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Transparency With(out) Accountability: Open Government in the United States

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INTRODUCTION

The administration of Barack Obama has been marked by its stated quest for transparency. On his first full day in office, President Obama signed the Open Government Memorandum, declaring that he was “committed to creating an unprecedented level of openness in government” and that he aimed to “promot[e] accountability and provid[e] information for citizens about what their Government is doing.”¹ Following this ambitious commitment, the Obama Administration engaged in a frenzy of transparency-related activities, bringing to light thousands of data sets that contained previously unavailable information in a wide variety of regulatory domains. Dozens of other countries have enthusiastically followed the American example, vowing to release unprecedented amounts of regulatory information to the Internet.²

The core purpose of these transparency initiatives was to strengthen the accountability of governmental agencies and to ensure “that persons with public responsibilities [are] answerable to ‘the people’ for the performance of their duties.”³ Indeed, regulatory transparency has traditionally been regarded as a means for improving agencies’ public accountability.⁴ The advent of the Internet era further buttresses this logic, creating unprecedented opportunities for accessing, sharing, and processing regulatory information. This Article complicates this traditional marriage between transparency, technology, and public accountability.

The Article begins with a basic question: do existing online transparency policies succeed in improving public accountability? To answer this question, the Article develops an analytic typology composed of three different types of

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1. Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009) [hereinafter Open Government Memorandum].
 2. See OPEN GOVERNMENT PARTNERSHIP, <http://www.opengovpartnership.org> (last visited Oct. 23, 2012).
 3. Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, in PUBLIC ACCOUNTABILITY: DESIGN, DILEMMAS AND EXPERIENCES 1, 3 (Michael W. Dowdle ed., 2006).
 4. Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 917 (2006) (“[P]opular accountability need[s] a system for disclosing information about government.”).

online transparency policies. The first of these regimes is *mandatory transparency*, which refers to policies that oblige federal agencies to release specific categories of regulatory information. Examples include online notice and comment, online Freedom of Information Act (FOIA) requests, and online disclosure of federal spending. The second regime is *discretionary transparency*, which refers to policies that direct agencies to publish some information online but do not specify what exactly should be released. This is the approach taken by Data.gov—the landmark Obama initiative that requires agencies to place online “high-value” datasets of their choice. The final regime is *involuntary transparency*, which explores the regulatory response to whistleblowers and leaks.

Exploring the theoretical pillars of these models of online transparency as well as their practical implementation, the Article argues that existing transparency policies do not actually strengthen public accountability. Far from being a game-changer, the marriage of transparency and technology reinforces the traditional pitfalls of transparency policies. The current architecture of online transparency allows agencies to retain control over regulatory data and thus withhold information that is essential for public accountability purposes. It also prioritizes quantity over quality of disclosures, and reinforces traditional barriers of access to information. Hence, although public accountability is the *raison d'être* of online transparency policies, these policies often fail to improve accountability.

Technology should not be blamed, however, for this broken link between transparency and public accountability. This Article argues that a more nuanced institutional design of online transparency policies could successfully overcome traditional challenges and strengthen public accountability. In order to do so, a closer look should be given to the role of technology in the administrative state and its capacity to alter existing institutional structures. While the introduction of technology alone cannot convince agencies to expose themselves to the public eye, a combination of supporting institutional provisions and a more targeted reliance on technology could be valuable for accountability purposes.

Accordingly, this Article suggests that the content of online transparency policies—and not only their rhetoric—should focus on accountability-related information. Agencies should be required to release structured information on their decisionmaking processes and on their performance—the two categories of information that are most pertinent for public accountability purposes. Moreover, this transparency regime should be complemented by effective enforcement measures—a basic element that is surprisingly missing from the architecture of regulatory transparency. The suggestions below provide an extensive menu of potential enforcement techniques.

This Article also explores how civil society can use information released by agencies to hold them accountable for their decisions, as well as what role the Internet plays within this framework. Although these questions play a vital role in designing any public accountability system, they have long been ignored by the architects of transparency policies. The Article outlines two major mechanisms of public accountability: judicial oversight and public advocacy. It demon-

strates that while the direct access of civil society to courts is limited, online transparency policies can be vital for the public advocacy efforts of civil society, with technology playing a key role in this endeavor.

The Article proceeds as follows. Part I articulates the role of public accountability in administrative law, and explores the major “offline” policies that aim to improve public accountability, such as notice and comment and FOIA. Part II offers a typology of the three major regimes of online transparency policies, and demonstrates that they largely fail in their efforts to strengthen public accountability. Part III suggests an alternative design for online transparency policies, such as requiring agencies to release information on their decisionmaking processes and performance. Part III also suggests improved enforcement measures, and discusses the mechanisms available to civil society for holding agencies accountable. Part IV concludes.

I. PUBLIC ACCOUNTABILITY IN THE ADMINISTRATIVE STATE

A. *Transparency and Public Accountability of Administrative Agencies*

The accountability of administrative agencies to the general public is a “hallmark of modern democratic governance.”⁵ The core of this concept is that “persons with public responsibilities should be answerable to ‘the people’ for the performance of their duties.”⁶ Democracies should allow citizens to “appreciably influence the direction of government, and . . . have an opportunity to assess progress and assign blame.”⁷ Democracy, according to this vision, “remains a paper procedure if those in power cannot be held accountable in public for their acts and omissions, for their decisions, their policies, and their expenditures.”⁸

Public accountability consists of two components: the explanation and justification of agencies’ activities to the public; and an accompanying mechanism for public sanctions. Accordingly, an institutional design for public accountability should be grounded in an explanatory requirement (ensuring that agencies explain and justify their actions), and a punitive element (providing avenues for public assessment of agencies’ actions and appropriate responses). As the public cannot vote agency officials out of office, potential punishments in-

5. Mark Bovens, *Public Accountability*, in *THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT* 182, 182 (Ewan Ferlie, Laurence E. Lynn & Christopher Pollitt eds., 2007); see also Glen Staszewski, *Reason Giving and Accountability*, 93 *MINN. L. REV.* 1253, 1254 (2009) (“Modern public law is strongly devoted to the notion that public officials should be held ‘accountable’ for their decisions.”).

6. Dowdle, *supra* note 3, at 3.

7. Samaha, *supra* note 4, at 916.

8. Bovens, *supra* note 5, at 182; see also Samaha, *supra* note 4, at 916 (“Democracies promise responsiveness and accountability to popular will, rather than claim obedience by divine right or by the threat of overwhelming force.”).

clude changes in regulatory policy or, in more extreme cases, changes in personnel.⁹ While this structure may appear simple and intuitive, its practical implementation has thus far been highly complex and problematic.

The demand for public accountability of administrative agencies is primarily satisfied through regulatory transparency.¹⁰ Public accountability has been inseparably linked to transparency; and transparency is routinely regarded as a necessary precondition of accountability.¹¹ A range of public figures, both historic and contemporary, have amply supported this view. James Madison, for example, famously noted that a “popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”¹² Justice Brandeis stated that “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹³ President Obama himself stated that a “democracy requires accountability, and accountability requires transparency.”¹⁴ Throughout American history, it has been well understood that “[d]emocracies die behind closed doors,”¹⁵ and that “[t]o be held accountable and to perform well, [government] must be visible to the public.”¹⁶

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9. The changes introduced in the Torture Memoranda of the Bush Administration are one possible example of such developments. See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 141-176 (2007).
 10. See Dowdle, *supra* note 3, at 5-6. On the prevalence of transparency discourse, see Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1340-42. For a discussion of the general benefits of transparency in government, see Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895-902 (2006).
 11. See, e.g., Open Government Memorandum, *supra* note 1, at 4685 (“Transparency promotes accountability and provides information for citizens about what their Government is doing.”); ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 182 (2007) (“Transparency is necessary for accountability, and helps to promote impartiality by suppressing self-interested official behavior.”); Fenster, *supra* note 10, at 900 (“[Transparency] enables the free flow of information among public agencies and private individuals, allowing input, review, and criticism of government action, and thereby increases the quality of governance.”); Schauer, *supra* note 10, at 1346 (“Foremost among [the aims of transparency], at least in much of contemporary discourse, is what is commonly described as ‘accountability.’”).
 12. Letter from James Madison to W. T. Barry (Aug. 4, 1822), in 9 *THE WRITINGS OF JAMES MADISON* 103, 103 (Gaillard Hunt ed., 1910).
 13. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (Thoemmes Press 2003) (1914).
 14. Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter FOIA Memorandum].
 15. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).
 16. Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 619 (2010); see also Steven Aftergood, *Reducing Government Secrecy: Finding What*

There are, of course, several problems with this assumption. First, the general call for regulatory transparency rarely defines the precise contours of the desired transparency policy. Even the most basic questions about regulatory transparency—what types of regulatory information should be made public, how this information should be presented, and how the potential pitfalls of transparency should be avoided¹⁷—are often left unanswered by the fuzzy generalities of many transparency regimes. Second, it is not clear to what extent current transparency policies actually enhance public accountability. As this Article demonstrates, existing transparency policies often fail to explain and justify agencies' actions. Furthermore, even if the explanatory elements of public accountability are fulfilled, transparency alone cannot elicit the type of public outcry that would compel an agency to change its course of action. The fact that transparency is a necessary, but insufficient, requirement for public accountability is often overlooked by policymakers, and transparency is pursued for its own sake.

The next sections of this Article illustrate these observations in detail, discussing the failure of several offline transparency policies to improve public accountability. The Article then discusses how a similar problem plagues online transparency policies.

B. *Notice and Comment on Proposed Regulation*

Despite the prevalence of accountability rhetoric in modern politics, the concept of public accountability for administrative agencies has not always been a part of the American legal system. It emerged as a result of the opposition of industry groups to the insulated administrative culture of the New Deal.¹⁸ These groups did not have a say on rules that affected their interests. Until 1935, agencies were not even required to publish regulations that they adopted or to pro-

Works, 27 YALE L. & POL'Y REV. 399, 399 (2009) (“[T]he free flow of information to interested members of the public is a prerequisite to their participation in the deliberative process and to their ability to hold elected officials accountable.”); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 100 (2011) (“Open government and equal access to decisionmaking processes are cornerstones that ensure an accountable and democratically legitimate Fourth Branch.”).

17. The main arguments against regulatory transparency are that it is costly, that it impedes law enforcement and security objectives, and that it inhibits “the ability of government officials to deliberate over policy matters . . . without the inevitable pressure that accompanies public scrutiny.” Fenster, *supra* note 10, at 908.
18. See William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 178 (2009). Funk notes that the “personnel and culture of the agencies were hostile to business” and that agency capture had not yet begun. *Id.*

vide public access to their records.¹⁹ Frustrated business groups pressured Congress to protect private interests affected by regulation by imposing on agencies requirements of transparency and public participation.²⁰

The Administrative Procedure Act of 1946 (APA)²¹ represented the first step toward a more comprehensive scheme of public accountability.²² The “notice and comment” procedure was a major innovation of the Act, allowing the public to comment on proposed rules and obliging agencies to include in final rules an explanation of their basis and purpose.²³ Although the original scope of this procedure was narrow,²⁴ it transformed administrative law for decades to come. Citizen participation in rulemaking became “one of the most fundamental, important, and far-reaching democratic rights.”²⁵ Nonetheless, the APA has largely failed to keep administrative agencies accountable.

As part of the notice and comment procedure, the APA requires agencies engaged in rulemaking to provide a “general notice” of the proposed rule and invite the public to comment on it.²⁶ While the Act only refers to a minimal notice, judicial interpretation expanded its terms, instructing agencies to explain the different data and considerations that underlie the proposed rule.²⁷ Following the notice and comment period, agencies must consider public comments and “incorporate in the rules adopted a concise general statement of their basis

19. *Id.* at 172-73.

20. *Id.* at 178.

21. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

22. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 472 (explaining that the APA “intended overall to guard against overreaching or unfair regulation by providing affected parties increased hearing and participation rights”).

23. 5 U.S.C. § 553(b)-(c) (2012).

24. See Funk, *supra* note 18, at 173-75 (discussing “the history of the development of public participation and transparency in administrative law”); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1432 (2004).

25. Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 517 (2004).

26. 5 U.S.C. § 553(b)-(c). The notice shall include “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.* § 553(b).

27. See, e.g., *ACLU v. FCC*, 823 F.3d 1554, 1581 (D.C. Cir. 1987) (requiring the FCC to respond to significant comments); *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977) (requiring the FDA to disclose scientific data); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973) (requiring the EPA to disclose findings that underlay the proposed rule).

and purpose.”²⁸ In so doing, agencies have to explain their policy choices.²⁹ In theory, then, this framework fully corresponds to the justification component of public accountability.

Although courts demanded that agencies “infuse[] the administrative process with the degree of openness, explanation, and participatory democracy required by the APA,”³⁰ the notice and comment process has hardly met these high expectations. In fact, the procedure has drawn substantial criticism from various directions. While the primary goal of the process had been to funnel public input into agency decisionmaking, “very few ordinary citizens have availed themselves of this opportunity.”³¹ Meaningful participation requires thorough knowledge and expertise in the regulated field, coupled with sizeable resources and the motivation to persuade the agency in favor of one’s position. Most citizens do not fit this description, and agencies are not required to actively encourage participation or solicit comments from underrepresented stakeholders. Hence, notice and comment is typically dominated by a limited number of high-caliber professional interest groups and industry representatives, who possess the resources and the expertise necessary to file persuasive comments.³²

Furthermore, even if citizens do participate in the notice and comment procedure, agencies do not necessarily answer to them. While a considerable share of public comments involves normative judgments and questions related to policy priorities, agencies are reluctant to publicly address such comments.³³ An empirical study demonstrates that agencies spend the bulk of their time responding to the most sophisticated comments—those that articulate complex

28. 5 U.S.C. § 553(c).

