligation on government to share information instead of the public having to take initiative to find and obtain it through requests and litigation. And the same categories of information should be available on all government websites.

All agencies should also provide a directory of their information resources that describes the information (including meta data), how to obtain it, and limitations of the information. Even if certain information is not public, the information should be identified in the directory but marked as secret.

Agencies are already required under OMB Circular A-130 to prepare “an inventory of the agency's major information systems, holdings, and dissemination products; an agency information locator

service; a description of the agency's major information and record locator systems; an inventory of the agency's other information resources, such as personnel and funding (at the level of detail that the agency determines is most appropriate for its use in managing the agency's information resources); and a handbook for persons to obtain public information from the agency..."<sup>63</sup> But, although this requirement has been in place for more than a decade, it has not been widely implemented. In the past few years, President Obama has begun to push for an inventory of agency databases. For example, under the Open Government Directive, agencies were to develop Open Government Plans that, among other things, provide "inventories [of] agency high-value information currently available for download."<sup>64</sup> More recently, in a White House memo on Open Data Policy, agencies were instructed to create an "enterprise data inventory, if it does not already exist, that accounts for datasets used in the agency's information systems."<sup>65</sup> The data in the "inventory that can be made publicly available must be listed at [www.\[agency\].gov/data](http://www.[agency].gov/data) in a human-and machine-readable format that enables automatic aggregation..."<sup>66</sup>

#### 4. *Put an End to Secret Law.*

An increasing number of binding governmental rules have not been disclosed to the public or even to other branches of government. In the aftermath of Edward Snowden's leaks, there has been widespread news coverage about secret court decisions under the Foreign Intelligence Surveillance Act, but at any given time, there are many secret decisions made by executive agencies that guide

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<sup>63</sup> OMB Circular A-130, § 9(a)(g). This is pursuant to the Paperwork Reduction Act (44 U.S.C. 3506(b)(4) and 3511) and the Freedom of Information Act (5 U.S.C. 552(g)).

<sup>64</sup> Peter Orszag, "Open Government Directive," *Office of Management and Budget*, M-10-06, December 8, 2009, accessed on May 20, 2014, [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf).

<sup>65</sup> Sylvia M. Burwell, Steven VanRoekel, Todd Park, and Dominic J. Mancini, "Open Data Policy – Managing Information as an Asset," *Office of Management and Budget*, M-13-13, May 9, 2013, Section III(3)(a), accessed on May 20, 2014, <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf>.

<sup>66</sup> *Ibid.*, Section III(3)(b), accessed on May 20, 2014, <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf>.

government decision-making.<sup>67</sup> For example, the Office of Legal Counsel within the Justice Department has withheld a number of decisions it has made even though these decisions are authoritative legal opinions on questions of law and often function as the final arbiter of laws. Secrecy in government undermines our system of checks and balances and the accountability that system brings. Keeping the rule of law secretive reduces trust in government and harms our democratic way of life.

### 5. *Update other Openness Laws.*<sup>68</sup>

The Government in the Sunshine Act (Sunshine Act) requires that meetings of multi-member agencies be held publicly, that is, federal agencies with appointed boards or commissions. For any meeting involving a quorum of board or commission members, the agency must announce the event at least seven days in advance in the *Federal Register* and, with certain exceptions, permit attendance by interested members of the public. Over the years, a number of agencies have used exceptions in the law to avoid the requirements. For example, some have avoided the intent of sunshine by conducting votes in writing (often called notational voting) which is exempted from the definition of “meeting” in the law.

The Administrative Conference of the United States reports a survey that found only 17 of 37 responding multi-member agencies fully opened 50 percent or more of their meetings to public attendance in the period from 2007–10.<sup>69</sup> Moreover, 40 percent of the surveyed agencies said they used notational voting to dispose of more than 75 percent of matters, though the frequency differed significantly from agency to agency.<sup>70</sup> Many transparency advocates

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<sup>67</sup> See, for example, Jeremy Carp, “Secret Laws are a Threat to American Democracy,” *Brennan Center for Justice*, May 27, 2014, at <http://www.brennancenter.org/blog/secret-laws-are-threat-american-democracy>.

<sup>68</sup> Although this section only addresses the Government in Sunshine Act and the Federal Advisory Committee Act, other laws also need to be updated, including core whistleblower protections. Additionally, Congress needs to revisit our system of national security surveillance systems, along with classification and declassification procedures. Too much is unnecessarily being classified and not enough is being declassified.

