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TRANSPARENCY AND PERFORMANCE IN GOVERNMENT

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INTRODUCTION

Transparency has of late been an increasingly popular topic of discussion in domestic and international policy circles. Often, it is prescribed as a remedy for an immediate crisis. For example, the Sarbanes-Oxley Act of 2002 was passed in response to the Enron and WorldCom accounting scandals.[1] Reacting to the Jack Abramoff lobbying scandal, the 109th Congress made the adoption of new ethics rules one of its first orders of business.[2] However, this reactionary approach focuses on rooting out corruption—often after it has already been discovered—and often ignores the other salutary effects of transparency.

The legal literature on transparency is generally divided into two categories: the study of transparency as a solution to political corruption and scholarship looking at transparency in the context of corporate disclosure requirements. The former is concerned with preventing government malfeasance that can lead to serious societal problems, especially in the developing world. The latter focuses on the disclosure of corporate performance to fully inform markets. However, these two insights on transparency never meet. In this article, we hope to show that just as mandatory transparency can improve corporate performance, it may help improve government performance as well.

As Nobel Laureate Joseph Stiglitz has shown, transparency is a tool to address the principal-agent problem caused by information asymmetries.[3]

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[1] Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.R. 357, 357-360 (2003).

[2] Brian Griffith, *Lobbying Reform: House-Cleaning or Window Dressing?*, 75 U. CIN. L. REV. 863, 863-865 (2007).

[3] Joseph E. Stiglitz, *Information and the Change Paradigm in Economics*. 92 THE AMERICAN ECON. REV 460, 487 (2002).

Markets work most efficiently when all parties have good information about what they are buying and selling, which allows everyone to accurately determine how much they value the trade. Because each party values what she gets more than what she gives up, value is created for both (an efficient market). But this is not always the case; sometimes one party to a trade knows much more than the other, which can disrupt this mutually beneficial exchange. Auto mechanics have long suffered as the butt of innumerable jokes because they know exactly what is wrong with their customers' cars—and they know that their customers do not know.

Corruption is just one type of principal-agent inefficiency. This is important for developing countries where corruption is often endemic. In a country like the United States, however, where there is a strong respect for the rule of law and a very low level of corruption, one might think that the gains from more transparency would be smaller. But graft and corruption are only at one extreme end of the principal-agent problem. The principal agent-problem deals not only with agents who would outright steal from their principal when the principal is not looking, but also with agents who simply to not perform well because they lack an incentive to exert themselves. Therefore benefits of transparency are not limited to combating corruption, but extend to making all principal-agent relationships more efficient and effective.

Part I of this article defines transparency and shows how it relates to accountability performance. Part II explores how transparency can result in improved performance and looks at the lessons government can draw from corporate financial transparency. Finally, part III examines some limits to transparency, including exceptions that swallow the rule and public choice concerns.

I. WHAT IS TRANSPARENCY?

The concept of transparency is often posited as an unalloyed good and a hallmark of democratic government. Rarely is it explained in any detail why this is the case. The reason seems obvious: In a democratic society, the people are entitled to know how their representatives govern. For our discussion here, however, it will be useful to understand explicitly the case for transparency.

An economist might view transparency as a way to eliminate a type of market failure known as an "information asymmetry." Described in detail by Nobel Prize-winner Joseph Stiglitz, information asymmetry occurs when one party to a transaction has much more relevant information than the other, which can potentially create suboptimal market conditions.[4] In classical economic theory, mutual gains from trade are based on the idea that each party knows exactly what he is getting and values it more highly than what he gives up, enabling both sides to benefit.[5] But this is not always the case in the real world. Sometimes one party has access to important information that the other lacks. Transparency, at bottom, can be a means of eliminating that information asymmetry and ensuring that mutually beneficial trades can take place.

One particular type of information asymmetry will be especially important for understanding this Article, and it is worth spending a moment to discuss it before moving forward. The "principal-agent" problem refers to situations in which we find it difficult to monitor the behavior of our agents so that it becomes difficult to appropriately compensate them for their efforts.[6] The incentives of agents and those of principals rarely align perfectly—if they did, principals would not have to compensate agents to complete their tasks. Steven Levitt and Stephen Dubner, the authors of *Freakonomics*, explain this concept with reference to real-estate agents.[7] While home sellers would like their agents to secure the highest possible bids for their property, they cannot monitor the agent's every action. The agent, on the other hand, would like to spend as little time and effort as possible selling house so she can move on to the next client. Not surprisingly, studies show that when real estate agents sell their own homes, they command significantly higher prices than comparable units.[8]

Another familiar example of a principal-agent problem is the difficulty of finding a good mechanic. Because the mechanic knows much more about cars than her customers do, there is a temptation for the mechanic to "fix" things that aren't really broken. Of course, paying for unnecessary repairs is not mutually beneficial, but the customer is unlikely to know the difference.

That said, it should be noted that information asymmetries occur all the time, but are resolved nearly as often with no outside intervention. Competition is perhaps the most powerful solution. The sole mechanic in a town will face different incentives than a mechanic with many competitors to whom her customers can turn. Reputation is important in a marketplace,

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[4] Stiglitz*, supra,* note 3 at 469-470.

[5] For a discussion on this, see chapters one and seven of David Ricardo's *On the Principles of Political Economy and Taxation.*

[6] David E. M. Sappington, *Incentives in Principal-Agent Relationships*, 5 THE JOURNAL OF ECONOMIC PERSPECTIVES 45, 45-49 (1991).

[7] Steven D. Levitt & Stephen J. Dubner, Freakonomics: A Rogue Economist Explores the Hidden Side of Everything, 66-67 (Harper Collins Publishers, 2005).

[8] Steven D. Levitt and Chad Syverson, "Market Distortions When Agents Are Better Informed: The Value of Information in Real Estate Transactions," 90 THE REVIEW OF ECONOMICS AND Statistics 599, 609 (2008).

and a cheating mechanic will quickly find that she has no more customers of which to take advantage. *Consumer Reports* has made a good business of providing individuals with information, as has Underwriters Laboratories. Movie reviewers make their living by giving moviegoers the information they need to avoid duds, and advertisers make theirs by quickly communicating a product's advantages over those of their competitors. The internet's impact almost defies overstatement, though an attempt might begin with eBay, Amazon reviews, Craigslist, Yelp!, and a dozen others.

Governmental corruption is one manifestation of the principal-agent problem. If the people cannot adequately monitor their political agents, or if there is little recourse to punishment, then the agents' incentives can become misaligned with those of the people. Allowed to act in secret, officials will have a greater incentive for self-dealing at the expense of their principals, the people.