29. *See* *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (“We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rule making. We do expect . . . to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.”).

30. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978).

31. Cary Coglianese, *Expanding Regulatory Pluralism: The Role of Information Technology in Rulemaking* 7 (Belfer Ctr. for Sci. and Int’l Affairs Working Paper, 2005), <http://belfercenter.ksg.harvard.edu/files/coglianese.pdf>; *see* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 *DUKE L.J.* 1321, 1382, 1386 (2010); Wagner, Barnes & Peters, *supra* note 16, at 108-119.

32. *See, e.g.*, Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present and Future*, 55 *DUKE L.J.* 943 (2006); Scott Furlong & Cornelius Kerwin, *Interest Group Participation in Rulemaking: A Decade of Change*, 15 *J. PUB. ADMIN. RES. & THEORY* 353 (2005); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 98 *J. POL.* 128 (2006).

33. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 *GEO. WASH. L. REV.* 1343, 1347 (2011). For specific examples, *see id.* at 1362-71.

technical concerns and are typically submitted by organized groups.³⁴ But agencies “appear to be impatient with and unresponsive to” policy or value-laden reasons and concerns found in public comments, even if the volume of these comments is large.³⁵

If the goal of notice and comment is to satisfy the explanatory requirement of public accountability, this tendency is naturally worrisome. First, as broad citizen participation is hindered by barriers of expertise, resources, and motivation, agencies avoid the necessity to respond to public queries. Second, even if asked, agencies are reluctant to meaningfully explain their rulemaking priorities and normative preferences. Although the notice and comment process was envisioned as a landmark of public accountability, it has nonetheless evolved into a system that is widely considered inaccessible and nontransparent.

C. Freedom of Information

The APA was part of the first wave of public accountability legislation, spurred by groups seeking to protect private interests affected by administrative rulemaking. The second wave was mostly concerned with the public interest.³⁶ It arrived in the wake of public discontent with the Vietnam War and the Watergate scandal, representing “a revolution against the establishment” and expressing “a grave distrust of those in power.”³⁷ Several statutes that reflected this sentiment were enacted between 1966 and 1978. The primary piece of legislation, the Freedom of Information Act of 1966,³⁸ aimed to “ensure an informed citi-

34. Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414-15 (2005).

35. Mendelson, *supra* note 33, at 1363-64, 1367 (noting that “rulemaking documents only occasionally acknowledge the number of lay comments and the sentiments they express; they very rarely appear to give them any significant weight”); *see also* Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 908 (2006) (analyzing the FCC’s rulemaking on media ownership and noting that the “overwhelming sentiment against the rules in the comments appears to have had no effect”).

36. Funk, *supra* note 18, at 180.

37. *Id.* at 178; *see also* Dowdle, *supra* note 3, at 6 (discussing the causes for the “open government” movement in the United States and Britain).

38. Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (2012)). Two other significant laws of this period are the Government in the Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241 (codified as amended at 5 U.S.C. § 552(b)), which obliged multi-member agencies such as the Federal Trade Commission to open their meetings to the public, and the Federal Advisory Committee Act of 1972, Pub. L. No. 92-463, 86 Stat. 770 (codified at 5 U.S.C. app. § 2), which aimed to open for public scrutiny the advisory committees operated by administrative agencies. *See* Funk, *supra* note 18, at 183-91; Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 456 (1997); Carolyn Bingham Kello, Note, *Drawing the Cur-*

zenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”³⁹ However, as with notice and comment, the rhetoric of FOIA has not resulted in robust public accountability outcomes. Instead, the release of governmental records has come to depend on a variety of contingencies.

The operating principle of FOIA is straightforward: all governmental records shall be made available upon public request, unless specifically exempted.⁴⁰ The Act grants “any person” the right to seek information,⁴¹ thus establishing a “strong presumption in favor of disclosure.”⁴² As part of this, FOIA requires agencies to publish certain types of information in the *Federal Register*,⁴³ instructs them to proactively release some other categories of information,⁴⁴ and offers the public a right to ask for governmental information that has not been otherwise published.⁴⁵

Despite these ambitious prescriptions, FOIA has been subject to criticism since its enactment. The latest FOIA amendment, the OPEN Government Act of 2007, acknowledged that “in practice, the [FOIA] has not always lived up to [its] ideals.”⁴⁶ A major weakness of FOIA has been its failure to impose affirma-

tain on Open Government? In Defense of the Federal Advisory Committee Act, 69 BROOK. L. REV. 345, 346-47 (2003).

39. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); *see also* Dowdle, *supra* note 3, at 6 (explaining that FOIA’s goal was “to allow a much wider range of civil society to hold public officials to account even without directly participating in political decisionmaking”).
40. 5 U.S.C. § 552(a)-(b). A record is broadly defined to include information stored on any form of media. *Id.* § 552(f); *see* David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-To-Know Acts*, 86 TEX. L. REV. 1787, 1797 n.66 (2008).
41. 5 U.S.C. § 552(a)(3).
42. U.S. Dep’t of State v. Ray, 502 U.S. 164, 173 (1991); *see also* Vladeck, *supra* note 40, at 1796 (noting that FOIA established a “presumption of open access to all records in the hands of the federal government”).
43. The information that ought to be published includes “substantive rules of general applicability,” “statements of general policy or interpretations of general applicability formulated and adopted by the agency,” and descriptions of the agency’s organization. 5 U.S.C. § 552(a)(1).
44. 5 U.S.C. § 552(a)(2). This information includes “final opinions [and] . . . orders, made in the adjudication of cases,” “statements of general policy and interpretations which have been adopted by the agency,” and “administrative staff manuals and instructions to staff that affect a member of the public.” *Id.*; *see infra* text accompanying notes 101-107.
45. 5 U.S.C. § 552(a)(3).
46. Pub. L. No. 110-175, 121 Stat. 2524 (codified in scattered sections of 5 U.S.C.).

tive disclosure duties on agencies.⁴⁷ FOIA is fully “requester driven”: agencies release information in response to a public request.⁴⁸ As a result, the burden to obtain records falls on the shoulders of the requester. Instead of facilitating this process, agencies often attempt to hinder it. Indeed, “[t]o press a recalcitrant administration for disclosure under FOIA requires time, money, and expertise.”⁴⁹ The effectiveness of FOIA therefore depends on professional and well-funded intermediaries—most often the media, public interest groups, and non-governmental organizations.⁵⁰ These intermediaries are necessary to overcome FOIA’s substantial time and cost barriers. But even more importantly, they are needed because FOIA requests require some degree of prerequisite knowledge; indeed, one must know exactly what to ask for and how to ask for it before filing a request. Such prerequisite knowledge is naturally the domain of a limited number of professional intermediaries who handle the majority of FOIA requests.⁵¹ Although they can be effective in bringing to light governmental information, full reliance on these intermediaries is problematic because they are often “subject to the vicissitudes of public opinion, the need to remain on good terms with government sources, and the demands of competing priorities for their resources.”⁵²

Malleability is another “perennial problem”⁵³ and a notable feature of FOIA. Each presidential administration may obligate agencies to process information requests according to its own interpretation of the Act. The administration of George W. Bush, for example, instructed agencies to deny information

47. See Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 577, 584 (2008).

48. Vladeck, *supra* note 40, at 1789 (referring to this problem as “FOIA’s Achilles’ heel”).

49. Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1020 (2008).

50. The “most effective requesters” include the National Security Archives, the ACLU, the Electronic Privacy Information Center, the Electronic Frontier Foundation, the Center for Constitutional Rights, Judicial Watch, and the Center for National Security Studies. *Id.* at 1024.

51. A related concern is that, at times, prerequisite knowledge is simply unavailable to entities outside the government. As Donald Rumsfeld famously noted, “[t]here are things we don’t know we don’t know. . . . And each year, we discover a few more of those unknown unknowns.” Donald H. Rumsfeld, U.S. Sec’y of Def., Press Conference at NATO Headquarters, Brussels, Belgium (June 6, 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3490>. When no one outside the government is aware of such “unknown unknowns,” FOIA becomes irrelevant. In such cases, only insider whistleblowers can make information public. For a comprehensive analysis, see David Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

52. Kreimer, *supra* note 49, at 1023.

53. Vladeck, *supra* note 40, at 1790.

requests whenever a “sound legal basis” was available.⁵⁴ True to his campaign promises, President Obama revoked that policy on his first day in office. Obama’s FOIA memorandum stated that “[a]ll agencies should adopt a presumption in favor of disclosure,” and that this presumption “should be applied to all decisions involving FOIA.”⁵⁵

While the Bush Administration’s presumption of secrecy was swiftly adopted by agencies, the effects of Obama’s FOIA policy have been uneven. A survey conducted in March 2010, one year after the issuance of Obama’s FOIA memorandum, revealed that less than fifteen percent of agencies to which the memorandum applied “had actually made concrete changes in their FOIA procedures.”⁵⁶ Following pressure by the media and the White House, the number of complying agencies rose to fifty-five percent by March 2011.⁵⁷ But a closer look reveals that the traditional problems of FOIA persist: “Long backlogs of requests for information, along with responses that take a year or more, are common.”⁵⁸

President Obama himself has noted that FOIA, “which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government.”⁵⁹ However, the composite of exemptions, delays, costs, expertise, and administration-dependent interpretations has generated a gap between freedom of information on the books and freedom of information in action. Transparency cannot independently promote public accountability in such conditions, as it depends on a combination of experienced intermediaries, cooperative administrations, and supportive courts. In some cases, this combination materializes and governmental records are released. In other cases, one or more of these elements is missing and FOIA’s transparency and public accountability model fails.

In sum, the major vehicles for public accountability for administrative agencies—notice and comment on proposed regulation and FOIA—have fallen short of expectations. Notice and comment has failed to engage the public in the regulatory process and prompt agencies to provide meaningful explanations for their choices and priorities. The implementation of FOIA has been similarly

54. Memorandum from John Ashcroft, U.S. Att’y Gen., to the Heads of All Fed. Dep’ts & Agencies (Oct. 12, 2001), <http://www.fas.org/sgp/foia/ashcroft.html>.

55. FOIA Memorandum, *supra* note 14, at 4683.

56. *Glass Half Full: Knight Open Government Survey 2011*, NAT’L SEC. ARCHIVE 3 (Mar. 14, 2011), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB338/KnightOpenGovtSurvey2011.pdf>.

57. *Id.*

58. Natasha Singer, *How To Break an Information Bottleneck*, N.Y. TIMES, June 25, 2011, <http://www.nytimes.com/2011/06/26/business/26stream.html>.

59. FOIA Memorandum, *supra* note 14, at 4683.

unsatisfactory from a public accountability perspective, as the release of governmental records has come to depend on a variety of contingencies.

II. THE ONLINE ARCHITECTURE OF TRANSPARENCY AND PUBLIC ACCOUNTABILITY

Scholars have celebrated the potential of the Internet to open new channels of communication between citizens and the government, overcome agencies' resistance to exposure, and begin a new chapter in the long story of regulatory transparency and public accountability.⁶⁰ Despite these high aspirations, the current architecture of online transparency policies has not managed to avoid the traditional pitfalls of offline transparency policies: barriers to information access and agencies' resistance to exposure. In fact, both the design and the implementation of online transparency policies have been flawed and have largely failed to promote true public accountability. While the quantity of available regulatory information has increased exponentially, the quality and utility of that information has not considerably improved. As this Part shows, online transparency policies allow agencies to retain control over regulatory information, letting them decide what, when, and in what form information will be released to the public. Thus, the introduction of technology often seems to have only marginal effects on agencies' public accountability.

The following pages provide a background on the current architecture of online transparency policies. This Part then suggests a three-part typology of online transparency policies, and examines the contribution of these policies to the public accountability of administrative agencies.

The rapid development of information technologies since the mid-1990s has spurred the effort to enhance the public accountability of administrative agencies and cure the deficiencies of existing accountability mechanisms.