<sup>69</sup> Reeve T. Bull, “The Government in the Sunshine Act in the 21st Century,” *Administrative Conference of the United States*, March 10, 2014, pg. 3, fn. 10, accessed May 21, 2014, <http://www.acus.gov/sites/default/files/documents/Government%20in%20the%20Sunshine%20Act%20Draft%20Report%20REVISED%205-7-14.pdf>.

<sup>70</sup> *Ibid.*, 46.

and journalists have complained that the Sunshine Act has largely been neutered, even though agencies may disagree.<sup>71</sup>

The Federal Advisory Committee Act (FACA) was another law ushered in during the post-Watergate era intended to bring greater accountability to the executive branch. FACA regulates the government's ability to interact with outsiders, formalizing the process of seeking advice from groups containing at least one non-federal employee and imposing various procedural requirements on groups from which such advice is sought. The law required agencies to provide adequate justification for creating an advisory committee and to ensure that committees operated objectively and are not improperly captured by special interests.

To achieve these objectives, the law requires that advisory committees not be inappropriately influenced by the appointing authority or any special interest and requires that the membership of committees reflect an appropriate balance of viewpoints for the functions to be performed. Additionally, the law imposes various transparency requirements to ensure that committees operate publicly and that everyday citizens have the opportunity to express their views to committee members. Nonetheless, in fiscal year 2010, 72 percent of the meetings subject to FACA were either completely or partially closed pursuant to one of the FACA exceptions.<sup>72</sup>

The time has come to update the openness laws to address inappropriate exceptions so that the laws apply more comprehensively and uniformly to all federal agencies and to include 21st century standards for defining "sunshine" that includes remote access to meetings. There should be open meetings for all federal agencies engaged in decision-making actions that affect the public or influence policies. This can be achieved while also providing the necessary means for private communications that are often needed in development of products.

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<sup>71</sup> The Administrative Conference of the U.S. noted in its Recommendation 2014-2 (at <http://www.acus.gov/recommendation/government-sunshine-act>) that a 1995 recommendation that was never acted upon called for a pilot project for agencies that would offer more discretion to hold closed meetings in return for a weightier burden to summarize and make public the contents of those meetings. In Footnote 13, ACUS notes: "...Congress may wish to authorize such a program and track the results to determine whether to expand it to all covered agencies."

<sup>72</sup> Reeve T. Bull, "The Federal Advisory Committee Act: Issues and Proposed Reforms." *Administrative Conference of the United States*, September 12, 2012, pg. 25, fn. 181. Accessed May 21, 2014, <http://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf>.

## 6. *Create Incentives to Disclose Data.*

There is also a need to change the culture within government to support a spirit of openness and accountability. While there is no one step that will assuredly change the environment within federal agencies, here are four ideas:

### a. *Create New Review Processes that Deliver Feedback on Transparency to Government Officials.*

This includes making public access and other government openness issues part of formal government employee reviews. If it is clear that promotions and bonuses derive from actively disseminating information to the public, that behavior will be reinforced. It may also be appropriate to have government job titles that reflect openness and privacy responsibilities, along with job tracks that allow for growth in this area.

### b. *Create a Review and Reporting Process in which Agencies Annually Evaluate their Performance on Transparency...*

A sort of transparency report card that all agencies fill out. This information can be made available to the public through a performance dashboard.

### c. *Establish Mechanisms for the Public to Provide Better Feedback about Government Actions based on the Information being Disclosed.*

For instance, if an online tool such as the Amazon.com five-star rating system allowed the public to indicate its approval or disapproval of programs or spending decisions being disclosed, then officials would have unique information, which it could use to make decisions about improvements. Thus, the disclosure could strengthen performance. This public assessment could be linked to the agency report card and employee reviews.

### d. *Building on the Report Cards and Public Input, the Government could Grant Awards for the Best Agency Efforts on Transparency.*

Awards should come from top offices of government to make them coveted forms of recognition, pushing agency staff to be recognized for good work. Groups outside government could also provide best and

worst awards – sometimes shame works wonders.

B. *Specific Projects to Strengthen Accountability*

Beyond overhauling core laws to create stronger building blocks for accountability, there are steps that need to be taken now by our political leaders to start a transformative process that uses data and transparency to create a more vibrant and accountable government, one that will improve public trust in our government. Here are three top priorities to shine a light on the role of special interests and bring greater disclosure to core governmental functions dealing with spending and regulations.