Mandatory transparency is one solution to this type of information asymmetry, and it has an especially important role to play in developing countries where corruption is endemic.[9] In the United States, however, we suffer from a much lower incidence of outright corruption, and one might think that the gains from transparency would be smaller. However, graft and corruption are only at the extreme end of the principal-agent problem. Theft

[9] Alejandro Ferreiro credits Chile's success in Transparency International's ranking to Chilean legislators' implementation of transparency initiatives, such as the Personnel Regulation, the Transparency law, and a public bid process for government contracts (10 Sw. J.L. & Trade Am. 345). Patricio Maldonado and Gerardo Berthin discuss the Americas' Accountability/Anti-Corruption (AAA) Project in Latin America, and its effort to document and promote transparency through a series of country-specific Technical Assistance Modules. These programs have raised awareness of corruption among citizens, but given the size and scope of the problem, there has not yet been significant political reform (10 Sw. J.L. & Trade Am. 243). Anne Janet DeAses argues that transparency measures in Guatemala and Nicaragua improved public confidence in government and contributed to budgetary savings by making bid processes more competitive (34 Pub. Cont. L.J. 553). Manuel Chavez demonstrates that political corruption has hindered trade in Latin America, and any solution must include both transparency legislation and participation by social institutions—including citizens, non-governmental organizations, and the press (14 Mich. St. J. Int'l L. 225).

C. Raj Kumar documents how various movements in India, whether at the state or central levels, promoted transparency through right to information laws, and he argues that securing transparency of information—especially official records or government spending—is essential for large nations such as India, where citizens and the media must take more responsibility to hold their government accountable (16 Mich. St. J. Int'l L. 475). Lisa Philipps and Miranda Stewart argue that, especially important for developing nations, increased fiscal transparency improves national accountability and enhances credibility with external investors. They note that the International Monetary Fund has influenced improved fiscal transparency in Pakistan and Nigeria, while non-government organizations and activists have pushed for recent fiscal transparency reforms in India and South Africa (34 Brook. J. Int'l L. 797).

and fraud are not the only consequences of a principal-agency problem.

Another less-destructive—but no less pernicious—consequence of misaligned incentives is that agents might simply not perform to their highest potential at the expense of the principal's interests.[10] Again, mandatory transparency can serve as a remedy.

A. Transparency and Accountability

Transparency is not an end in itself, but simply a means to an end, and that end is accountability. Accountability happens when one party holds another party responsible for its actions. One party may hold another responsible for its actions when there is a principal-agent relationship. For example, if you stopped a stranger on the street and demanded to know what she was doing there, you would not be surprised by a surly response. Absent an understanding to the contrary, no one—stranger or friend—owes you an explanation for his or her actions. However, if the person you stop were the babysitter who should have been watching your children at that moment, you would expect a very good explanation. What allows you to hold her accountable for her presence on the street is your principal-agent relationship with her.

As we have seen, a principal-agent relationship is one in which one party—the principal—contracts with another—the agent—to act on the principal's behalf.[11] A principal, therefore, is entitled to monitor the performance of the agent and hold the agent accountable for her actions. For example, if a principal hires an agent to paint a house, the principal will hold the agent accountable by checking to see whether in fact the house has been painted. Accountability then takes the form of either reward or punishment. If the agent has done a good job of painting the house, the principal rewards the agent by paying her and perhaps also by paying a bonus and by recommending the agent's services to friends. On the other hand, if the agent has not painted the house or has done a poor job, the principal may punish her by withholding payment and dissuading friends from hiring the agent.

In some instances, an agent's performance will be easily observed. Whether a house is painted or not, for example, will be obvious to the naked eye and it will be easy for a principal to hold the agent accountable. There are other instances, however, when a principal cannot easily monitor an agent's performance. For example, if you hire a babysitter to watch your toddler while you are away on an overseas trip, you cannot directly monitor the babysitter's performance. Indeed, in this case you are contracting with

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[10] Sappington, *supra* note 6 at 46-47.

[11] Sappington, *supra* note 6 at 45.

an agent to act on your behalf precisely because you cannot be present.

In such a case we see that there is an asymmetry of information. That is, that the agent knows more about her own performance than the principal so that it is difficult or impossible for the principal to hold the agent accountable. Was the babysitter with the toddler at all times? Did the babysitter feed the toddler healthy meals or junk food? Such an information asymmetry changes the agent's incentives. That is, because the agent knows that the principal cannot adequately monitor the agents' actions, the agent may feel she has a freer hand to behave differently than if the principal were able to monitor.

Why would the agent behave differently than how she contracted with the principal to behave? If the babysitter can be monitored, then she will have an incentive to feed the child a healthy meal—even though cooking it may be laborious—because if she does not, she will be held accountable and punished by the parent. The babysitter's incentive is to do as she has promised the parent and be rewarded for her actions. The interests of the principal and agent are therefore aligned. However, if there is an information asymmetry, and the babysitter knows that the parent cannot monitor her performance, then the babysitter's interest will no longer align with those of the parent. It is much easier, and perhaps less expensive, for the babysitter to feed the toddler junk food instead of healthy food. She could pocket the cost difference and spend the time saved from cooking watching TV. The information asymmetry—the fact that the babysitter-agent cannot be monitored—changes her incentives.

Transparency, as we said, is not an end in itself, but a means to accountability: being held responsible for the results of our actions. Transparency helps achieve accountability by removing information asymmetries and therefore helping to align the interests of principals and agents. To see how, we must define what we mean by transparency. Transparency is a process that: (1) requires us to disclose (2) substantively and truthfully (3) our performance (4) to those who are entitled to know.[12]

First, in order for transparency to be effective, disclosure must be mandatory. Otherwise, the agent's incentive would be to disclose her performance when it is convenient to her and to withhold information when it is not. To avoid an information asymmetry, a policy of transparency must compel an agent to disclose her performance 100 percent of the time. Similarly, disclosures must be full and truthful. Partial disclosure does not eliminate the potential for information asymmetries if inconvenient parts of

[12] Our friend and colleague Maurice McTigue, who led New Zealand's transparency and accountability reforms in the 1990s when he served in parliament and cabinet, developed the definition we propose here.

one's performance can be withheld.[13] That disclosures must be truthful should go without saying; agents cannot be held accountable unless the information available to principal about the agent's performance is accurate.

Therefore, what transparency properly understood requires us to disclose is not merely our actions, but our *performance*. Our performance is the result of our actions. In some cases, our actions and our performance are practically one in the same. If we paint a house, the house will be painted. In most instances, however, evidence of actions or activity is not evidence of good performance. For example, if a parent hires a teacher to educate her child, the teacher may teach diligently, but that is not evidence that the child has been educated. The teacher's performance would be measured by how much the child has learned. Only if the principal can measure the agent's performance—and not simply monitor their activity—can the agent be held accountable.

Finally, transparency requires us to make substantive and truthful disclosures of our performance, but only to those who are entitled to the information. As an employee, you may have an obligation to disclose your performance to your employer, but not to your doctor or your mailman. There is a principal-agent relationship in the first case, but not in the latter cases. A *potential* principal-agent relationship might also trigger an obligation to disclose. For example, a company's management must disclose the corporation's performance not only to its board of directors and shareholders, but to potential shareholders as well.