The first attempts to introduce technology into administrative proceedings sought to improve agencies' internal management and the provision of public services. The Paperwork Reduction Act of 1995, for example, required the Office of Management and Budget (OMB) to employ information technology as a means "to improve the productivity, efficiency, and effectiveness of Federal

60. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 212-72 (2006); BRUCE BIMBER, *INFORMATION AND AMERICAN DEMOCRACY: TECHNOLOGY IN THE EVOLUTION OF POLITICAL POWER* (2003); ANDREW CHADWICK, *INTERNET POLITICS: STATES, CITIZENS, AND NEW COMMUNICATION TECHNOLOGIES* (2006); STEPHEN COLEMAN & JAY G. BLUMLER, *THE INTERNET AND DEMOCRATIC CITIZENSHIP: THEORY, PRACTICE AND POLICY* (2009); *DEMOCRACY ONLINE: THE PROSPECTS OF POLITICAL RENEWAL THROUGH THE INTERNET* (Peter M. Shane ed., 2004); HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* (MIT Press 2000) (1993); A. Michael Froomkin, *Habermas@Discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003); Jennifer Shkabatur, *Cities @ Crossroads: Digital Technology and Local Democracy in America*, 76 BROOK. L. REV. 1413 (2011).

programs.”⁶¹ The Government Paperwork Elimination Act of 1998 directed agencies to use, when practicable, electronic forms, filings, and signatures to improve their service provision to the public.⁶² As part of the effort to increase agencies’ transparency, the Electronic Freedom of Information Act of 1996 (E-FOIA)⁶³ instructed agencies to place online frequently requested FOIA records. The E-Government Act of 2002 continued that course of action, directing federal agencies to enhance the volume of public records available online and adopt standards for improved organization and categorization of regulatory information.⁶⁴ Other initiatives of this period targeted federal spending and required agencies to generate comprehensive online datasets that contained information on federal contracts, grants, and awards.⁶⁵

While the roots of online transparency policies are found in the Clinton and Bush Administrations, these policies have become much more prominent during Barack Obama’s presidency. On his first full day in office, President Obama signed two major policy documents: the Transparency and Open Government Memorandum and the Freedom of Information Act Memorandum.⁶⁶ The Open Government Memorandum declared that the Obama Administration “is committed to creating an unprecedented level of openness in Government,” and that it aims to “promote[] accountability and provide[] information for citizens about what their Government is doing.”⁶⁷ The FOIA memorandum was similarly determined, suggesting that FOIA “should be administered with a

61. Pub. Law No. 104-13, § 2, 109 Stat. 163, 167 (codified at 44 U.S.C. § 3504(h)(5) (2012)).

62. Pub. L. No. 105-277, div. C, tit. XVII, § 1702, 112 Stat. 2681 (codified at 44 U.S.C. § 3504).

63. Pub. L. No. 101-231, 110 Stat. 347 (codified at 5 U.S.C. § 552).

64. Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended in scattered sections of 5, 10, 13, 15, 18, 28, 31, 40, 41, and 44 U.S.C.). The Act defines “electronic government” as “the use by the Government of web-based Internet applications and other information technologies . . . to enhance the access to and delivery of government information and services to the public.” *Id.* § 101(a), 116 Stat. at 2902. The Act specifies the information that ought to appear on agencies’ websites and sets “minimum agency goals to assist public users to navigate agency websites.” *Id.* § 207(f)(B), 116 Stat. at 2918.

65. On federal spending transparency, see discussion *infra* Subsection II.A.3. On open data, see discussion *infra* Section II.B.

66. Open Government Memorandum, *supra* note 1; FOIA Memorandum, *supra* note 14.

67. Open Government Memorandum, *supra* note 1, at 4685.

clear presumption” in favor of openness.⁶⁸ The Internet has been envisioned as a major catalyst of these developments.⁶⁹

President Obama’s two memoranda and the efforts of the previous administrations to digitize administrative proceedings laid the groundwork for the existing architecture of online transparency and public accountability. These policies, in turn, can be divided into three major categories: mandatory transparency, discretionary transparency, and involuntary transparency. An analysis of these three categories sheds light on the role of transparency in the administrative state, and illuminates the effects of online transparency policies on the public accountability of administrative agencies. The analysis below also explores the extent to which the introduction of the Internet may help overcome agencies’ resistance to openness, lower participation barriers, and ultimately translate transparency into public accountability—a challenge that often proved insurmountable in the pre-Internet era.

A. *Mandatory Transparency*

Mandatory transparency refers to policies that obligate agencies to place specific types of information online. This concept can serve as an effective transparency mechanism, as it removes agency discretion to decide which information should be publicly disclosed. Mandatory disclosure disciplines agencies, prevents regulatory capture, and limits the corrupting power of improper influences. Since agency decisions are publicly scrutinized in this regime, proponents of mandatory transparency expect that agencies subject to mandatory transparency would be less inclined to shirk their obligations or engage in dubious activities.

Although mandatory transparency policies have always been common in administrative law, the advent of the Internet led to a quantitative and qualitative shift in their implementation. Agencies can now make much more information available to many more individuals at significantly lower costs. The link between transparency and accountability is expected to be particularly strong in this context. First, agencies can be forced to explain and justify a larger range of their decisions to a substantially wider online audience. Second, public scrutiny and sanctions become easier since one does not have to examine the physical copies of the *Federal Register* in order to inspect agencies’ decisions. Instead, it becomes possible to browse an agency’s website and retrieve the desired information within seconds. The information on an agency’s website can then be used in courts, or conveyed to the media and the executive and legislative branches of government. These actors, in turn, can use that information to influence the agency’s behavior.

68. FOIA Memorandum, *supra* note 14, at 4683.

69. See Cary Coglianesi, *The Transparency President? The Obama Administration and Open Government*, 22 *GOVERNANCE* 529, 535 (2009).

The following Sections discuss three major policies of online mandatory transparency. Two of these—online notice and comment and online FOIA—seek to cure the public accountability deficiencies of their offline counterparts. The third—federal spending transparency—is a new development that takes advantage of the opportunities created by the Internet. This Section will show that the design and implementation of all three of these policies have largely been flawed. In all three cases, the agencies' transparency mandate is either insufficiently "mandatory" or inapplicable to the categories of information that would truly contribute to public accountability.

1. Online Notice and Comment

In hopes of improving public engagement in rulemaking, the federal government has been interested in the "computerization of rulemaking dockets" since the beginning of the 1990s.⁷⁰ Accordingly, a major part of the e-government effort of the Clinton and Bush Administrations addressed rulemaking. The E-Government Act required agencies to place their official rulemaking dockets online to the extent practicable and to accept electronic comments from the public.⁷¹

The premise of the early e-rulemaking experiments of the Clinton Administration was that the introduction of information technology would enhance public participation and improve the transparency of the rulemaking process.⁷² Citizens interested in commenting on proposed rules would no longer need to travel in order to visit records repositories. Comments would be e-mailed to agencies and posted on their websites, notices would be made searchable, and voluminous documents would be easily linked to each other.⁷³ The Bush Administration enthusiastically expanded the e-rulemaking initiative, making it "one of its governmental reform priorities."⁷⁴ As part of this reform effort, the Administration launched the government-wide web portal Regulations.gov, which allows the public to view and submit electronic comments on proposed

70. Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 399 (2011).

71. E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915-16 (codified at 44 U.S.C. § 3501 note (2012)).

72. Coglianese, *supra* note 32, at 945-46; see Steven J. Balla & Benjamin M. Daniels, *Information Technology and Public Commenting on Agency Regulations*, 1 REG. & GOVERNANCE 46, 47 (2007); Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451, 454 (2010).

73. Lubbers, *supra* note 72, at 453-54.

74. Coglianese, *supra* note 32, at 946. For a history of the federal e-Rulemaking Initiative, see Committee on the Status and Future of Federal E-Rulemaking, *Achieving the Potential: The Future of Federal E-Rulemaking*, AM. BAR ASS'N 21-24 (2008), <http://www.resource.org/change.gov/cei-report-web-version.fixed.pdf> [hereinafter Committee on E-Rulemaking].

rules.⁷⁵ An online docket management system that accompanies the portal is supposed to serve as a common repository for the records of all administrative agencies.⁷⁶ By 2012, Regulations.gov was serving more than 170 federal entities that engage in rulemaking.⁷⁷

The initial reaction of both government officials and legal academics to the e-rulemaking developments was enthusiastic. Commentators declared that the Internet “changes everything” by encouraging citizens to “play a more central role in the development of new agency policies and rules.”⁷⁸ Some envisioned the e-rulemaking effort as a trigger for a more interactive and deliberative rulemaking process, including online chat rooms and deliberative dialogues.⁷⁹ However, as time passed, the effects of technology on citizen participation failed to meet these optimistic predictions. Neither of the two expressed goals of e-rulemaking—citizen participation and transparency—has been fully satisfied.

Although Regulations.gov has been active for almost a decade, it has not enticed citizens to take a more active role in the rulemaking process.⁸⁰ While some rules drew an unprecedented number of public comments,⁸¹ the Internet has hardly changed the traditional patterns and biases of citizen participation.⁸² This should not be surprising: while e-rulemaking reduces the costs of accessing

75. For a comprehensive analysis of the portal, see Committee on E-Rulemaking, *supra* note 74.

76. Coglianese, *supra* note 32, at 946.

77. See *Participating Agencies*, REGULATIONS.GOV, http://www.regulations.gov/docs/Participating_Agencies.pdf (last updated June 2012); Cynthia R. Farina, *Achieving the Potential: The Future of Federal E-Rulemaking*, 62 ADMIN. L. REV. 101, 101-02 (2010).

78. E.g., Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 277, 303 (1998); see Committee on E-Rulemaking, *supra* note 74, at 7.

79. See, e.g., Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 502-05 (2004); Thomas C. Beierle, *Discussing the Rules: Electronic Rulemaking and Democratic Deliberation* 6-15 (Resources for the Future, Discussion Paper No. 03-22, 2003), <http://www.rff.org/rff/Documents/RFF-DP-03-2.pdf>.

80. Curiously, agency officials do not consider Regulations.gov to be cost effective either. See Lubbers, *supra* note 72, at 474.

81. For instance, more than a quarter of a million comments addressed the Department of Agriculture’s rulemaking on organic foods. Hundreds of thousands of comments were directed to the Federal Communications Commission with regard to its rulemaking on the concentration of ownership of media outlets. See Coglianese, *supra* note 31, at 7; see also Mendelson, *supra* note 33, at 1361 (citing, among other examples, a Clinton Administration tobacco rule that generated over 700,000 comments and a Fish and Wildlife Service rule relating to the listing of polar bears as a threatened species that received over 640,000 comments).

82. Coglianese, *supra* note 31, at 7.

records and submitting comments, it does not diminish the traditional barriers to citizen participation.⁸³ These barriers—professional expertise in the subject matter, motivation, and resources to translate knowledge into substantive comments—deter civil society from meaningful participation in notice and comment, with or without the Internet.⁸⁴ Hence, even if the sheer number of participants grows, this does not necessarily imply that a broader range of interests is being represented in the rulemaking process.⁸⁵

Nor have the transparency aspirations of e-rulemaking met original expectations. A robust policy of online transparency would require agencies to provide full information on the statute that authorizes the agency's rule, disclose administrative records related to the rule, post public comments and the agency's responses, explain the final rule, and detail the developments that followed its adoption (court decisions, amendments, interpretations, and guidelines).⁸⁶ Ideally, this information would be available in a user-friendly format and would be periodically updated. This idyllic scenario, however, is far from the reality.

The interface of Regulations.gov proved difficult to navigate. Moreover, the quality, completeness, and timeliness of rulemaking materials posted by agencies have been uneven.⁸⁷ And although Regulations.gov was launched as a centralized system for e-rulemaking, it still allows agencies to set their own practices and priorities for the online notice and comment process.⁸⁸ This early choice of design has resulted in a lack of interagency "harmonization on such essential elements as (i) what agencies call key rulemaking documents; (ii) what information about these documents ('metadata') is supplied during data entry; and (iii) what kinds of documents and metadata will be made available for re-

83. *Id.*; see CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 111 (3d ed. 2003).

84. In fact, sophisticated knowledge is required even to navigate the different e-rulemaking websites. For studies that demonstrate the sophistication and time required to find rulemaking information on Regulations.gov, see Coglianese, *supra* note 31, at 8-11; and Stuart Shapiro & Cary Coglianese, *First Generation E-Rulemaking: An Assessment of Regulatory Agency Websites* (U. of Penn. Law Sch., Pub. Law Research Paper No. 07-15, 2007).

85. See, e.g., Coglianese, *supra* note 31. This is particularly true in cases where high numbers of comments originate from mass e-mail campaigns concocted by public or private interest groups. See, e.g., Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV'T 41, 58 (2006). *But see* Mendelson, *supra* note 33, at 1361 (arguing that mass e-mail campaigns can convey helpful content to the agency).

86. Lubbers, *supra* note 72, at 454.

87. See, e.g., Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civic Infrastructure*, 54 ADMIN. L. REV. 1421, 1451-55 (2003); Stuart W. Shulman, *E-rulemaking: Issues in Current Research and Practice*, 28 INT'L J. PUB. ADMIN. 621, 632-33 (2005).

88. Farina, *supra* note 77, at 105.

view by the public.”⁸⁹ Taking advantage of this decentralized structure, agencies have retained full and undisputed control over the content of their dockets on Regulations.gov. They have full discretion to decide which evidence is presented in support of a proposed rule and which documents are left hidden from the public eye.