1. *Special Interest Disclosure.*

There should be more timely and complete disclosure of direct and independent campaign contributions.<sup>73</sup> If Congress cannot pass such laws, then executive action should be taken to require federal contractors and public companies to do so. A key concern is the growth of “dark money,” that is, political contributions for which the donor is not disclosed. The favored vehicle for this in the aftermath of the *Citizens United* Supreme Court decision has been tax-exempt organizations, such as social welfare groups and trade associations. The Center for Responsive Politics estimates that the 2012 election saw more than \$300 million in political spending by such nonprofit groups, up from \$69.2 million in 2008 and \$5.9 million in 2004.<sup>74</sup> CRP also notes that outside spending has more than tripled between 2008 and 2012, going from \$338.3 million to \$1.04 billion, with the largest increase being in independent expenditures which went from \$143.6 million in 2008 to \$1 billion in 2012.<sup>75</sup>

The Supreme Court has stood in the way of regulating this explosion of money in politics, but has promoted disclosure. “With

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<sup>73</sup> This statement is made with the belief that it is unlikely that Congress will find a way to regulate campaign contributions, that a constitutional amendment will take many years even from the perspective of advocates, and that it may take even longer to change the composition of the Supreme Court. Some remain hopeful that small donor matches or public financing options may help address the corrupting influence of money in politics. Candidly, disclosure is not a solution, but can be an important band-aid.

<sup>74</sup> See [Opensecrets.org](http://www.opensecrets.org/outsidespending/disclosure.php), “Outside Spending,” <http://www.opensecrets.org/outsidespending/disclosure.php>.

<sup>75</sup> *Ibid.*

modern technology, disclosure now offers a particularly effective means of arming the voting public with information,” Chief Justice John Roberts observed in *McCutcheon v. Federal Election Commission*.<sup>76</sup> However, if Congress is not willing to take action, the president can move quickly on four fronts:

i. *Require Federal Contractors to Disclose Direct and Independent Campaign Contributions, both from the Companies and Senior Officials.*

In 2011, President Obama had reportedly been considering an executive order to require potential government contractors to reveal their political spending as a condition of submitting bids.<sup>77</sup> Those bidding on contracts would have been required to disclose any contributions to candidates, parties or third-party political groups exceeding \$5,000 in the two years prior to submitting the bid. The rule would have applied to both companies and the individuals running them. After an outcry of opposition from contractors and big business, the plan was dropped. The president could rekindle the effort but target the disclosure requirements to those who are receiving federal contracts as opposed to those bidding on them.

ii. *Require Public Companies to Disclose Political Contributions on their Regular Disclosures to the Securities and Exchange Commission.*

The SEC received a petition from ten academics that provided a plan for disclosure.<sup>78</sup> It appeared the SEC planned to create a rule to this end but efforts were apparently dropped towards the end of

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<sup>76</sup> *McCutcheon et al. v. Federal Election Commission*, 572 US \_\_\_\_ (April 2, 2014), pg. 36, accessed May 22, 2014, [http://www.supremecourt.gov/opinions/13pdf/12-536\\_e1pf.pdf](http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf); "MCCUTCHEON v. FEDERAL ELECTION COMMISSION," The Oyez Project at IIT Chicago-Kent College of Law, accessed January 21, 2015, [http://www.oyez.org/cases/2010-2019/2013/2013\\_12\\_536](http://www.oyez.org/cases/2010-2019/2013/2013_12_536).

<sup>77</sup> Perry Bacon Jr. and T.W. Farnam, "Obama Weighs Disclosure Order for Contractors," *The Washington Post*, April 20, 2011, accessed on May 22, 2014, [http://www.washingtonpost.com/politics/obama-weighs-disclosure-order-for-contractors/2011/04/20/AFBw7qEE\\_story.html](http://www.washingtonpost.com/politics/obama-weighs-disclosure-order-for-contractors/2011/04/20/AFBw7qEE_story.html).

<sup>78</sup> See "Petition For Rulemaking" from Committee on Disclosure of Corporate Political Spending, August 3, 2011, <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf>.