B. Transparency in Government

In a democracy, there is a principal-agent relationship between the people and the government. We hire our elected leaders, and by extension civil servants, to manage the government and we are thus entitled to hold them accountable for their performance. To the extent that the people can hold elected officials accountable at the ballot box (and elected officials can hold civil servants accountable in turn) the interests of the people and their representatives should be aligned. That is, the people want effective government, and those in government will have an incentive to perform well because they want to be rewarded, not punished, at the ballot box or in the court of public opinion.

Unfortunately, there are often information asymmetries because it is difficult for the people to monitor the actions of government. Politicians and civil servants are human just like everyone else. When our representatives know they are not being monitored—and therefore cannot easily be held

[13] Mark C. Penno, "Information Quality and Voluntary Disclosure," 72 THE ACCOUNTING REVIEW 275, 277 (1997).

accountable—their incentives will change. Like our errant babysitter, a public servant whose performance cannot be observed will be subject to shifting incentives and may be tempted to indulge her personal interests at the expense of the public interest.

Many of these information asymmetries arise out of the costs and benefits of monitoring public figures. Voters have a weak incentive to monitor the behavior and actions of policymakers; the costs of actual delving into the minutia of government are fairly high because of the sheer volume of policy options and considerations.[14] The actual benefit that voters will receive from many of these policy questions, however, are low compared to the costs of informing themselves of the detailed positions of policymakers.

Transparency initiatives, especially those that provide easily accessible information through sources such as the Internet, help this problem by lowering the monitoring costs of voters. Furthermore, instead of relying on filters such as the media for information on public figures, the public has a greater ability to directly observe the actions of government. Therefore, by lowering the cost of finding information, transparency allows voters to more closely monitor policymakers and this can potentially lead to better outcomes.

As we have noted, the extreme manifestation of misaligned incentives is political corruption. We try to eliminate information asymmetries that can lead to corruption by requiring disclosures. For example, the 1978 Ethics in Government Act requires that high-level federal employees and political appointees, candidates for office, and elected officials—including the president, vice president, and members of Congress—disclose the amount and source of their income on an annual basis.[15] There is also the Federal Funding Accountability and Transparency Act of 2006, which requires the online disclosure of all organizations receiving federal funds.[16] It is targeted at legislative earmarks, which Congress uses to direct federal money to specific persons or projects.[17] The act establishes a searchable website that catalogs each funding award along with relevant information, including the Congressional district in which the money is spent.[18]

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[14] Viktor Vanberg & James Buchanan, *Constitutional Choice, Rational Ignorance, and the Limits of Reason*, *in* THE CONSTITUTION OF GOOD SOCIETIES 39, 43-44 (Karol Soltan & Stephen Elkin eds., 1996).

[15] Ethics in Government Act of 1978 §§ 101-02, 5 U.S.C. app. 4 §§ 101-02 (2006).

[16] Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 1186 (2006).

[17] Press Release, Sen. Barack Obama, Senate Passes Coburn-Obama Bill to Create Internet Database of Federal Spending (Sept. 8, 2006), *available at* http://obama.senate.gov/press/060908-senate_passes_c/.

[18] FFATA, *supra*, note 16 § 2(b)(1), 120 Stat. 1186, 1187.

While perhaps effective against fraud and corruption, simple disclosure requirements that reveal only inputs or ouputs are insufficient to address performance-related principal-agent problems. That is, transparency about amounts of money disbursed, to whom, and under what circumstances, provides little help evaluating a program's effectiveness.[19] "Output data" are mere measures of actions taken, and stand in contrast to "*outcome* data," measurement of progress toward a defined public benefit. To determine whether or not a program is performing as intended, the public needs information not only about outputs, but also about outcomes.[20]

As an example, consider the Universal Service Fund (USF), a telephone subsidy overseen by the Federal Communications Commission.[21] Congress created the USF in the wake of telecom deregulation in order to ensure affordable telephone service for Americans living in high-cost rural areas.[22] To accomplish this goal, the FCC subsidizes rural telecom providers through the USF so that these providers can recover some of the high operating costs associated with rural areas.[23]

In order to make rural services and rates "reasonably comparable" to urban areas, as Congress envisioned, the subsidies need to create affordable access and increase subscription.[24] Therefore, the relevant metric for success must measure how the program changes service availability and evaluate how the program affects rural and urban prices, after adjusting for income disparities.[25] In its annual USF program reports, however, the FCC does not provide this data.[26] Instead, the FCC monitors the program using program outputs, like the number of requests for support payments, or internal control mechanisms, like carrier certification and audits.[27] As a

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[19] *See e.g.*, http://usaspending.gov/, a transparency initiative that lists where government money goes but does not disclose outcomes. A number of states have also set up a number of transparency websites that take a similar approach, disclosing spending but not outcomes; see, for example, http://www.window.state.tx.us/comptrol/expendlist/cashdrill.php and http://www.nebraskaspending.com/.

[20] HARRY P. HATRY, PERFORMANCE MEASUREMENT (Urban Institute Press 1999) at 35-41 & 174.

[21] *See* Federal Communications Commission's Universal Service Web page, *available at* http://www.fcc.gov/wcb/tapd/universal_service/.

[22] *Id.*

[23] *Id.*

[24] Mercatus reply, pg. 3

[25] Mercatus, pg. 9

[26] *See* annual FCC monitoring reports, *available at* http://www.fcc.gov/wcb/iatd/monitor.html.

[27] U.S. Government Accountability Office, *Telecommunications: FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program* (2008), 5, 31.

recent GAO report notes, "FCC's data collection efforts focus on program outputs, and not program outcome or efficiency. Therefore, FCC's efforts will be of limited use in illustrating the impacts of the high-cost program or how efficiently the program is operating."[28]

The FCC is transparent in the sense that it clearly details the amount of funding it doles out and who receives it. Inspecting the FCC's reports, one can quickly determine that the substantial funds allocated to the program do not vanish into the pockets of cronies. However, the FCC is also obscurantist because it does not provide the information that would allow one to determine whether the funds have accomplished their intended purpose.[29] Without clear outcome-based goals, neither Congress nor the public can hold the FCC accountable. The USF illustrates the gap between transparency as it has traditionally been seen—a hedge against outright corruption—and transparency as it could be.

In contrast to the FCC, a number of government agencies instead focus on outcomes with specifically targeted performance goals. One such example is the Child and Family Services Review (SFSR), a monitoring system run by the Department of Health and Human Services (HHS) to identify and improve outcomes for children and families served by public child welfare programs.[30] Under the process, which began in 2001, states and HHS conduct a review of the outcomes achieved by welfare programs, after which states must develop program improvement plans to address areas identified by the review as needing improvement.[31] The reviews and the improvement plans are publicly available, which allows taxpayers to assess how well their agents are performing, as well as progress towards improvement.