Furthermore, both official records and public comments submitted through the website require agency approval before appearing online,⁹⁰ and some public comments are being filtered out from the website without explanation.⁹¹ Moreover, users outside the agency cannot assess “the nature or extent of material in the rulemaking record that is missing from the electronic docket.”⁹² Agencies still “own” their data and fiercely resist losing control over it.⁹³

The ability of Regulations.gov to enhance public accountability is further undermined by the fact that it was designed solely by federal agencies, without involvement of potential nongovernmental users of the platform and with insufficient attention to the particular needs and capacities of these users.⁹⁴

Funding presents another difficulty. E-rulemaking endeavors have been sponsored through existing agency budgets, forcing agencies to divert funds from their other projects. Hence, agencies have been reluctant to allocate considerable funds to the e-rulemaking system, supporting “only those features that seem obviously worthwhile to their own operations.”⁹⁵

This reality has broad implications for the public accountability of administrative agencies. First, the assumption that the mere introduction of new technological tools and improved docket accessibility will transform the transparency of rulemaking, overcome agencies’ resistance to openness, and invigorate public participation has not held. The Regulations.gov design was insufficiently specific and detailed, and therefore allowed a system that was technically mandatory to become dependent on agencies’ discretion. As the system can be tweaked by agencies according to their internal priorities and preferences, its

89. *Id.*

90. *Id.* at 107. The Committee on the Status and Future of E-Rulemaking notes that “[t]here appears to be a significant amount of material—including comments submitted online—that agencies do not make accessible online to the public and other agencies.” Committee on E-Rulemaking, *supra* note 74, at 13. The absence of certain materials is usually explained by copyright, sensitivity of personal information, or confidentiality of business information. *Id.*

91. Committee on E-Rulemaking, *supra* note 74, at 18.

92. *Id.* at 13.

93. *Id.* at 26.

94. Farina, *supra* note 77, at 284-85.

95. *Id.* at 284.

outputs cannot be regarded as fully reliable and trustworthy.⁹⁶ The explanation and justification elements of public accountability, therefore, remain unfulfilled. If coupled with a more nuanced institutional design,⁹⁷ e-rulemaking may certainly improve the notice and comment process. But so far, its effects on the public accountability of administrative agencies have been relatively negligible.

2. Online Freedom of Information

Similar difficulties persist in the FOIA context. The lack of affirmative disclosure obligations has been recognized as a major weakness of the Act.⁹⁸ Because it is request driven, FOIA's efficacy depends on professional intermediaries who have to file a request, wait to receive the records, and litigate if the request is rejected. Only successful cases force public disclosure of the information. Aware of these difficulties, Congress chose in 1996 to adopt an online extension to FOIA.⁹⁹ This extension, called E-FOIA, sought to harness the power of the Internet to solve the problems that prevented FOIA from resulting in genuine agency accountability.

E-FOIA aims to lower the threshold for information requests and enable "FOIA resources to be more efficiently used."¹⁰⁰ E-FOIA addresses three primary issues. First, it requires agencies to publish online copies of records they have released pursuant to prior FOIA requests, as well as information that is "likely to become the subject of subsequent requests."¹⁰¹ The reading groups should include four categories of records: "final opinions [and] orders, made in the adjudication of cases," "statements of policy and interpretations which have been adopted by the agency," "administrative staff manuals and instructions to staff that affect a member of the public," and records that are or will likely become the subject of subsequent requests.¹⁰² The addition of the latter to the inventory

96. *Id.* (noting that "searches [on Regulations.gov] will produce results that are unreliable in ways that public users are unlikely to realize and cannot, in any event, control").

97. The Cornell e-Rulemaking Initiative, for example, has been experimenting with a variety of pilots that can improve the original design of the system, collaborating in particular with the Department of Transportation. *See* Farina et al., *supra* note 70, at 411-16 (discussing the Regulation Room pilot with the Department of Transportation).

98. *See supra* text accompanying notes 47-52.

99. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 101-231, 110 Stat. 347 (codified at 5 U.S.C. § 552).

100. H.R. REP. NO. 104-795, at 11 (1996).

101. 5 U.S.C. § 552(a)(2)(D) (2012).

102. *Id.*

is particularly important because of the “requester-driven” nature of FOIA.¹⁰³ Without the publication of frequently requested records, FOIA requesters would not know that the information has already been released and would ask for the same records over and over again, wasting their own time and resources (and those of the agency). The second innovation of E-FOIA is a requirement that agencies “make reasonable efforts” to maintain and release records in electronic formats,¹⁰⁴ thus preparing the ground for a full digitalization of FOIA requests.¹⁰⁵ Lastly, E-FOIA seeks to overturn “[t]he three-decade long history of agency delay in processing requests for records,”¹⁰⁶ requiring an expedited processing in cases where the requester “demonstrates a compelling need.”¹⁰⁷

The public accountability premises of these provisions are intuitive: E-FOIA compels agencies to provide civil society with better and more accessible information on their decisions and activities, according to public needs and interests. But even though E-FOIA was intended to be easily implemented, agencies have “by and large failed to comply with E-FOIA’s affirmative disclosure mandate.”¹⁰⁸ A survey conducted ten years after E-FOIA came into force found “massive non-compliance” among 149 administrative agencies.¹⁰⁹ Only twenty-one percent of the surveyed agencies had on their websites all four categories of records (even if only partially),¹¹⁰ and more than forty percent of agencies had not posted even one frequently requested record.¹¹¹ Agencies are still

103. For a discussion of the “requester-driven” nature of FOIA, see *supra* text accompanying notes 47-52.

104. 5 U.S.C. § 552(a)(3)(B)-(C).

105. This amendment was necessary as agencies tended to print out “boxes of listings and charge[] thousands of dollars for the paper.” *The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 81-82 (2011) (statement of Sarah Cohen, Knight Professor of the Practice of Journalism, Duke University) [hereinafter *Cohen Testimony*].

106. Mark H. Grunewald, *E-FOIA and the “Mother of All Complaints:” Information Delivery and Delay Reduction*, 50 ADMIN. L. REV. 345, 345 (1998). E-FOIA aimed to “tackle the mother of all complaints lodged against the Freedom of Information Act: that is, the often ludicrous amount of time it takes some agencies to respond, if they respond at all, to freedom of information requests.” 142 CONG. REC. H10,451 (daily ed. Sep. 17, 1996) (statement of Rep. Horn).

107. 5 U.S.C. § 552(a)(6)(E)(i)(I).

108. Vladeck, *supra* note 40, at 1789.

109. *File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent*, NAT’L SEC. ARCHIVE 1 (2007), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/e-foia_audit_brief.pdf.

110. *Id.* at 7-9.

111. *Id.* at 9.

reluctant to provide records in open data formats.¹¹² Moreover, even agencies that do publish some of their frequently requested records online often have no centralized location to host them, making navigation of their websites time consuming and cumbersome.¹¹³ The public accountability pillars of E-FOIA, therefore, remain weak.

The Department of Justice, which is responsible for FOIA's implementation, sought to solve some of these problems by employing a different online tool. In March 2011, it inaugurated FOIA.gov—a web portal that compiles agencies' annual FOIA reports into a customizable and searchable database. The goals of the website are twofold. First, it displays a variety of statistics on agencies' performance under FOIA.¹¹⁴ This endeavor follows a “naming and shaming” logic, which is typical of mandatory transparency: encouraging agencies to do well by making information about their performance accessible to all who are interested. Second, the website pursues educational goals. It provides public guidance on the FOIA process and helps individuals prepare their own FOIA requests—a function that apparently aims to diminish the need for professional intermediaries that are typically responsible for the majority of FOIA requests.

It is still too early to assess the long-term effects of FOIA.gov on FOIA implementation. Time will show to what extent its “naming and shaming” mechanism improves agencies' responsiveness to FOIA requests, and whether the public takes advantage of the guidance and explanations available on the website. However, given the difficult history of FOIA implementation, “naming and shaming” alone is not likely to overcome agencies' natural resistance to information disclosure. Stronger enforcement measures and a lower threshold for information requests are therefore required to fulfill the potential of E-FOIA and make its transparency provisions genuinely mandatory.

3. Online Federal Spending

Online transparency policies have also been adopted as a vehicle for a more accountable spending management. However, as with the examples of online notice and comment and E-FOIA, efforts to disclose information on federal spending have not necessarily led to improved public accountability. Each year federal agencies disburse over a trillion dollars in “contracts, loans, grants, and

112. See *Cohen Testimony*, *supra* note 105, at 82 (“Most requests for correspondence and other documents are fulfilled by printing them, redacting, then re-scanning into unsearchable images.”).

113. *Id.*

114. The website features charts and graphs that allow users to compare the FOIA performance of different agencies, view the backlog of unanswered requests, examine exemptions utilized by agencies, and more. See FOIA.gov, <http://www.foia.gov> (last visited Dec. 12, 2012).

other awards” to governmental and private entities.¹¹⁵ The spectacular amount of federal funds funneled to private parties shapes the economy and deeply affects society.¹¹⁶ As the privatization of governmental functions has expanded in the past decades, scholars have warned about the lack of accountability of federal contractors and grantees.¹¹⁷ Federal spending has therefore been perceived as an important target for the open government movement. Pursuing the logic that transparency promotes accountability, the assumption has been that agencies would be reluctant to fund wasteful and unnecessary projects if the details of their spending decisions are available online for all to inspect.¹¹⁸ The next pages discuss two online transparency policies that target federal spending and examine their effect on the public accountability of federal government.

The E-Government Act of 2002 represents the first major attempt to infuse transparency into federal spending by placing spending data online. It required OMB to launch a website with relatively limited information on governmental funds invested in research and development projects.¹¹⁹ Building on this framework, the Federal Funding Accountability and Transparency Act of 2006 (FFATA)¹²⁰ took an ambitious leap forward, aiming to “increase the transparency . . . and accountability” of federal disbursements¹²¹ and thus reduce wasteful and unnecessary spending.¹²² In pursuit of this goal, the Act instructed the OMB to create a website that provides public access to general information about federal grants, loans, and contracts.¹²³ The website, named USASpend-

115. *Electronic Government: Implementation of the Federal Funding Accountability and Transparency Act of 2006*, U.S. GOV'T ACCOUNTABILITY OFFICE 1 (2010), <http://www.gao.gov/new.items/d10365.pdf> [hereinafter *GAO FFATA*].

116. See, e.g., Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 159-72 (2011) (discussing the distributive implications of federal spending).

117. See, e.g., GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009); Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1304 (2003) (“[P]rivatization may enable government to avoid its traditional legal obligations, leading to an erosion of public law norms and a systematic failure of public accountability.”).

118. See Nina A. Mendelson, *Six Simple Steps To Increase Contractor Accountability*, in GOVERNMENT BY CONTRACT 241, 241 (Jody Freeman & Martha Minow eds., 2009).

119. Pub. L. No. 107-347, 116 Stat. 2899 (2002).

120. Pub. L. No. 109-282, 120 Stat. 1186 (2006) (codified at 31 U.S.C. § 6101 (2012)).

121. *GAO FFATA*, *supra* note 115, at 1.

122. See Garrett L. Hatch, *The Federal Accountability and Transparency Act: Implementation and Proposed Amendments*, CON. RESEARCH SERV. 1 (2008), <http://www.fas.org/sgp/crs/secretary/RL34718.pdf>.

123. The following information on each award is required: the name and location of the recipient, the amount of the award, its purpose, and any other information specified by OMB. 31 U.S.C. § 6101.

ing.gov, was launched in December 2007, aiming to enable civil society to “easily determine how much money was given to which organizations, and for what purposes.”¹²⁴ The website currently contains data on entities directly funded by federal agencies, as well as subcontractors and subgrantees of federal funds recipients.¹²⁵ It allows searches by several data fields—entity, type and amount of award, location, and the like—and shows the total amount of funds granted to an entity in each fiscal year.¹²⁶

The recent economic recession provided more opportunities for experimentation with online spending transparency. In response to the deepening economic crisis of 2009, the Obama Administration enacted a stimulus bill titled the American Recovery and Reinvestment Act.¹²⁷ The Act sought to create jobs and offer assistance to those who were most harmed by the recession.¹²⁸ Its estimated cost was \$862 billion.¹²⁹ This unprecedented expenditure of federal funds was accompanied by a promise that “[a] historic level of transparency, oversight and accountability will help guarantee taxpayer dollars are spent wisely and Americans can see results for their investment.”¹³⁰ Following the model of USA Spending.gov, the Act mandated the creation of a website where the public can access all stimulus spending records and ensure that “the economic recovery package is fully transparent and accountable to the American people.”¹³¹

Recovery.gov—launched in September 2009—indeed contains abundant data about stimulus funds: the amount of the reported award, its general purpose and precise location, the number of jobs created or retained by the award,

124. Hatch, *supra* note 122, at 1.

125. 31 U.S.C. § 6101. As federal funds are often allocated to large governmental recipients (for example, state agencies or cities) that further disburse the funds to private contractors, this system enables the monitoring of the flow of funds from the federal government to the ground level.

126. *Id.*

127. Pub. L. No. 111-5, 123 Stat. 115 (2009).

128. For a general overview of the Act’s provisions, see Johnson, *supra* note 116, at 172-79.

129. *Recovery Act: Increasing the Public’s Understanding of What Funds Are Being Spent on and What Outcomes Are Expected*, U.S. GOV’T ACCOUNTABILITY OFFICE 1 (2010), <http://www.gao.gov/new.items/d10581.pdf> [hereinafter *GAO Recovery Act*].

130. *Id.* at 1 (citing the House Appropriations Committee).