2013.<sup>79</sup> More recently, Citizens for Responsibility and Ethics in Washington filed a petition requesting the SEC to immediately initiate a rulemaking.<sup>80</sup> Further efforts to revive the rulemaking process should be pursued.

iii. *Require Disclosure of Executive Branch Procurement Lobbying.*

In President Obama's Ethics Executive Order, signed in his first full day in office in 2009, he called for improving disclosure of lobbying within the executive branch by companies trying to win contracts.<sup>81</sup> Although a group of organizations proposed ways to address this requirement, very little has been done to put in place a system of accountability and oversight on behind-the-scenes deals to win government contracts.<sup>82</sup>

iv. *Issue Tax Regulations to Define "Political Activity" and Push such Activity into Organizations that are Required to Disclose Donors.*

The Treasury Department and the IRS published a proposed rule towards the end of 2013 to define "candidate-related political activity" for social welfare organizations.<sup>83</sup> There were more than 150,000

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<sup>79</sup> Dina ElBoghdady, "SEC Drops Disclosure of Corporate Political Spending from its Priority List," *Washington Post*, November 30, 2013, accessed May 23, 2014, [http://www.washingtonpost.com/business/economy/sec-drops-disclosure-of-corporate-political-spending-from-its-priority-list/2013/11/30/f2e92166-5a07-11e3-8304-caf30787coa9\\_story.html](http://www.washingtonpost.com/business/economy/sec-drops-disclosure-of-corporate-political-spending-from-its-priority-list/2013/11/30/f2e92166-5a07-11e3-8304-caf30787coa9_story.html).

<sup>80</sup> Citizens for Responsibility and Ethics in Washington, "Petition For Rulemaking On Disclosure By Public Companies Of Corporate Resources Used For Political Activities," April 15, 2014, accessed May 23, 2014, <http://www.sec.gov/rules/petitions/2014/petn4-637-2.pdf>.

<sup>81</sup> Sec. 4(c)(4) of Executive Order 13490, "Ethics Commitments by Executive Branch Personnel," January 21, 2009, accessed May 24, 2014, <http://www.whitehouse.gov/the-press-office/ethics-commitments-executive-branch-personnel>.

<sup>82</sup> Several organizations provided private communications in 2010 and 2011 to White House staff describing a plan for disclosure of procurement lobbying. They made a summary of a revised plan available when making recommendations for Obama open government plans at <https://sites.google.com/site/draftingnap2/the-commitments/ethics-disclosure/implement-executive-branch-procurement-lobbying-disclosure>.

<sup>83</sup> Internal Revenue Service, "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," November 29, 2013, 26 C.F.R. Part 1: 2013-28492, <http://www.regulations.gov/#!documentDetail;D=IRS-2013-0038-0001>.

comments on the proposal, more than the IRS has ever received. Most of those comments were short comments from individuals generated by a campaign led by conservative and tea party organizations that opposed the rules believing that the IRS has been targeting them and quashing their free speech. Even as such, an analysis of the comments submitted by organizational commenters found a more nuanced picture.<sup>84</sup> At least 594 organizations from across the political spectrum commented or signed on to comments from other organizations. Even though nearly none of the organizations wished to enact the rules exactly as proposed, 67 percent of those that commented or signed comments encouraged the IRS to move forward with improving rules defining nonprofit political activity.

IRS abandoned its initial regulatory proposal, but has promised a new proposal in 2015. It is time for the IRS to develop bright lines to define political activity that excludes nonpartisan voter work, applies the definition across all tax-exempt categories, and establishes standards for how much political activity is permitted by social welfare organizations, trade associations and others. The goal should be to force large shares of dark money into the category of “527 organizations” that must disclose donors.<sup>85</sup>

These actions should complement needed reforms to the Lobbying Disclosure Act as well as improved disclosure of the revolving door between government and the private sector.

## *2. Federal Spending Transparency.*

Recently, Congress took action to build on the success of Recovery.gov and USAspending.gov, two websites providing federal spending disclosure, with a new law that requires new standards for reporting spending information.<sup>86</sup> However, accountability demands more. Here are several steps that are still needed:

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<sup>84</sup> Public Citizen, “Most Organizations Support Changes to Rules Governing Nonprofits,” March 26, 2014, <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=4124>.

<sup>85</sup> A 527 group is a tax-exempt organization formed under Section 527 of the U.S. Internal Revenue Code (26 U.S.C. § 527) for the purpose of influencing elections.

<sup>86</sup> Digital Accountability and Transparency Act, or DATA Act, was signed into law on May 9, 2014.