Most governments in the United States are sufficiently transparent to avoid systemic corruption. Now we should seek to bolster that transparency with performance disclosures in order to improve the results of government activity.

II. PUBLIC AND PRIVATE TRANSPARENCY

The legal literature on transparency is generally divided into two study areas that rarely intersect. The first is about transparency in government,

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[28] *Id.* 30.

[29] OMB, Program Assessment—Universal Service Fund High Cost http://www.whitehouse.gov/omb/expectmore/summary/10004451.2005.html (accessed July 8, 2009).

[30] U.S. Department of Health and Human Services, "General Findings from the Federal Child and Family Services Review," *available at* http://www.acf.hhs.gov/programs/cb/cwmonitoring/results/genfindings04/intro.htm.

[31] *Id.*

which focuses on the principal-agent problem of corruption.[32] The second area looks at transparency in the private sector and focuses on corporate financial disclosure.[33] This literature looks not just at the principal-agent problem, but explores the idea that transparency improves corporate performance.[34]

The literature on government transparency is focused on developing countries, which are much more afflicted by corruption. The policy prescriptions contained in this literature focus on the development of institutions, such as property rights and the rule of law, which are already present in the United States.[35] Perhaps as a result, the United States has one of the lowest rates of corruption in the world.[36]

Because it is focused on transparency as an antidote to corruption, the transparency-in-government literature is implicitly focused on one extreme type of principal-agent problem. As we have seen, however, transparency helps overcome other information asymmetries, including providing the information necessary to judge the performance of an enterprise. We see that aspect of transparency addressed in the transparency-in-business literature.[37]

Legislation mandating corporate financial reporting was initially driven

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[32] *See* Malinda Lee, "Reorienting the Debate on Presidential Signing Statements: The Need for Transparency in the President's Constitutional Objections, Reservations, and Assertions of Power," 55 UCLA L. REV. 705 (2008). Gia B. Lee, "Persuasion, Transparency, and Government Speech," 56 HASTINGS L.J. 983 (2005). David Markell, "'Slack' in the Administrative State and its Implications for Governance: The Issue of Accountability," 84 OR. L. REV. 1 (2005).

[33] *See* Jennifer B. Lawrence & Jackson W. Prentice, "The SEC Form 8-K: Full Disclosure or Fully Diluted? The Quest for Improved Financial Market Transparency," 41 WAKE FOREST L. REV. 913 (2006). Enrico C. Perotti & Ernst-Ludwig von Thadden. "Dominant Investors and Strategic Transparency," 21 J.L. & ECON. 76 (2005). David A. Westbrook, "Telling All: The Sarbanes-Oxley Act and the Ideal or Transparency," 2004 MICH. ST. L. REV. 441.

[34] *See* Timothy Riley and Cai Huiyan, "Unmasking Chinese Business Enterprises: Using Information Disclosure Laws to Enhance Public Participation in Corporate Environmental Decision Making," 33 HARV. ENVTL. L. REV. 177, 205 (2009).

[35] *See* Manuel Chavez, "Trade and Environment in Latin America: When Institutions, Transparency, and Accountability are Essential," 14 MICH. ST. J. INT'L L. 225 (2006). See also literature review *supra* note 9.

[36] *See The 2009 Index of Economic Freedom*, THE HERITAGE FOUNDATION (2009), *available at http://www.heritage.org/Index/; Report on the Transparency International Global Corruption Barometer 2007,* TRANSPARENCY INTERNATIONAL – TOLICY AND RESEARCH DEPARTMENT (2007), *available at http://www.transparency.org/content/download/27256/410704/file/GCB_2007_report_en_02-12-2007.pdf.*

[37] *See* Claude Menard, "Maladaptation of Regulation to Hybrid Organizational Forms," 18 INT'L REV. L. & ECON. 403, 405 (1998).

by the need to address a principal-agent problem.[38] In fact, Louis D. Brandeis wrote the much-quoted maxim that "sunlight is the best disinfectant" in 1914 in reference to the need for financial disclosure laws. In its full context, the quotation read:

> [Disclosure] is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman. And publicity has already played an important part in the struggle against the Money Trust. . . .[39]

Before the Securities Act of 1933 and the Securities Exchange Act of 1934, many companies did not disclose their assets or earnings. This resulted in waves of securities fraud, as well as self-dealing by the management of corporations.[40] Mandatory disclosure has certainly dealt with the principal-agent problem by making sure that investors are informed about the true state of the ventures in which they invest.[41] In that sense, the mandatory financial disclosure of the business literature is much like institutional transparency of the government literature. One aims at fraud and self-dealing, the other aims at official corruption, but both target the same type of principal-agent problem. That said, corporate transparency results in a further salutary effect that we do not always see in government.

As Professor Louis Lowenstein has shown, "quite apart from these intended benefits, good disclosure has been a most efficient and effective mechanism for inducing managers to manage better."[42] The calculus is simple: As an agent, if you are forced to disclose your performance, you will have an incentive not to self-deal against the interests of the principal. Additionally, however, if your compensation is tied to your performance, you will have an incentive to perform well.[43] At the very least you will have an incentive to try to improve those figures that will be disclosed and on which you will be judged.[44] In short, "you manage what you measure."[45]

[38] Louis Lowenstein, "Financial Transparency and Corporate Governance: You Manage What You Measure," 96 Colum. L. Rev. 1335, 1339-1340 (1996).

[39] Louis D. Brandeis, *Other People's Money and How the Bankers Use It, Chapter 5: What Publicity Can Do* (1914), *available at http://www.law.louisville.edu/library/collections/brandeis/node/196.*

[40] Joel Seligman, "The Historical Need for a Mandatory Corporate Disclosure System," 9 J. CORP. L. 1, 27-31 (1983).

[41] Lowenstein, *supra*, note 38 at 1340-1342.

[42] Louis Lowenstein, *A Governance Tool That Really Works*, DIRECTORS & BOARDS (1997), *available at* http://findarticles.com/p/articles/mi_go2446/is_n1_v22/ai_n28695337/.

[43] John M. Abowd, "Does Performance-Based Managerial Compensation Affect Corporate Performance?" 43 INDUSTRIAL AND LABOR RELATIONS REV. 52-S, 53-S (1990).

[44] One would hope that a disclosed figure improved because the program performance

In the case of corporate managers, what is managed is straightforward. On a quarterly basis a publicly traded corporation must disclose its earnings, as well as its expenditures, assets, and capital depreciation.[46] They must do so in granular form, breaking down results by line of business and by geographic region.[47] Such an objective measure of performance not only allows the market to set the stock price, but also allows shareholders to hold management accountable. Now think of government transparency. For every agency and program, expenditures are disclosed in the form of the annual budget.[48] Capital assets and depreciation are reported in agencies' annual financial reports.[49] What government does not report are earnings figures, for the simple reason that there are none. Therefore, while a government program may be transparent, the fact is that we only see half of the balance sheet.