131. *GAO Recovery Act*, *supra* note 129, at 8 (quoting the Obama Administration’s pledge). Additionally, the Act establishes the Recovery Accountability and Transparency Board to directly oversee the disbursement of the funds and the reporting requirements. See *The Recovery Accountability and Transparency Board*, RECOVERY.GOV, <http://www.recovery.gov/About/board/Pages/TheBoard.aspx> (last visited Oct. 23, 2012).

and more.¹³² The website offers a wide variety of custom search and visualization options, including the capacity to “track the money” to the street level and view which organizations in a certain zip code receive federal funds and for what purpose, compare recipients in different states, or examine agencies’ and recipients’ statistics for job creation.¹³³

Contrary to online initiatives like e-rulemaking or E-FOIA, which sought to digitalize existing offline policies, the FFATA and the Recovery Act introduce a new transparency mechanism that would not have been possible without the Internet. These efforts are therefore particularly illustrative of the existing regulatory vision of online transparency. Indeed, public officials have applauded this approach to online transparency, declaring that Recovery.gov will provide an “unprecedented level of transparency into how Federal dollars are being spent and will help drive accountability for the timely and effective spending of recovery dollars.”¹³⁴ The reality is more complex.

Both USAspending.gov and Recovery.gov have been criticized for their lack of accuracy. The case was more severe for USAspending.gov: in March 2008, the OMB admitted that “the data submitted for posting to [the website] in the past has been incomplete, untimely, and inaccurate.”¹³⁵ Two years later, in March 2010, the Government Accountability Office (GAO) reported that the situation was still worrisome.¹³⁶ ClearSpending.com, an online tool developed by the Sunlight Foundation, demonstrated that USAspending.gov has “over 1.2 trillion dollars’ worth of misreported spending in 2009 alone.”¹³⁷ And although the information on Recovery.gov was more accurate than that on USAspending.gov, it was still imperfect.¹³⁸ There is no doubt that grave data inaccuracies considerably impair the potential of federal spending transparency projects. However,

132. GAO *Recovery Act*, *supra* note 129, at 10-11.

133. RECOVERY.GOV, <http://www.recovery.gov> (last visited Oct. 23, 2012).

134. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads of Dep’ts & Agencies 1 (June 22, 2009), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-21.pdf.

135. Memorandum from Robert Shea, Assoc. Dir., Office of Mgmt. & Budget, to Fed. Agencies 3 (Mar. 6, 2008), <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2008/m08-12.pdf>.

136. See GAO *FFATA*, *supra* note 115.

137. *Transparency Through Technology: Evaluating Federal Open-Government Initiatives: Hearing Before the Subcomm. on Tech. of the H. Comm. on Gov’t Reform and Oversight*, 112th Cong. 3 (2011) (statement of Ellen Miller, Co-founder and Executive Director, Sunlight Foundation), http://www.oversight.house.gov/wp-content/uploads/2012/01/Miller_Testimony-Bio-TNT_3-11-11.pdf.

138. GAO *Recovery Act*, *supra* note 129, at 8; see *Recovery Act: One Year Later, States’ and Localities’ Uses of Funds and Opportunities to Strengthen Accountability*, U.S. GOV’T ACCOUNTABILITY OFFICE (2010), <http://www.gao.gov/new.items/d10437.pdf>.

these problems can ultimately be solved by better procedures for data collection and validation.¹³⁹

The weaknesses of USAspending.gov and Recovery.gov are deeper than their potential inaccuracies. A larger problem has been a lack of context for the released data. The voluminous spending details available on the websites represent a relatively random part of the entire federal spending chain. These bits and pieces can hardly contribute to public accountability. In order to assess agencies' spending decisions, one would have to know at least some of the reasons that underlie their awards. What criteria guided agencies in their award decisions? What were their funding priorities? How were the bids, if any, conducted? What was the decisionmaking procedure for stimulus contracts, loans, and awards? This information is vital for any sensible assessment of federal spending, but none of it is publicly available.¹⁴⁰ A transparency regime that seeks to make this information available would have to require agencies to release targeted information about their decisionmaking processes and their performance. Such information would contain answers to the questions of how and why a certain decision to allocate funds was made, what were its alternatives, and what are the results of this decision on the ground.¹⁴¹

Furthermore, in order to determine whether an award or earmark is wasteful or valuable, the data available on USAspending.gov—a one-sentence description of the award coupled with the name of its recipient—cannot possibly suffice. For instance, what should the public make out of a contract for \$20 million between the Department of Commerce and a corporation named Industrial Economics for “continued support for the Deepwater Horizon oil spill”?¹⁴² How could civil society meaningfully assess a contract of the Department of Defense with Lockheed Martin Corporation for \$817 million accompanied by the description “incremental funding”?¹⁴³ These two reports, drawn from

139. One possible strategy is to place online the spending of the Treasury Department and compare it to the reports filed by agencies and recipients. See *Achieving Transparency and Accountability in Federal Spending: Hearing Before the H. Comm. on Oversight and Gov't*, 112th Cong. 6 (2011) (statement of Craig Jennings, Director of Federal Fiscal Policy, OMB Watch), http://www.oversight.house.gov/wp-content/uploads/2012/01/6-14-11_Jennings_Testimony.pdf.

140. See Raymond Yee, Eric C. Kensa & Erik Wilde, *Improving Federal Spending Transparency: Lessons Drawn from Recovery.gov*, U.C. BERKELEY SCH. OF INFO. REPORT 5 (2010), <http://dret.net/netdret/docs/wilde-irep10-recovery-lessons.pdf> (noting that “[i]t is nearly impossible to know how actual spending patterns [on Recovery.gov] mapped to Congress’s wishes as expressed in the passed legislation”).

141. These suggestions are discussed at more length in Section III.A *supra*.

142. *Prime Award Spending Data*, USASPENDING.GOV, <http://www.usaspending.gov> (last visited Oct. 23, 2012) (search “Industrial Economics”; then sort results by “Dollars Obligation”; then locate entry for contract signed “10-21-2010” with “Obligation Amount” of “\$20,000,000”).

143. *Prime Award Spending Data*, USASPENDING.GOV, <http://www.usaspending.gov> (last visited Oct. 23, 2012) (search “Lockheed Martin Corporation”; then sort re-

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USAspending.gov, are exemplary of its general pitfall: even if data is timely and reliable, it does not fulfill the explanatory requirement of public accountability.

However, even if the beginning of the spending chain is obscure, transparency could be improved by providing information on the performance of federal funds recipients. But performance measurement is problematic under both the FFATA and the Recovery Act. The websites created under these Acts contain almost no information on the performance of federal contractors or grantees.¹⁴⁴ Moreover, the primary recipients of federal funds and their subcontractors or subgrantees are the only entities obliged to file reports. In many cases, this information is not sufficient to understand how federal funds were actually spent. A typical example would be a federal agency that allocates funds to the State of Massachusetts for road construction. The state then allocates the funds to the city of Boston, and Boston then signs contracts with several construction firms that have their own subcontractors. While the state and the city are obliged to report the receipt of federal funds, the city's contractors and subcontractors are exempted from reporting obligations under the Recovery Act. The performance of those who actually execute the projects therefore remains obscure.

In sum, even when the accuracy of reports on the websites is perfect, the explanatory requirement of public accountability can be achieved only if the full chain of federal spending becomes available and understandable. The first part of this chain concerns how a decision to disburse funds is made, by whom, and to what purpose. The second part is information about recipients, amounts, and details of awards. The third part is performance data that allows assessment of the overall effectiveness of the funded projects. As only the second part of the chain is currently available to the public, the road to public accountability remains long. Thus, as with online notice and comment and E-FOIA, while agencies are obliged to release information about their spending, this mandatory transparency regime does not considerably contribute to public accountability, as the most relevant and important information often remains hidden from the public eye.

Policies of mandatory online transparency have been implemented by the federal government in three major fields: notice and comment, FOIA, and federal spending. The analysis above demonstrates that there is a single problem plaguing each of these fields: despite their stated objectives, none offers the public a meaningful explanation and justification of agencies' decisions and activities. The reason for this failure is not a conceptual inadequacy of mandatory transparency as a vehicle for public accountability. On the contrary, the failure

sults by "Dollars Obligation"; then locate entry for contract signed "11-13-2008" with "Obligation Amount" of "\$817,110,000").

144. The number of "created jobs" that is reported by recovery funds recipients is important, but not sufficient as the only measure for the evaluation of the Recovery Act. Not all funds expended on recovery projects directly create or retain jobs (infrastructure projects, for instance, also require payments for supplies, tools, or equipment), and it is not clear whether jobs are the right metric for performance.

is one of flawed design and implementation: transparency is either not sufficiently mandatory or not applicable to categories of information that meaningfully contribute to public accountability.

Online notice and comment and online FOIA are examples of the former. The legislation that obliges agencies to publish their dockets online took an expressly decentralized approach, thus allowing agencies to independently shape the scope and content of their regulatory dockets. Likewise, E-FOIA does not contain effective enforcement mechanisms. Because neither initiative imposes sanctions on noncompliant agencies or introduces other measures to compel them to proactively place records online, many agencies simply do not comply.

The case of federal spending transparency is a bit different. By and large, agencies and recipients of federal funds do comply with the provisions of the FFATA and the Recovery Act. The problem is that the Acts target information that cannot independently enhance the public accountability of federal agencies. Data on who receives federal funds and for what general purpose cannot suffice to assess agencies' decisionmaking. What is required to evaluate agencies' actions is the first part of the chain of federal spending (how spending decisions are made, by whom, and following what priorities) and the last one (the performance of federal contractors and grantees and the results they achieved).

One way or another, online transparency efforts inevitably succumb to agencies' resistance to disclose information. Taking advantage of flawed enforcement and design of regulatory policies, agencies avoid unwanted disclosures. The traditional barriers to the translation of transparency into public accountability remain intact. The potential of the Internet to change this distribution of power and tilt the balance in favor of meaningful transparency is therefore unfulfilled. This conclusion does not imply that mandatory transparency is inadequate as a means to achieving public accountability. It does suggest, however, that the institutional design of mandatory transparency policies should be reformed.

B. *Discretionary Transparency*

While mandatory transparency reflects the traditional approach to regulatory transparency policies, the Internet created opportunities for new transparency policy designs. This Section examines one of those new opportunities: discretionary transparency.

A discretionary transparency policy instructs agencies to publish information online, but leaves them the discretion to determine what exactly should be disclosed. As with mandatory transparency policies, this policy has not resulted in improved public accountability so far. Indeed, it comes as no surprise that, if agencies "are given unrestrained discretion to manage information access," then they will usually disclose "information that makes the administration look public spirited, effective, and efficient, but withhold information to the contrary."¹⁴⁵

145. Samaha, *supra* note 4, at 919; see Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, in GLOBALIZING

The Open Government Directive (OGD), issued in December 2009, aimed to implement the Open Government Memorandum signed by President Obama in January 2009.¹⁴⁶ Adopting a presumption in favor of openness and access, the Directive instructed agencies on how to “implement the principles of transparency, participation, and collaboration”—the cornerstones of the Memorandum.¹⁴⁷ The Directive’s major policy innovation is “discretionary transparency”: it instructs all federal agencies to release in an open format at least three “high-value” raw datasets that have not been previously published and to place them on the website Data.gov within specified deadlines.¹⁴⁸

The amorphous term “high-value datasets” encompasses a wide variety of information, according to agencies’ discretion.¹⁴⁹ Although the precise meaning of the term is not clear, it is clear that agencies are not required to expose their agendas, priorities, or decisionmaking processes. Nonetheless, public accountability is a major goal of the Directive. In fact, one of the architects of the OGD noted that the Directive “demonstrates the Administration’s commitment to hardwire accountability and drive[s] performance to restore the American people’s confidence in Government.”¹⁵⁰ Data.gov has indeed become the flagship of the Obama Administration’s transparency policy.

RIGHTS: THE OXFORD AMNESTY LECTURES 1999, at 115, 129-36 (Matthew J. Gibney ed., 2003); Christina E. Wells, “National Security” *Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1221 (2004).

146. See Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to the Heads of Exec. Dep’ts and Agencies (Dec. 8, 2009), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf [hereinafter Open Government Directive].
147. *Id.* at 1.
148. *Id.* at 7.
149. “High-value” datasets are defined as “information that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation.” *Id.* at 7-8.
150. *Data-Driven Performance: Using Technology to Deliver Results: Hearing Before the S. Budget Comm. Taskforce on Gov’t Performance*, 111th Cong. 1 (2009) (statement of Vivek Kundra, Federal Chief Information Officer, Administrator for Electronic Government & Information Technology, Office of Management & Budget), http://www.budget.senate.gov/democratic/index.cfm/files/serve?File_id=e5f9ca20-f09d-4afi-9325-1e3761f6f22b. Further guidance provided to federal agencies by the federal Chief Information Officers Council emphasized the accountability aspect of the datasets, explaining that “agencies have been asked to post datasets on Data.gov that increase government accountability by revealing the results and characteristics of government services to citizens; the public’s use of government services; the distribution of funds from the government; and demonstrable results from Federal programs” OFFICE OF E-GOV’T AND IT OFFICE OF MGMT. & BUDGET, FED. CHIEF INFO. OFFICERS COUNCIL, DATA.GOV CONCEPT OF OPERA-

By October 2012, federal agencies had posted nearly 400,000 datasets on the website, divided into three categories: raw (statistical and machine-readable) data, geospatial data (datasets containing spatial and geographic data), and tools that help develop applications based on the datasets.¹⁵¹ The White House seemed satisfied with the agencies' actions, granting most of them the top score of "meets expectations" on an online "scorecard" that tracked the fulfillment of the OGD requirements on the White House website.¹⁵² As agencies have the discretion to determine what information is placed on the website, the contents of the datasets are telling. Not surprisingly, they have little to do with public accountability.