- Provide unique identifiers for entity and parent entities to be used government-wide so that data about the entity from disparate government databases can be linked together;
- Provide information about recipients of federal funds, including their compliance with major federal laws and regulations (including tax law), lobbying expenses and campaign contributions, and how they are performing under contracts and grants;
- Set consistent government-wide standards for financial data that includes online recipient reporting from the ultimate recipient, improves data quality, and ensures all reports are fully searchable, sortable, downloadable, and machine-readable;
- Put spending data from the Treasury Department on [USAspending.gov](http://USAspending.gov) so it can be compared with agency obligations and with what recipients report they have received; and
- Add tax expenditure data, which now accounts for about \$1 trillion in annual spending.

Only when these types of activities are implemented will we begin to have the data needed for meaningful accountability.

### 3. *Rulemaking Transparency.*

Federal rulemaking is another key area of government where there is a need for greater accountability, and improved access to data will help to ensure the rulemaking process is fair and transparent. Here are five steps that can be taken immediately:

- Improve documentation and disclosure during the regulatory review process. The rules for regulatory review – Executive Order 12866, signed by President Clinton (September 30, 1993) and reaffirmed by President Obama in E.O. 13563 (January 18, 2011) – contain explicit requirements for the full public disclosure of the roles of the Office of

Information and Regulatory Affairs and the rulemaking agency in the creation of new regulations. These need to be implemented and expanded to require all information submitted to OIRA related to a regulation under review, including submissions from the rulemaking agency, other agencies, and the public. All information transmitted to agencies from OMB throughout the review process should be made public through the rulemaking agency's record and Regulations.gov.

- Establish clear standards across all agencies for rulemaking records, including the location and format of data about the positive and negative effects of regulations. Providing consistency in the content and location of information will foster greater agency accountability.
- Use simple-to-understand tables of costs and benefits, when such data is collected, in the summaries of major proposed and final regulations. This will make it easier to evaluate regulatory proposals and hopefully offset recent trends in the news media and independent analysis where discussion of benefits have been minimized and costs emphasized.
- Improve tools for increasing public comments and the ability to analyze them. This includes employing social media and other vehicles beyond the *Federal Register* for seeking public comments on proposed regulations.<sup>87</sup> It also requires improving the search and download features of Regulations.gov to analyze comments that have been submitted.<sup>88</sup>

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<sup>87</sup> Professor Michael Herz provides a helpful review of ways to use social media in rulemaking. See Michael Herz, "Using Social Media in Rulemaking: Possibilities and Barriers," *Administrative Conference of the United States*, November 21, 2013, <https://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf>.

<sup>88</sup> In trying to analyze the more than 150,000 comments submitted on "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," a proposed rule issued by the Treasury Department and the IRS (see <http://www.regulations.gov/#!documentDetail;D=IRS-2013-0038-0001>), we ran into numerous problems. First, the number of records in the download was limited without letting the user know it was not the complete record. Second, not all fields were able to be downloaded. Third, the download only provided some meta-data; the users needed to click

- Fulfill the promises of the January 18, 2011 Presidential Memorandum on Regulatory Compliance requiring agencies to make information about their regulatory compliance and enforcement activities accessible, downloadable, and searchable online.<sup>89</sup>

## VI. FINAL COMMENTS

Government accountability and Big Data go hand-in-hand. However, it is equally as true that accountability demands an open government and transparency that go beyond access to Big Data, but for which Big Data plays an important role. It requires access to small datasets and to information that may not even be classified as a database. Most importantly, accountability requires access to information that is accurate and timely. In order to achieve accountability, reform efforts need robust support to overcome barriers like opposition to disclosure by powerful interests and deferral to the status quo by government.

In many cases, the use of Big Data raises privacy issues and other civil liberty concerns. In that context, Big Data itself needs to have privacy and civil liberty safeguards built in, and those using it need to be held to a high standard. The public needs to know about how Big Data is collected and the rules surrounding its use.

Various experiences, including those with federal spending datasets, have taught us much about using data to hold government and corporations accountable. Simply making data publicly accessible is not enough: for example, the data must be accurate, accessible, complete, and timely. Additionally, these experiences highlight the need to overhaul our core public access and openness laws, and suggest the need to plow forward with specific projects that will hold the government more accountable by expanding the public's right to access key data.

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on a url to get the actual comments from each submitter. Finally, even when government officials were contacted to get the full dataset (minus the actual comments), it was provided in Excel spreadsheets limited to 10,000 records. All these factors made it challenging to analyze and report on the comments submitted under this rule.

<sup>89</sup> Barack Obama, "Regulatory Compliance," Memorandum for the Heads of Executive Departments and Agencies, January 18, 2011, accessed May 25, 2014, <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-compliance>.