In business, a firm's overall performance can be measured by its profit or net income, which describes the return on investment. How much a firm can earn given how much it spent describes its results, and investors will judge these results. If a company consistently spends more money than it earns, or if investors believe the company can earn more given how much it spends, they will demand changes from management.

In contrast, the public cannot adequately judge the results of a government program or agency. In general, there is little disclosure of whether the expenditures made produced any returns at all, much less returns that justify the investment.[50]

A. Government Performance and Results Act

As we have seen, government performance data has to be produced before it can be disclosed. The federal government has attempted to generate this data through the Government Performance and Results Act of 1996 (GPRA). The act is a product of the "reinventing government"

results they reflect has improved. But we should note that agents may be able to prevaricate so that reports look acceptable at first glance.

[45] Lowenstein, *supra* note 45 *passim*.

[46] *Id*. at 1346.b

[47] *Id.* at 1347.

[48] 31 U.S.C. § 3515(b)(1) (2007).

[49] *Id.*

[50] As early as 1940, scholars understood that governments had no "bottom line" to serve a metric of success. V.O. Key, *The Lack of a Budgetary Theory*, 34 AM. POL. SCI. REV. 1137 (1940) (reviewing the public administration literature and concluding that there is no coherent theory to suggest how government should allocate resources). More recently, it has been suggested that attempts to formulate any such normative theory for resource allocation is "utopian." Aaron Wildavsky, *"Political Implications of Budget Reform:" A Retrospective*, 52 PUB. ADMIN. REV. 594, 595 (1992).

movement of the 1990s and aims to improve federal program results by measuring outcomes and giving federal managers greater freedom to improve those results. It tries to generate results data by requiring agencies to 1) state what they plan to accomplish in a given time period in objectively measurable terms, 2) measure their performance, and 3) compare their actual performance to their stated goal. This comparison should generate what in financial terms could be thought of as "revenue" figures.

The roots of GPRA can be seen in the Chief Financial Officers Act of 1990, which sought to improve agencies' financial management and created the office of Deputy Director for Management at the Office of Management and Budget (OMB), as well as the position of CFO at 24 large agencies.[51] Among other things, the deputy director was charged with overseeing managerial systems at federal agencies "including the systematic measurement of performance,"[52] and the new CFOs were charged with developing accounting systems that "provide[] for … the systematic measurement of performance."[53] The Senate Government Affairs Committee's report on GPRA noted, however, that neither the CFO Act nor its legislative history explained what "systemic measurement of performance" meant and suggested that GPRA was intended to clarify the matter.[54] Remarking that unless clear expectations were set, the bureaucracy would resist performance measurement, the report stated: "The mandate for its implementation must be unambiguous. The specific requirements must be clear. And the effort must be sustained."[55]

GPRA sets out three clear requirements. First, it requires each agency to produce what the act calls a "strategic plan," which must cover a period of at least five years.[56] In it the agency must define its missions, and state its general goals and objectives, "including outcome-related goals and objectives."[57] The strategic plan must also explain how the agency plans to achieve its goals, identify program evaluations used to reevaluate goals and objectives, and set forth a schedule of program evaluations.[58] A program evaluation is defined as "an assessment, through objective measurement and systematic analysis, of the manner and extent to which Federal programs

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[51] Chief Financial Officers Act of 1990, Pub. L. 101-576, 104 Stat. 2838 (codified in scattered sections of 31 U.S.C.) [hereinafter CFO Act].

[52] *Id*. § 202, 31 U.S.C. § 503(b)(2)(A).

[53] *Id*. § 205, 31 U.S.C. § 902(a)(3)(D)(iv).

[54] S. REP. NO. 103-58, at 332 (1993).

[55] *Id.*

[56] 5 U.S.C. §§ 306(a)(1) & 306(b).

[57] 5 U.S.C. §§ 306(a)(1)-306(a)(2).

[58] 5 U.S.C. § 306.

achieve intended objectives."[59]

Second, GPRA requires agencies to produce annual performance plans identifying measures that will be used to assess "the relevant outputs, service levels, and outcomes of each program activity" and resources required to produce those results.[60] Goals must be expressed "in an objective, quantifiable, and measurable form" unless the agency determines this is not feasible and the Office of Management and Budget approves an alternative evaluation scheme.[61] Goals and measures can aggregate or disaggregate programs as long as the plans and reports do not "omit or minimize the significance of any program activity constituting a major function or operation for the agency."[62] Agencies thus have a great deal of flexibility in crafting goals and measures, as long as they reflect the major functions and results for which the agency is responsible.

Third, agencies must produce annual performance reports that compare actual program performance with the goals in the performance plan.[63] If the agency fails to meet a goal, it must explain why and present a plan for remedying the deficiency.[64] The performance report must also summarize the results of program evaluations concluded in that fiscal year.[65]

GPRA's statutory requirements represented a radical change to the way agencies measured their performance. The act requires that agencies state the desired outcomes of their activities in advance, and that they do so in measurable terms. Before GPRA, a federal agency might have operated a community development grants program without any clear articulation of the outcomes it expected the program to generate. GPRA also requires retrospective review of program performance to discover whether the stated goal has been reached. What is key about this type of backward-looking review is that it measures whether the desired outcome (e.g. a ten percent reduction in poverty) has been achieved. Prior to GPRA, simply measuring outputs (e.g. number of grants awarded) was the norm.[66]

B. GPRA Lacks Independent Audits

Government performance reports under GPRA differ from corporate financial reporting in one fundamental way. A publicly traded company

[59] 31 U.S.C. § 1115(f)(2).
[60] 31 U.S.C. § 1115(a)(4).
[61] 31 U.S.C. § 1115(a)(2).
[62] 31 U.S.C. § 1115(c).
[63] 31 U.S.C. § 1116.
[64] 31 U.S.C. § 1116(d)(3).
[65] 31 U.S.C. § 1116(d)(5).
[66] U.S. General Accounting Office, "Results-Oriented Government: GPRA Has Established a Solid Foundation for Achieving Greater Results," GAO-04-38 (2004) at 31.

must hire independent third-party auditors to help prepare and certify its reports.[67] In contrast, an agency's management will write and certify its own reports. The corporate world requires independent auditors for obvious reasons. As we have seen, an agent will have the upper hand if she can control the information available to the principal.[68] Conversely, a principal can make an agent's incentives align with the principal's own interests if she can credibly monitor the agent's activities and performance. Independent auditors are therefore at the heart of solving the principal-agent problem. They are the disinterested monitors that certify to the principal the accuracy of what the agent reports is its performance.