The three leading departments in terms of dataset publication are the Census Bureau (responsible for nearly 240,000 datasets), the Geological Survey (responsible for nearly 125,000 datasets), and the National Oceanic and Atmospheric Administration (responsible for nearly 25,000 datasets).¹⁵³ More than 390,000 of these datasets are categorized as "geospatial data."¹⁵⁴ The remaining "raw" datasets mostly contain consumer-oriented information. For instance, datasets that White House officials labeled as "exemplary"¹⁵⁵ include ratings of "child safety seats" by the National Highway Traffic Safety Administration,¹⁵⁶ datasets containing "details behind automobile safety and crash ratings" by the Department of Transportation,¹⁵⁷ and Medicare information that previously required a payment.¹⁵⁸

TIONS DRAFT, VERSION 1.0, at 4-5 (2009), http://www.data.gov/documents/data_gov_conops_v1.0.pdf.

151. *Federal Agency Participation*, DATA.GOV, <http://www.data.gov/metric> (last visited Nov. 23, 2012).
152. *Around the Government*, OPEN GOVERNMENT INITIATIVE, <http://www.whitehouse.gov/open/around> (last visited Oct. 23, 2012).
153. DATA.GOV, *supra* note 151.
154. These datasets are arranged into several categories (for example, atmospheric and climatic, administrative and political boundaries, inland water resources, and transportation networks). Datasets include, for instance, the 2002 Average Monthly Sea Surface Temperature of California and multiple Census Tract Reference Maps for different U.S. counties. *See* DATA.GOV, <http://www.data.gov/geoportal/catalog/main/home.page> (last visited Dec. 12, 2012).
155. Vivek Kundra, *How "Open Gov" Datasets Affect Parents and Consumers*, OFFICE OF MGMT. & BUDGET (2010), <http://www.whitehouse.gov/blog/2010/01/23/why-open-gov-matters-you>.
156. *Child Seats: Ease of Use Ratings*, NHTSA, <http://www.nhtsa.gov/Safety/Ease-of-Use> (last visited Oct. 23, 2012).
157. SAFERCAR.GOV, <http://www.safercar.gov> (last visited Oct. 23, 2012).
158. Kundra, *supra* note 155.

Datasets that reveal information on the decisions and performance of administrative agencies themselves—ones that could legitimately contribute to the public accountability of agencies—are largely absent from Data.gov.

This weak performance of Data.gov on the public accountability front can be explained by the political context and roots of this initiative. The vision underlying Data.gov and the discretionary transparency model is straightforward: agencies should release raw data according to their discretion, and positive results will follow. Because agencies cannot know *ex ante* how their datasets might be helpful to the public, they should simply publish them in a raw and open format and wait for the public to decide how to use them and for what purposes. The basic assumption is that private developers and programmers will access the data and develop applications that analyze and visualize the datasets that interest them. As the discussion below demonstrates, this approach is rooted in a new concept of innovative production. Such an approach, however, is not necessarily appropriate for the political realm.

This vision of regulatory transparency derives from the principle of “crowdsourcing”—a novel model of distributed production and problem solving. Crowdsourcing refers to a situation in which an organization distributes a request to help with a large task across a broad online network.¹⁵⁹ There is no limit on the number of contributors and the work is “granular”—broken into small and discrete tasks. Participants are not primarily motivated by money and contribute their efforts in their leisure time.¹⁶⁰

The crowdsourcing model was first championed as an effective strategy for open-source peer production.¹⁶¹ The basis of this theory is that “users of products and services . . . are increasingly able to innovate for themselves. User-centered innovation processes offer great advantages over the manufacturer-centric innovation development systems that have been the mainstay of commerce for hundreds of years.”¹⁶² Empirical studies suggest that in many industries consumers are indeed the originators of the most helpful innovations.¹⁶³ According to this theory, consumers are well positioned to innovate, as their needs and preferences may change well before manufacturers realize it. This innovation process has been dubbed “democratizing” because “users that innovate can develop exactly what they want, rather than relying on manufac-

159. See Jeff Howe, *The Rise of Crowdsourcing*, WIRED, http://www.wired.com/wired/archive/14.06/crowds_pr.html (last visited Dec. 12, 2012).

160. See JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS 28-29, 62-63 (2008).

161. See *id.*

162. ERIC VON HIPPEL, DEMOCRATIZING INNOVATION 1 (2005); see BENKLER, *supra* note 60, at 91-132; Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002); Karim R. Lakhani & Jill A. Panetta, *The Principles of Distributed Innovation*, 2 INNOVATIONS: TECH., GOVERNANCE, GLOBALIZATION 97 (2007).

163. See VON HIPPEL, *supra* note 162; Lakhani & Panetta, *supra* note 162.

turers. . . . Moreover, individual users . . . can benefit from innovations developed and freely shared by others.”¹⁶⁴

Inspired by this revolutionary perception of economic production, the drafters of the OGD have applied this theory to the domain of government.¹⁶⁵ This course of action is exemplified by Tim O’Reilly, a renowned open-source activist, who suggests treating government as a platform for innovation, or a bazaar where “the community itself exchanges goods and services.”¹⁶⁶ O’Reilly explains that as a platform provider, the goal of government is to create “core applications that demonstrate the power of the platform and inspire outside developers to push the platform even further.”¹⁶⁷ Online transparency in this context has nothing to do with public accountability. Rather, it serves as a tool to collaboratively develop socially useful applications. Indeed, following this logic, administrative agencies developed applications that feature recalls of defective products,¹⁶⁸ real-time operating status for airports,¹⁶⁹ local daily air quality da-

164. VON HIPPEL, *supra* note 162, at 1. A fascinating question in this respect is what motivates users to take part in developing and sharing innovations without being paid. See YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN* (2011); BENKLER, *supra* note 60, at 92-99; Karim R. Lakhani & Eric von Hippel, *How Open Source Software Works: “Free” User-to-User Assistance*, 32 RES. POL’Y 923 (2003); Lakhani & Panetta, *supra* note 162, at 103-04; Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 50 J. INDUS. ECON. 197 (2002); Joel West & Karim R. Lakhani, *Getting Clear About Communities in Open Innovation*, 15 INDUSTRY & INNOVATION 223 (2008).

165. The first and most notable initiative of governmental crowdsourcing in the United States was implemented in Washington, D.C in 2008. Vivek Kundra, who was then the Chief Technology Officer of the District, placed online 428 datasets containing information on crime incidents and statistics, details on construction projects, vacant properties, and more. See DATA CATALOG, <http://data.octo.dc.gov> (last visited Oct. 23, 2012). His idea was to “democratize” this data: “individuals and organizations are not only viewing our government data, but are actually improving upon our work by analyzing and repurposing the information in useful ways.” Vivek Kundra, *Building the Digital Public Square*, APPS FOR DEMOCRACY (Oct. 15, 2008), <http://www.appsfordemocracy.org/building-the-digital-public-square>. Hence, the District of Columbia sponsored a contest, “Apps for Democracy,” which encouraged citizens to create and share open-source applications that integrate and visualize governmental data for various public purposes. *Id.* For an analysis of this initiative, see Shkabatur, *supra* note 60, at 1450-55.

166. Tim O’Reilly, *Government as a Platform*, in OPEN GOVERNMENT: COLLABORATION, TRANSPARENCY, AND PARTICIPATION IN PRACTICE 11, 13 (Daniel Lathrop & Laurel Ruma eds., 2010). The bazaar metaphor is borrowed from Eric Raymond’s influential manifesto on open-source programming. ERIC RAYMOND, *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* (2001).

167. O’Reilly, *supra* note 166, at 36.

168. RECALLS.GOV, <http://www.recalls.gov> (last visited Oct. 23, 2012).

169. FLYONTIME.US, <http://www.flyontime.us> (last visited Oct. 23, 2012).

ta,¹⁷⁰ weekly reports on fatalities and catastrophes from OSHA,¹⁷¹ and more.¹⁷² In line with the open-source production philosophy, Data.gov offers a platform for experimentation and innovation, while agencies lead by example, developing applications with useful consumer information and encouraging private developers to join in and create their own applications and mash-ups.¹⁷³

Although agencies chose to release mostly consumer-oriented information on Data.gov, this does not mean that governmental crowdsourcing cannot succeed as a vehicle to increase public accountability. If agencies had been mandated to release datasets with information on their decisionmaking processes and performance, the concept of crowdsourcing could have been more impactful. However, as in the e-rulemaking initiative, a notable feature of the OGD is its decentralized approach. Instead of dictating standards of disclosure, it instructs agencies to develop their own “open government plan[s],” letting them decide what types of datasets would be released and what other steps would be taken to “improve transparency and integrate public participation and collaboration” into the agencies’ activities.¹⁷⁴ Moreover, the OGD does not place any sanctions on agencies that fail to fulfill the Directive’s requirements. Not surprisingly, this institutional design hardly persuades agencies to publish intrusive information about their own activities or decisions. Hence, while the decentralized approach can be beneficial in allowing agencies to tailor online transparency policies to their unique structure and capacity, its implementation in this case is problematic due to the broad discretion it grants.

A different accountability obstacle is the OGD’s policy to release raw datasets rather than contextualized information. In line with O’Reilly’s metaphor of “government as a platform,” the OGD sought to prevent agencies from present-

170. AIR NOW, <http://www.airnow.gov> (last visited Oct. 23, 2012).

171. *Weekly Reports of Fatalities, Catastrophes, and Other Events*, OCCUPATIONAL SAFETY & HEALTH ADMIN., http://www.osha.gov/dep/fatcat/dep_fatcat.html (last visited Oct. 23, 2012).

172. *Open Government Highlights*, THE WHITE HOUSE, <http://www.whitehouse.gov/open/highlights> (last visited Oct. 23, 2012).

173. A “mash-up” means a “creative combination or mixing of content from different sources.” *Mash-up Definition*, DICTIONARY.COM, <http://www.dictionary.reference.com/browse/mash+up?s=t> (last visited Oct. 23, 2012). While the OGD did not provide agencies with incentives to release sensitive information, it did pay attention to incentives given to the public to tinker with the data, offering contests and prizes. See Memorandum from Jeffrey D. Zients, Deputy Dir. for Mgmt., Exec. Office of the President, to the Heads of Exec. Dep’ts and Agencies (Mar. 8, 2010), http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-11.pdf.

174. Open Government Directive, *supra* note 146; see *Data-Driven Performance: Using Technology To Deliver Results: Hearing Before the S. Budget Comm. Taskforce on Gov’t Performance*, 111th Cong. (2009) (statement of Aneesh Chopra, Chief Technology Officer and Associate Director for Technology, Office of Science & Technology Policy), http://www.budget.senate.gov/democratic/index.cfm/files/serve?File_id=40922c99-9613-46af-8169-2ae057e9da85.

ing regulatory information in a certain light or within a specific context, and instead aimed to convey it to the public in its “naked” form—that is, in raw datasets.¹⁷⁵ This policy stems from the desire to achieve neutrality, but neutrality is hardly possible if agencies are allowed to decide what raw data they release.

A second, related problem is distributive in nature. While a major goal of the open government enterprise is to make governmental information easily accessible to the general public, Data.gov does not necessarily lower the access threshold. Professional intermediaries have to develop mash-ups and applications in order to bridge the raw datasets and the interested public. Data.gov therefore generates a bias of access—or a “data divide”—in favor of established organizations and individuals with programming skills.¹⁷⁶ In some cases, these organizations and individuals will strive to unveil information that sheds light on agencies’ activities and contributes to public accountability. It is, however, risky to base a transparency policy on the probability that these organizations and individuals will timely intervene to make raw datasets accessible to the general public.

The White House emphasized that Data.gov will “increase agency accountability . . . and change the default setting of Washington to be open, transparent and participatory.”¹⁷⁷ But a closer look reveals that the enthusiasm about “government as a platform” has little to do with improved public accountability of administrative agencies. Discretionary transparency as a vehicle for public accountability therefore seems misplaced. In the end, discretionary transparency has failed to overcome the traditional challenges of regulatory openness. Since agencies are the ones who shape their disclosure policies in the first place, no measures are taken against agencies’ tendency to avoid unwanted disclosures. Moreover, barriers of access to information become higher as information is released in the form of raw datasets that only professional intermediaries can decipher.

175. Karim R. Lakhani, Robert D. Austin & Yumi Yi, *Data.gov 7* (2010), http://www.data.gov/sites/default/files/attachments/hbs_datagov_case_study.pdf (Harvard Business School Case Study).

176. See Michael B. Gurstein, *Open Data: Empowering the Empowered or Effective Data Use for Everyone*, FIRST MONDAY (Feb. 7, 2011), <http://www.firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fmarticle/view/3316/2764> (discussing various issues related to the data divide).

177. Kundra, *supra* note 155; see also *Data.gov Concept of Operations*, OFFICE OF E-GOV’T & IT & OFFICE OF MGMT. & BUDGET 4 (2009), http://www.data.gov/sites/default/files/attachments/data_gov_conops_v1.o.pdf (explaining that Data.gov aims at “[i]ncreasing the ability of the public to discover, understand, and use the stores of government data to increase government accountability and unlock additional economic and social value”).

C. *Involuntary Transparency*

An agency's transparency policy is not determined exclusively by decisions as to what information should be available in the public domain. Transparency policies are also shaped by the agency's reaction to leaks of classified or otherwise restricted information. I call this regime involuntary transparency.

Whistleblowers—the primary source of involuntary transparency—can be an important driver of public accountability, functioning as an external and independent check on agencies' behavior. As the recent Wikileaks controversy demonstrates, the Internet now plays an unprecedented role in fostering such involuntary disclosures and in lighting up the dark corners of regulatory decisionmaking.¹⁷⁸ While mechanisms of involuntary transparency should be used with caution and without obstructing administrative decisionmaking, their potential to reveal abuses and malfunctions should not be underestimated. Nonetheless, in practice, federal whistleblowers are hardly praised.

The treatment of governmental whistleblowers and Wikileaks is telling in this respect. As a presidential candidate, Barack Obama expressed avid support for whistleblowers. In his campaign's "Ethics Agenda," he referred to "government employee[s] committed to public integrity and willing to speak out" as being one of "the best source[s] of information about waste, fraud, and abuse in government."¹⁷⁹ He promised to strengthen whistleblower laws to protect federal employees who expose administrative wrongs and ensure that whistleblowers' claims are expeditiously reviewed by the authorities.¹⁸⁰ These promises, however, have not been realized. While the Obama Administration initiated an ambitious effort to declassify governmental records,¹⁸¹ the Administration's treatment of whistleblowers has been far less favorable.

The most dramatic example of this tendency has been the Obama Administration's "unprecedented crackdown on leaks."¹⁸² Unauthorized disclosures of information to the media have thus far triggered criminal charges under the Espionage Act of 1917 in five cases during the Obama Administration, compared

178. See Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011).

179. *The Obama-Biden Plan*, CHANGE.GOV, http://www.change.gov/agenda/ethics_agenda (last visited Oct. 23, 2012).

180. *Id.*

181. See Classified Information and Controlled Unclassified Information: Memorandum from the President to the Heads of Exec. Dep'ts and Agencies, 74 Fed. Reg. 26,277 (June 1, 2009). The memorandum requires establishing a National Declassification Center in order "to perform collaborative declassification review," develop "[e]ffective measures to address the problem of over classification," and "facilitate greater sharing of classified information among appropriate parties." *Id.*

182. Scott Shane, *U.S. Pressing Its Crackdown Against Leaks*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/us/politics/18leak.html>; see also Jane Mayer, *The Secret Sharer*, NEW YORKER, May 23, 2011, at 46.

with only three cases “under all previous Administrations combined.”¹⁸³ Notorious for its vagueness, breadth, and confusing language,¹⁸⁴ the Act remains on the books but had scarcely been used by previous administrations. The excessive reliance on the Espionage Act in order to prosecute federal whistleblowers is alarming.¹⁸⁵ According to its plain language, the Act can apply “to a media entity or reporter who obtains, retains, or publishes national defense information,”¹⁸⁶ thus threatening to impose criminal sanctions on news organizations. As the Act was developed during “one of the most fiercely repressive periods in American history,”¹⁸⁷ its renaissance in recent years has been dubbed “a remarkable exercise in historical amnesia.”¹⁸⁸

The Espionage Act is the harshest measure taken against whistleblowers, but it is by no means the only one. The Obama Administration’s crackdown on leaks has also defined the President’s legislative strategy on two recent proposals. The first of these was the Free Flow of Information Act,¹⁸⁹ which sought to protect the confidentiality of journalistic sources by imposing on the executive the burden to prove that their disclosure was necessary to prevent significant harm to national security.¹⁹⁰ Although then-Senator Obama was one of the sponsors of the bill in 2007, President Obama later “objected to the scope of the privilege envisioned by the bill” and requested an amendment to “require judges to defer to executive branch judgments.”¹⁹¹ The Whistleblower Protec-

183. Shane, *supra* note 182.

184. See, e.g., Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973); Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 264 (2008) (noting that “[t]he potential breadth and scope of the various provisions of the current Espionage Act are staggering”).

185. For a review of measures other than the Espionage Act that can be taken against whistleblowers, see Papandrea, *supra* note 184, at 245-48.

186. *Id.* at 264. Section 793 of the Act prohibits individuals from gathering, transmitting, or receiving defense information with the intent or reason to believe it will be used against the United States or to the benefit of a foreign nation. 18 U.S.C. § 793 (2000). Individuals who possess defense information—either lawfully or not—and have reason to believe that it can be used to harm national security are prohibited from disclosing this information to persons who are not authorized to possess it. *Id.* § 793(e).

187. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 153 (2004).

188. *Id.* at 337.

189. S. 2035, 110th Cong. (2007), <http://www.govtrack.us/congress/bills/110/s2035>.

190. *Id.* § 5. See generally Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81, 100 (2012) (explaining context of statute).

191. Stone, *supra* note 190, at 100.

tion Enhancement Act¹⁹² presents a similar example. This legislation, which enjoyed broad bipartisan support, aimed to protect several categories of federal employees who report information of public concern to Congress or the media. But because the Obama Administration “has not taken any significant steps toward strengthening whistleblower protections,” the “bill still languishes in committee.”¹⁹³

President Obama’s antiwhistleblowing record is puzzling given his campaign promises and his general transparency pedigree. One possible explanation might be what Geoffrey Stone calls the “trust us” approach, where “[t]hose in power are always certain that they themselves will act reasonably . . . [and] therefore resist limitations on their own discretion.”¹⁹⁴ This reasoning is certainly plausible, but there might be more to the story. In fact, the current presidential administration has been the first to confront the transformative effects of technology on governmental whistleblowing: the Internet has made it easier than ever to leak massive amounts of information, but harder than ever to expose whistleblowers.

Wikileaks is the most famous example of this new reality. Wikileaks defines itself as “a not-for-profit media organization” dedicated to “bring[ing] important news and information to the public.”¹⁹⁵ The organization owes much of its success to the efficacy of its technological strategy—it offers a secure and anonymous channel for individuals around the world to leak information “of ethical, political and historical significance.”¹⁹⁶ Because the identity of Wikileaks’s sources is kept hidden, the website promises to provide “a universal way for the revealing of suppressed and censored injustices.”¹⁹⁷

After information is anonymously leaked to Wikileaks, there are two strategic venues for its release. From 2006 to 2010, Wikileaks published the information on its own website and invited the general public to inspect and analyze it. Using this strategy, Wikileaks brought to light information on extrajudicial killings in Kenya, evidence of an assassination plot in Somalia, a membership list of the far right British National Party, and other documents pertaining to the public and private sectors.¹⁹⁸ After 2010, Wikileaks began to coordinate with major mainstream news organizations such as *The Guardian*, *The New York Times*, *Der Spiegel*, and *Le Monde*. In particular, Wikileaks partnered with these

192. Whistleblower Protection Enhancement Act, S. 372, 111th Cong. (2010), <http://www.gpo.gov/fdsys/pkg/BILLS-111s372es/pdf/BILLS-111s372es.pdf>; H.R. 1507, 111th Cong. (2009), <http://www.gpo.gov/fdsys/pkg/BILLS-111hr1507ih/pdf/BILLS-111hr1507ih.pdf>.

193. Stone, *supra* note 190, at 99.

194. *Id.* at 101.

195. WIKILEAKS, <http://www.wikileaks.fdn.fr>.

196. *Id.*

197. *Id.*

198. Benkler, *supra* note 178, at 315-17.

organizations to release its most controversial troves: a cache of 77,000 Afghan war logs,¹⁹⁹ 400,000 field reports from the Iraq war,²⁰⁰ and highlights from 250,000 American embassy cables.²⁰¹

This last set of disclosures sent the American executive branch into turmoil. After losing control of classified information, it launched a “multi-system attack”²⁰² against the organization. This attack included efforts to link Wikileaks to the war on terror,²⁰³ misrepresenting Wikileaks’s activities,²⁰⁴ initiating legal investigations, threatening to charge its founder under the Espionage Act,²⁰⁵ and pressing private service providers such as Amazon and PayPal to cease working with the organization.²⁰⁶

Wikileaks and other groups that follow in its footsteps signify the beginning of a new era of governmental whistleblowing.²⁰⁷ Anonymous, the online network of hackers, represents another prime example of this phenomenon.²⁰⁸ As technology has made leaks easier and made identifying the actual whistleblower harder, the Obama Administration has attempted to strengthen deterrence. Given the existing legal framework, legal sanctions must target the whistleblower; once information is leaked, “[t]he government has little authority to stop the press from publishing whatever it can find out.”²⁰⁹ While the First Amendment does not grant substantial protection to whistleblowers, it does protect “those who receive that information and then broadcast it.”²¹⁰ The Obama Administration’s war against leaks can therefore be understood as a response to the new whistleblowing reality created by the Internet.

199. *Id.* at 324.

200. *Id.* at 325.

201. *Id.* at 327-30.

202. *Id.* at 330.

203. *Id.* at 331-33.

204. *Id.* at 333-36.

205. *Id.* at 337-38.

206. *Id.* at 339-42.

207. *Id.* at 376-79, 393-96.

208. Anonymous launches coordinated Distributed Denial of Service (DDoS) attacks against firms, organizations, and governmental entities as an act of protest. For a comprehensive discussion of Anonymous, see Yochai Benkler, *Hacks of Valor*, FOREIGN AFF. (Apr. 4, 2012), <http://www.foreignaffairs.com/articles/137382/Yochai-benkler/hacks-of-valor>.

209. Pozen, *supra* note 51, at 283; see *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); see Benkler, *supra* note 178, at 351-65; Kreimer, *supra* note 49, at 1034-35; Stone, *supra* note 190, at 91-95.

210. Pozen, *supra* note 51, at 283.

This hostility towards whistleblowers is worrisome. Leaks can play an important role in agencies' public accountability. Agencies, fearful that information might leak, might be less likely to engage in dubious activities. Relaxing whistleblower protections might therefore obstruct this valuable accountability mechanism.

D. Transparency Without Accountability

The previous Sections surveyed the three major regimes of online transparency. These regimes are typically considered effective vehicles for public accountability and are enthusiastically commended by many advocates of open government. Criticism of these policies usually focuses on technical problems, such as data quality and reporting accuracy. Although these concerns are legitimate, this Article addresses a different and deeper problem: namely, that while the existing design of online policies may lead to more transparency, it does not (and cannot) lead to better public accountability.

Regulatory transparency is supposed to compel agencies to publicly explain and justify their activities. However, in practice, explanations and justifications are largely absent. The age of the Internet has not changed agencies' ability to escape public scrutiny by carefully avoiding unwanted online disclosures.

The disconnect between transparency and accountability stems from two structural flaws of current online transparency policies: (1) the fact that agencies are allowed to retain control over regulatory information, and (2) the high threshold of access to online information.

First, agencies have large discretion to determine the scope of their information disclosures. Because the current architecture of online transparency policies is highly decentralized, it allows agencies to design and implement their own transparency schemes, determining their depth and breadth. Given this discretion, agencies naturally refrain from disclosing potentially sensitive or embarrassing information about their own activities. Instead, they release general information about the regulated field or generalized data that covers regulated entities.

This tendency is particularly evident within the discretionary transparency model. Here, agencies are obligated to disclose information, but are given only vague guidance about what information should be disclosed. Thus, agencies provide the public with a wide array of data that might be helpful for a variety of purposes, but generally has nothing to do with public accountability. Mandatory transparency policies are no different in this respect. Some of these policies are lax, permitting agencies to comply only partially or not at all (as in the case of E-FOIA). Other policies are overly decentralized, allowing agencies a relatively wide range of discretion to determine the types of information they publish online (as in the case of online notice and comment). Yet other policies simply target the wrong categories of information. Though they may achieve accurate reporting, these policies frequently fail to reveal information that would be necessary to assess agencies' decisions (as in the case of federal spending transparency). Bureaucratic reactions to instances of involuntary transpar-

ency follow a similar logic. Afraid of losing control over information, the executive branch has introduced harsh sanctions against whistleblowers, who represent a direct threat to agencies' monopoly over information. While these policies address a variety of regulatory matters, their common denominator is that they enable agencies to retain control over information and to refrain from unwanted disclosures.

As a result, the supply of the data published on governmental websites does not necessarily meet public demand. It is not clear who is served by the voluminous information available on agencies' websites, let alone how this information can improve public accountability. This problem is again most prevalent in the context of discretionary transparency. Agencies are not required to justify why they release certain datasets and not others. Nor are they required to explain to what extent their disclosure decisions satisfy actual public demands for information. This leads agencies to engage in costly releases of datasets in an attempt to follow the prescriptions of the OGD, without providing any indication as to whether and how this information is useful and to whom. Mandatory transparency suffers from similar flaws. As agencies develop their own e-rulemaking schemes, their decision as to the precise contents of their dockets does not necessarily reflect public needs. The FOIA memorandum did attempt to match public demands for information, requiring agencies to publish on their websites frequently requested records. However, this requirement was not accompanied by sanctions, and agencies largely ignored it.²¹¹ Lastly, agencies' resistance to match information supply with demand is exacerbated in cases of involuntary transparency. The "crackdown on leaks" by the Obama Administration attempts to skew the balance between what civil society seeks to reveal and what the government is willing to disclose in its own favor.