Because GPRA-mandated performance reports are written by the agencies themselves, it is unrealistic to expect a tough, neutral, and dispassionate evaluation. It would instead be more prudent to be skeptical of the metrics and data supplied in the reports. Put simply, GPRA tries to measure results by asking agencies to 1) state a goal, 2) to state objective measures to determine progress toward that goal, and 3) measure and report their progress.[69] If we accept that agents have an incentive to present results in the best possible light, then we can expect goal statements to be written in such a way that their meaning—and what counts as success—is at the very least open to interpretation. We would also expect the metrics selected by agencies to be similarly ambiguous. Finally, it would be prudent to verify data provided by an agency. In fact, studies have shown wide variability in the quality of GPRA reports.

Chun and Rainey studied the FY 1999 GPRA reports of 115 federal agencies to determine the level of what they call "goal ambiguity."[70] Among other things, they tested "mission comprehension ambiguity," which they describe as "the understandability of the mission statement that formally announces what the organization stands for."[71] They did so by collecting the mission statements from GPRA strategic plans and applying the Gunning Fog Index, which tests how understandable a piece of writing is to readers.[72] The mean score was 64.36, suggesting that a post-graduate level of education is necessary to understand the text. In contrast, *The New York Times* has a Gunning Fog score of about 17; this article's Fog Score is 19.17.[73] Chun and Rainey also looked at the metrics employed in GPRA

[67] 15 U.S.C. § 78j-1 (2007).

[68] Sappington, *supra* note 6 at 45.

[69] Government Performance and Results Act of 1993. Pub. L. No. 62-107 Stat. 285 (codified as amended in scattered sections of 31 U.S.C. and 39 U.S.C.).

[70] Young Han Chun and Hal G. Rainey, *Goal Ambiguity in US Federal Agencies*, 15 J. PUB. ADMIN. RESEARCH & THEORY 1, 19-20 (2005).

[71] *Id.* at 12.

[72] *Id.*

[73]

performance reports and identified them as either "subjective" or "objective" measures.[74] They defined subjective measures as those that are "based solely on individual perceptions about the level of organizational performance and frequently without a numerical target level."[75] Results were expressed as the percent of subjective measures in a report.[76] The mean for their sample was 54.62.[77]

Every year since the first full cycle of GPRA reporting was completed in 1999, a research team at the Mercatus Center at George Mason University has also evaluated the quality of the performance reports produced by the 24 "CFO Act agencies" that account for 99 percent of federal outlays.[78] The purpose of the Mercatus scorecard is not to judge the actual results produced by agencies, but simply to evaluate "how well the agencies' reports disclose to the public the results they produced, so that policy makes and citizens may make informed judgments about the agencies' results."[79] The key here is disclosure to the public, which is the ultimate principal. The most recent *Scorecard* report states:

> From our perspective, though, the most important stakeholders are the ordinary citizens who pay the bills and deserve to know what each agency has accomplished in the last fiscal year. A report will not do well in our evaluation if it does not do a good job of informing the average citizen, even if it is informative for experts, insiders, or others who have more specialized knowledge. Of course, we do not expect tens of millions of fellow citizens to rush to agency Web pages to read these reports. Journalists, bloggers, and other writers can also play an important role in making agency results more widely accessible to the public. But like the general public, these readers are not agency insiders. The information should be accessible and understandable for those who wish to access it. Reports that score high on our evaluation effectively communicate important performance results in a way that lay readers—ordinary citizens and taxpayers—can understand.[80]

The Mercatus project has found that while agencies have complied with GPRA by producing the required documents, the quality of reporting has varied widely.[81] Reporting quality has improved substantially since the first

[74] *Id.* at 13.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 17.
[78] Maurice McTigue, Hery Wray, & Jerry Ellig, "9th Annual Performance Report Scorecard: Which Federal Agencies Best Inform the Public?," MERCATUS CENTER AT GEORGE MASON UNIVERSITY (2008) at 1.
[79] *Id.* at 5.
[80] *Id.*
[81] *Id.* at 19.

reports covering fiscal 1999, yet there is great room for improvement.[82] Agency reports are evaluated on three criteria derived from the provisions of GPRA and scholarly research on performance management.[83] The criteria look at the accessibility of the reports, the quality of the measures chosen, and evidence that management uses results information to improve performance.[84] For each criterion an agency can receive 20 points for a total grading scale of zero to 60.[85] Since 1999, the yearly average scores have never risen above 36.[86]

If we separately look at the transparency criteria, which evaluates whether a report is "accessible, readable, and useable by a wide variety of audiences,"[87] the average score since 1999 has ranged from just under 11 to just under 14, out of a possible score of 20.[88] We can also look at the "public benefits" criterion, which tracks whether an agency is measuring its results using outcomes rather than outputs, and whether they are accounting for the cost of achieving those results.[89] For this criterion, the average agency score has ranged from just under 10 to just above 11.[90] For neither criteria has the quality of reporting approached a good score.[91]

Acknowledging that averages can sometimes be misleading, we can look at other measures. The Mercatus scorecard lists a total score of 36 as "satisfactory" or "acceptable"—the equivalent of a passing grade.[92] If we were to hold agencies to the same standard we might hold our children, we might expect them to earn As and Bs. These "good" and "very good" grades begin with total scores of 48 on the *Scorecard*.[93] With that in mind, we find that in no single year have more than 4 agencies scored 48 or higher, and in no single year have more than 12 agencies scored above the "satisfactory" 36 points.[94] Of the 24 agencies that are rated by the scorecard on an annual basis, only 5 have ever attained a score 48 or higher.[95] Additionally, we can look at the percentage of the budget covered by the best- and worst-scoring agencies. The most recent *Scorecard*, which looks at GPRA reports for FY 2007, totaled the non-interest federal spending by the 24 evaluated agencies

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[82] *Id.* at 20.
[83] *Id.* at 6.
[84] *Id.*
[85] *Id.* at 11.
[86] *Id.* at 17.
[87] *Id. at 6*.
[88] *Id.* at 17.
[89] *Id. at 6*.
[90] *Id.* at 17.
[91] *Id.* at 11.
[92] *Id.*
[93] *Id.*
[94] *Id. at 48-71.*
[95] *Id.*

and found that 65 percent of it was attributable to agencies with total scores below satisfactory;[96] 93 percent of spending was by agencies with scores below 48 of 60.[97]

In 1997, shortly after the first batch GPRA strategic plans were submitted to Congress, a group of congressional leaders issued a document grading the reports on 10 factors.[98] The plans were graded by a bipartisan and bicameral group of staffers.[99] On a 100-point scale, grades ranged from 28 to 75, with an average grade of 46.[100] Dissatisfied with the results, House Republicans introduced the Government Performance and Results Act Technical Amendments of 1997.[101] Among other things, this bill would have required each agency's inspector general to annually audit performance reports and submit the results to Congress.[102]

Under the legislation, each agency's inspector general or equivalent official would be charged with reviewing the agency's choice of performance measures and would also be tasked with verifying and validating the "data sources and information collection and accounting systems that support agency performance plans and performance reports and agency strategic plans[.]"[103] In essence they would have served as independent auditors, monitoring not only the quality of the data presented in performance reports, but also the criteria that agency management chose to judge itself.

The Clinton Administration officially opposed the legislation as unnecessary and premature, specifically citing provisions in the bill that would have required agencies to resubmit already completed strategic plans.[104] Agency inspectors general also opposed the bill, saying that the new audit responsibilities "could entail a massive effort, overwhelming the audit resources of many members of the IG community."[105] Ultimately, the

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[96] *Id. at 2.*

[97] *Id.*

[98] Frederick M. Kaiser & Virginia A. McMurtry, *Government Performance and Results Act: Proposed Amendments (H.R. 2883),* CONGRESSIONAL RESEARCH SERVICE (1998) at 2, *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-672:1.

[99] *Id.* at note 5.

[100] *Id.*

[101] *Id.*

[102] Government Performance and Results Act Technical Amendments of 1998. H.R. 2883, 105th Cong. (1998).

[103] Kaiser & McMurtry, *supra*, note 97 at 4.

[104] "Statement of Administration Policy: H.R. 2883 - Government Performance and Results Act Amendments" EXECUTIVE OFFICE OF THE PRESIDENT: OFFICE OF MANAGEMENT AND BUDGET (1998) *available at* http://clinton2.nara.gov/OMB/legislative/sap/105-2/HR2883-r.html.

[105] Kaiser & McMurtry, *supra*, note 97 at 4.

bill passed the House but failed in the Senate where it never left committee.[106]

Independent audits of performance reports are essential if GPRA is to be an effective tool for transparency and accountability. Without such audits, agencies, as agents, have little incentive to adequately report their performance to their principals, Congress, and the people. As we have seen, the principals are not equipped to developed performance data themselves. Additionally, as we will see in the next part, as an agent of the people, Congress itself may not have an incentive to see that adequate performance data is produced.

III. LIMITS TO TRANSPARENCY

Despite the enthusiasm surrounding transparency these days, any claim that transparency is a simple and all-encompassing cure-all will prove to be a disappointment. Transparency, like any reform, has limits; occasions when it will prove effective and occasions when it will fail. There are two major constraints on transparency's success: abuse of exceptions and public-choice concerns.

Most proponents of greater government transparency agree that there must be limits to openness. No one seriously believes that all national security data, up to and including the codes to our military's nuclear weapons, should be freely available on the Internet. We merely argue that there is a strong presumption of disclosure.[107] There are a number of instances that many believe override that presumption:

- **Privacy concerns:** Government often collects information about private individuals that should not be made generally available.
- **National security:** Information should be withheld when disclosure would threaten the security of the country.
- **Internal deliberations:** Government leaders are entitled to frank advice from counselors—who sometimes have strongly diverging views—and this process may be inhibited by public scrutiny.

This last reservation, however, provides a perfect example of the potential perils these exceptions hold. "Delicate negotiations" might encompass everything from the isolation in which the Constitution was

[106] *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR02883:@@@X .

[107] Indeed, the Freedom of Information Act recognizes nine exemptions to the information the federal government is required to provide to citizens upon request. 5 U.S.C. § 552. These exemptions include classified information, internal agency rules and practices, private citizen information, and trade secrets. *Id*.

written, to a pork barrel deal made in a legislative cloakroom. Does political bargaining really require secrecy, or is it simply another opportunity for back scratching and the indulgence of special interests?

It would be a serious mistake to assume that agents are static and will simply comply with disclosure requirements. Government, in particular, is likely to respond to the existence of a national security exception to transparency laws by classifying an ever-increasing (and increasingly dubious) list of activities under that heading.[108] The very introduction of exceptions—even in these cases—threatens to undermine the transparency project. There are legitimate exceptions, but these should be drawn with the brightest possible lines, and rules should establish careful and independent oversight to ensure that transparency works and does not become a hollow gesture. At the very least, all cases in which exceptions to disclosure are claimed must undergo rigorous, independent review. That power might be vested in an internal affairs officer or, in government, as mandatory judicial oversight. Countries like New Zealand have also found that aggressive, empowered ombudsmen and auditors general are ideally suited to this task.[109]

The delicate issue of just what and how much to disclose brings us to public-choice concerns that place a practical limit on transparency. Our political landscape seems to have become more and more ossified in a war of interest against interests that leaves little room for good governance. For example, in 1989 Congress created the Even Start Program, a family literacy program that seeks to help both children and their reading-challenged parents.[110] At the core of the effort is a grants program.[111] The Department of Education, which manages Even Start, hands out grants to states, which in turn give out sub-grants to "eligible entities," including school districts and "community-based" nonprofits that operate the literacy programs.[112]

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[108] *See* Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 400-403 (explaining the prevalence, and causes of, overclassification in the federal government). For example, the Defense Intelligence Agency, the National Geospatial Agency, and other national security entities were exempted from disclosing unclassified contracts on the USAspending.com Web site. *See* Letter from Shay D. Assad, Director, Defense Procurement & Acquisition Policy to Director, Defense Intelligence Agency, Director, National Geospatial Agency, Director, Counterintelligence Field Activity, & Defense Business Systems Acquisition Executive, Business Transformation Agency (Dec. 7, 2007), *available at* http://www.fas.org/sgp/othergov/dod/dod120707.pdf.

[109] http://www.ombudsmen.parliament.nz/ and http://www.oag.govt.nz/

[110] Gail McCallion, "Even Start: Funding Controversy," CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (2006) at 1-2.

[111] *Id.* at 1.

[112] *Id.*

Beginning in 1993, the Department of Education commissioned a series of wide-ranging national studies on Even Start's performance.[113] These reports found that there is no evidence to suggest that the program improves literacy.[114] The Office of Management and Budget's Performance Assessment Rating Tool, a compliment to GPRA that OMB uses to evaluate the performance of individual government programs, also rated Even Start as "ineffective."[115]

As a result of Even Start's disappointing performance, the Bush Administration recommended to Congress that the program be terminated in each of its last five budgets.[116] In its final Bush Administration budget justification to Congress, the Department of Education explained:

> National evaluations of Even Start provide strong justification for terminating the program. Three national evaluations show that Even Start projects did not effectively increase the literacy skills of participating children and their parents. Like the previous evaluations, the final report from the most recent rigorous evaluation of Even Start (Third National Even Start Evaluation: Program Impacts and Implications for Improvement, 2003) concluded that, while Even Start participants made gains, they did not perform better than those in the comparison group that did not receive services. Moreover, the scores of Even Start participants after 1 year of participation in the program were very low. . . . The key premise underlying the Even Start program is that the integration of the four core instructional components of adult education, parenting education, parent-child activities, and early childhood education adds value to the individual components. This premise, while appealing, remains unproven. The extent to which family literacy programs can enhance parent literacy and parenting skills is unknown.[117]

Despite the evidence that the Even Start program does not produce

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[113] Robert St.Pierre, *et al.,* "National Evaluation of the Even Start Family Literacy Program," U.S. DEPARTMENT OF EDUCATION, OFFICE OF POLICY AND PLANNING (1993) at Sec. 1, p. 3, *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/15/2a/83.pdf.

[114] McCallion, *supra*, note 110 at 2-3.

[115] *See* http://www.whitehouse.gov/omb/expectmore/detail/10000186.2002.html.

[116] Elisabeth Bumiller, "Bush Says He Has Listened to Concerns on Spending," THE NEW YORK TIMES ONLINE (Feb. 9, 2005), *available at* http://www.nytimes.com/2005/02/09/politics/09bush.html?fta=y. "Budget of the United States Government, FY 2007: Department of Education," OFFICE OF MANAGEMENT AND BUDGET, *available at http://www.whitehouse.gov/omb/budget/fy2007/education.html.* Elaine Korry, "Budget Would Trim Funds for 'Even Start,'" NATIONAL PUBLIC RADIO (2007), *available at* http://www.npr.org/templates/story/story.php?storyId=7492237.

[117] "Department of Education Fiscal Year 2009 Budget Request," at A-73-A74, *available at* http://www.ed.gov/about/overview/budget/budget09/justifications/a-edfordis.pdf.

results, however, Congress has continued to fund the program. While the program's managers have generated performance data showing that Even Start yields no return on the investment, Congress has nevertheless chosen to continue investing. President Obama is now attempting to shut down the program as well.[118]

This outcome may be less surprising once one understands that there is a National Even Start Association, comprised of the program's beneficiaries—teachers, community-based nonprofits, and parents—that lobbied aggressively to keep the program alive.[119] In this instance, the government has been very transparent about Even Start's results, so one would expect that the public would be able to hold Congress accountable for continuing to fund a failing program. The problem is that "the public"—a diffuse group made up of individuals with little incentive to pay attention to this particular government program—is no match for the organized beneficiaries of the program. Transparency is a prerequisite to accountability because you cannot hold Congress accountable for funding a failing program until you know the program is failing, but transparency by itself does not create an incentive for the people to hold their government accountable.

What increased transparency can do, however, is lower the threshold above which citizens will begin to have an incentive to hold government accountable. For example, if we do not know whether a reading program is working or not, Congress can conceivably increase funding to the program with impunity, citing the program's good intentions and the public's general agreement about the need to increase literacy. Once we have a measure of results, however, Congress's ability to fund a program in the face of poor performance, one hopes, will be constrained. It is not a perfect constraint, as Even Start demonstrates, but citizens will tolerate only so much spending on activities that do not produce results. Transparency at the very least identifies which activities are working and which are not. This might explain why Even Start's funding increased steadily from $14,820,000 in 1989 to a high of $250,000,000 in 2002, but fell to $99,000,000 in 2006

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[118] THE WHITE HOUSE, *Background Briefing By Senior Administration Officials to Discuss Terminations, Reductions, And Savings in the 2010 Budget*, May 6, 2009, available at http://www.whitehouse.gov/the_press_office/Background-Briefing-On-Terminations-Reductions-and-Savings-in-the-2010-Budget.

[119] REPORT ON LITERACY PROGRAMS, *Adult literacy programs level-funded, even start zeroed out in FY07 budget*, February 9, 2006 at 17 ("Immediately upon release of the FY07 budget, NCFL, along with the National Even Start Association and the Goodling Institute for Research in Family Literacy, announced a campaign to ensure Even Start 'receives the funding necessary to meet the educational needs of the nation's poorest families.' The groups are seeking to return the program to its FY05 funding of $225 million.").

after poor performance reports led to calls for its elimination.[120]

Another thing transparency cannot do is tame the political process. While the Bush Administration may seem heroic for having championed evidence-based budgeting, the fact is that in every one of the budgets in which it called for Even Start's termination, it requested that funds instead be directed toward Reading First—its preferred federal reading program, which was created by 2002's No Child Left Behind Act.[121] A recent study by the Department of Education's Institute of Education Sciences concluded that Reading First had virtually no effect on students' reading skills.[122] Like Even Start, Reading First has its own constituency. A 2006 report by the Department of Education's inspector general found that Reading First's management had conflicts of interest as a result of ties to educational publishers who benefited from the program.[123] As *The New York* Times put it, "A half-dozen experts setting guidelines for which reading textbooks and tests could be purchased by schools were also the authors of textbooks and tests that ended up being used."[124]

When we say that transparency is a prerequisite for accountability, we mean that knowing exactly what the government is doing makes it possible for citizens to call their elected officials to account, but it does not offer a guarantee. The public choice critique is still strongly in force. No person will take the time to delve into every policy issue, even if good data is available. Further, voting is an inefficient signaling mechanism. A voter might be deeply upset about waste in one program but happy with a politician's other choices, which makes it sensible to support him for re-election. The politician knows only that she has received a vote of confidence in her general performance. That difficulty in signaling and the costs of obtaining information in the first place return us to the public choice paradigm—recipients of tax money have every reason to fight for it while the broader public has little reason to oppose it.

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[120] McCallion, *supra*, note 110 at 3.

[121] David Nather, "A Political Read on Literacy Programs," CQ WEEKLY, Sept. 29, 2008, at 2549.

[122] Beth C. Gamse *et al.*, "Reading First Impact Study: Interim Report," DEPARTMENT OF EDUCATION, INSTITUTE OF EDUCATIONAL SCIENCES (2008) at 37, *available at* http://ies.ed.gov/ncee/pdf/20084016.pdf.

[123] U.S. Department of Education, Office of Inspector General. "The Reading First Program's Grant Application Process: Final Inspection Report" (2006) at 1, *available at* http://www.ed.gov/about/offices/list/oig/aireports/i13f0017.pdf.

[124] Joseph Berger, "She Found Abuses in U.S. Plan for Reading," NEW YORK TIMES ONLINE (Nov. 15, 2006), *available at* http://www.nytimes.com/2006/11/15/education/15education.html?ex=1321246800&en=3c0b879bc1ff59f5&ei=5088&partner=rssnyt&emc=rss.

CONCLUSION

While scholarship has established government transparency as an antidote to corruption, its other salutary effects have largely been neglected. As corporate financial transparency in the private sector demonstrates, openness allows principals to better hold their agents accountable, resulting in better performance. The same principle should be applied to the public sector.

Transparency can be a straightforward affair in the private sector because an organization's expenditures and revenue are obvious and easily quantifiable figures. However, while its expenditures are relatively easy to tally, the public sector has no similar revenue side of the ledger. We must instead measure and disclose results. Results should be measured using objective criteria,[125] and should be measured and reported by objective third parties, not the agent responsible for the result. Such a shift in practice would hopefully lead to better governmental performance and decision making.

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[125] *See* Jerry Ellig & Jerry Brito, *Toward a More Perfect Union: Regulatory Analysis and Performance Management*, 8 FLA. BUS. L.R. 1 (2009).