The second structural flaw of the current online transparency policies is limited access to regulatory information—a challenge that also plagued pre-Internet transparency policies. The premise of projects such as Data.gov, USAspending.gov, and Recovery.gov is that nongovernmental intermediaries can step in and translate the raw data for the general public. The ideal watchdog might be OMB Watch, Pro Publica, the Sunlight Foundation, or some other nonprofit organization with the public's interest at heart. The declared mission of these organizations is to provide investigative research and technological tools that expose and explain agencies' activities to the public. By employing specialists who can extract relevant information from datasets available on governmental websites and publish it in a contextualized, explanatory, and accessible manner, these organizations may make meaningful contributions to the fight for agency accountability.

The problem is that only a handful of public interest organizations can afford to render this type of help. In regulatory fields where such intermediaries are absent or less organized, public accountability will remain elusive. Hence, while the Internet lowers the cost of access to information, the form of the released information is problematic. Raw datasets inhibit the ability of a broad

211. See discussion *supra* Subsection II.A.2.

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array of individuals and civil society groups to effectively access and understand the released information. The current reliance on raw datasets that require professional processing and programming skills should therefore be reconsidered.

In sum, the current architecture of online transparency policies has not managed to avoid the two traditional pitfalls of transparency policies—barriers to information access and agencies’ resistance to exposure. Despite high hopes that the Internet would transform regulatory transparency and strengthen agencies’ accountability to the general public, the introduction of the Internet seems to have had only marginal effects. While the quantity of available regulatory information has exponentially increased, it has not translated into quality. A major reason for this failure is a flawed design of online transparency policies. As discussed above, these policies allow agencies to retain control over regulatory information, letting them decide what information will be released to the public, when, and in what form. Lacking agencies’ explanations and justifications for their priorities, decisionmaking processes, and performance, online transparency cannot (and does not) improve public accountability. In hopes of achieving true accountability, the next Part of this Article discusses how this regulatory reality can be reformed.

III. ALTERNATIVE ONLINE ARCHITECTURES: TRANSPARENCY WITH ACCOUNTABILITY

The core idea of the existing enterprise of online transparency is appealing in its simplicity: instruct agencies to place as much regulatory data as possible online and public accountability will improve. In a sense, the Internet is envisioned as an independent agent of change, embraced by agencies that strive to make their operations more transparent and accessible to the public.

The previous Parts demonstrated that, in reality, this vision has not been realized. Agencies do not easily accommodate transparency requirements. They do not strive to take advantage of the Internet to make regulatory information broadly accessible. Even if required to disclose information, agencies release data that may not independently improve public accountability. The role of the Internet in regulatory transparency policies should be understood as part of this context. In some cases, the networked capacity of the Internet is sufficiently powerful to generate new and relatively independent political structures.²¹² But the case of administrative agencies is different. Because agency resistance hinders the potential of the Internet to promote public accountability, the institutional design of online transparency policies should be more nuanced.

First, the content of online transparency policies—and not only the rhetoric that accompanies their implementation—should focus on agency accounta-

212. A prominent example of such an independent structure is Wikipedia. See JOSEPH MICHAEL REAGLE JR., *GOOD FAITH COLLABORATION: THE CULTURE OF WIKIPEDIA* (2010).

bility to the public. Rather than letting agencies disclose whatever data they choose, online transparency policies should require agencies to explain and justify their decisions. Further, regulatory information should be released in a form that allows multiple stakeholders—and not only the most professional public interest groups—to share, process, and publicize information that is pertinent to agencies' public accountability. Lastly, robust enforcement measures should be introduced to ensure that agencies follow their transparency obligations.

Second, more attention should be paid to the ways in which the Internet can help civil society groups to hold agencies accountable. The use of the Internet should be closely tied to the mechanisms civil society now uses to hold agencies accountable: litigation and public advocacy. The former triggers judicial oversight of administrative agencies; the latter relies on a broad array of legal, political, and social mechanisms that may eventually shift agencies' behavior. The Internet should be used to strengthen the ability of civil society to access and effectively utilize these mechanisms.

A. *The Scope and Form of Regulatory Transparency*

A major pitfall of the current transparency architecture is that it largely allows agencies to decide what types of information should be placed in the public domain. A more nuanced design of online transparency policies can help solve this problem. This Part discusses three core components of this alternative institutional design: the scope of transparency policies, their intended audience, and improved enforcement measures.

1. Process and Performance Transparency

The APA requires federal agencies to publish in the *Federal Register* descriptions of their structure and organization, statements of general policy, rules of procedure, and substantive rules of general applicability, along with amendments, interpretations, and guidance documents.²¹³ Adjudicatory opinions, orders, statements of policy, and interpretations not published in the *Register* still have to be made "available for public inspection and copying."²¹⁴ Agencies are obliged to release their proposed rules for public comments as part of the rulemaking process and to publish their final rules following the notice and comment procedure.²¹⁵ This voluminous amount of information, however, does not necessarily explain an agency's decision or allow the public to assess the soundness of the agency's reasoning.

This Section argues that the current focus of transparency policies should be altered. Since explanation and justification of agencies' activities are at the

213. 5 U.S.C. § 552(a)(1) (2012).

214. *Id.* § 552(a)(2).

215. 5 U.S.C. § 553(b)-(c).

core of public accountability, online transparency policies should compel agencies to release information on process and performance online. The next pages elaborate on these proposed principles, making the case for process and performance transparency as the hallmarks of an improved online transparency regime.

First, process transparency can considerably contribute to the public accountability of agencies. The existing policies of regulatory transparency focus mainly on the transparency of agencies' decisions, often leaving the input into those decisions hidden behind closed doors. A requirement of "process transparency," which targets the inputs flowing into regulatory decisionmaking, would be more effective. Shedding light on the regulatory process is necessary for several reasons. First, even if the resulting decision is socially optimal and desirable, "it may still be important in a democracy to understand whether it is the result of particular interest group pressure"²¹⁶ and what other regulatory alternatives are available. Second, process transparency may improve the quality of decisionmaking; indeed, "[t]he need to articulate public-regarding rationales requires participants to move away from positions too obviously tailored to their self-interest"²¹⁷

These goals are, however, not easy to implement. FOIA explicitly exempts "inter-agency or intra-agency memorandums or letters" from disclosure,²¹⁸ thus entitling agencies to withhold internal deliberative and predecisional documents.²¹⁹ The exemption reflects the common law "deliberative process privilege," which aims to protect and facilitate genuine internal deliberations and prevent premature (and potentially confusing) publications of proposed policies.²²⁰ There is no doubt that "frank discussion of legal and policy matters is

216. VERMEULE, *supra* note 11, at 187.

217. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1291 (2001); *see also* Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY 97, 111 (Jon Elster ed., 1998) (noting that "the effect of an audience is to replace the language of interest by the language of reason and to replace impartial motives by passionate ones"); Staszewski, *supra* note 5, at 1279-84 (discussing the value of reason-giving by public officials).

218. 5 U.S.C. § 552(b)(5).

219. The exemption protects "decision making processes of government agencies and focus[es] on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citations and quotation marks omitted); *see also* Dowdle, *supra* note 3, at 8 (discussing the wide application of this exemption).

220. *See, e.g.*, 421 U.S. 132, 149-50; *Casad v. U.S. Dep't of Health & Human Servs.*, 301 F.3d 1247, 1251 (10th Cir. 2002) (noting that "officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news" (citations and quotation marks omitted)); *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Schlefer v. United States*, 702 F.2d 233, 237 (D.C. Cir. 1983); Michael N. Kennedy, *Escaping the Fishbowl: A Proposal To Fortify*

essential to the decisionmaking process of a governmental agency.”²²¹ The suggested process transparency does not, however, conflict with the FOIA exemption.

The gist of the proposed process transparency mechanism is an ex post reasoning of how a decision has been made, providing meaningful information on the regulatory process but leaving ample room for internal consultations. Such an explanation need not include the minutes and precise details of each meeting and conversation held by agency officials. The failure of “sunshine acts,” which oblige agencies to open their meetings to the public, demonstrates that such requirements often undermine the objectives of process transparency. Public officials respond to such acts not by disclosing information, but rather by adopting alternative methods of confidential communication.²²² Ex post reasoning, on the other hand, would require public officials to explain the values and priorities that underlie their decisions. A watered-down version of this practice exists in the context of notice and comment, as agencies are mandated to explain the basis of their final rules and respond to public comments. However, the quality of the information provided as part of notice and comment varies from one regulation to another.²²³ The real purpose of process transparency is to substantiate and improve the modest reasoning requirement under the traditional notice and comment procedure, while extending its logic to other regulatory spheres such as federal spending.

Given agencies’ reluctance to reveal substantive information on their decisionmaking processes, the required ex post reasoning can be based on uniform and standardized templates, requesting agencies’ answers to specific queries. For instance, agencies could be asked to publicly explain the most problematic parts of their decision and the major difficulties associated with its implementation, the regulatory priorities that led them to the decision, the regulatory alternatives that were considered but left behind, and the advantages of their decision over alternatives. Rather than requiring agencies to release unstructured regulatory data and thus generate massive overflows of (often meaningless) information, an ex post facto response to such standardized questions could strengthen the ability to assess administrative decisions in a vast array of regula-

the Deliberative Process Privilege, 99 Nw. U. L. REV. 1769 (2005); Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. REV. 279 (1989).

221. *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993); *see also Sears*, 421 U.S. at 151 (explaining that “the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions”).
222. For an analysis of the Government in the Sunshine Act of 1976 and the Federal Advisory Committee Act of 1972, *see Croley & Funk, supra note 38*; and *Funk, supra note 18*, at 183-91; .
223. *See Cuéllar, supra note 34*; *Mendelson, supra note 33*, at 1346 (“[A]gency officials appear to be discounting . . . value-laden comments, even when they are numerous.”); *see also* discussion accompanying *supra* notes 33-34 (discussing the problems with citizen participation in the notice and comment procedure).

tory domains. If enforced and implemented properly, it could considerably enrich the public sphere and fuel better informed public deliberations over regulatory choices and priorities.

In the context of federal spending, for example, such a requirement would capture the context of major federal grants (and not only their technical details).²²⁴ What were the priorities that led the agency to invest federal funding in a specific project? Why was one contractor chosen over other contenders? What difficulties does the agency foresee in the implementation of this decision? Who are the most important stakeholders and how are they affected by the decision? Given the widespread concern about the lack of accountability of privatization processes, these questions are more pertinent than the specific details of the monetary award that are currently disclosed by agencies.

As agencies resist disclosure obligations, process transparency is likely to encounter implementation difficulties. Agencies may argue, for example, that such a transparency obligation is overly costly and a hindrance to effective regulation. This objection is only partially valid. First, a substantial part of the required information is already produced by agencies as part of their reporting obligations to congressional and presidential oversight bodies.²²⁵ Responding to process-oriented questions on the basis of these reports and revealing some of them should not be overly burdensome. Second, federal funds are already allocated to support the existing, problematic transparency policies. Funneling these funds into more productive channels can be more beneficial than sustaining policies of doubtful value.

Another objection is that process transparency would jeopardize trade secrets and other sensitive information held by industry and business interests. Indeed, transparency policies should take these concerns into account and provide private parties the necessary safeguards. However, the balance between transparency and business interests should be tilted toward the former. For instance, one option would be to create a default of transparency and “impose rigorous substantiation requirements on companies claiming that information submitted to the government is confidential.”²²⁶ Another option would be to mandate agencies’ response to process-oriented questions and, if necessary, request their inspectors general or an independent oversight commission to censor specific sensitive details.²²⁷

Lastly, agencies may avert the reasoning requirement of process transparency by only formally complying with it—responding to the template questions

224. As the implementation of the reasoning requirement may require an expenditure of administrative resources, it can be limited to larger grants (for example, over \$20,000), while smaller grants could be exempted.

225. See *infra* text accompanying notes 293-294 for a discussion of agencies’ reporting obligations to Congress and the President.

226. Vladeck, *supra* note 40, at 1832.

227. For a discussion of the role of federal inspectors general and an oversight commission, see *infra* Part IV.A.3(a).

without revealing substantive information, or constructing an overly rosy narrative of their activities. These behaviors do not necessarily undermine the advantages of process transparency. As discussed below,²²⁸ improved enforcement measures can help mitigate these effects. As the existing transparency policies are not effectively enforced, noncompliance or selective compliance is common. The introduction of more robust enforcement mechanisms could make attempts to avert the reasoning requirement more costly and impel agencies to reveal better information.

Improved enforcement would not, however, completely solve the distorted narrative concern. Once public officials release contextualized information on their decisionmaking processes, they can frame this information in their own terms, presenting self-assuring evidence and imposing their own vision of the process. However, despite these possible biases, such framing capacity is not necessarily a problem. First, effective enforcement should prevent overly biased explanations. Further, a questionable narrative may actually expose the agency to criticism and allow civil society “to contest both what public officials have said and what they have done.”²²⁹ An official ex-post narrative (even if faulty and self-assuring) may provide the grounds for fertile public debate and criticism.²³⁰

Process transparency, which lays out considerations that led the agency to make a regulatory decision, is only one part of an effective transparency regime. It should be complemented by a second policy mechanism: “performance transparency.”

In order to assess the decisions taken by federal agencies, it is important to understand the extent of their implementation and the degree of their success. Knowing how much money an agency disburses in order to rebuild New Orleans in the aftermath of Hurricane Katrina is important but not sufficient. What is more informative for public accountability purposes—but also more difficult to capture—is how these funds were distributed and to what extent they improved the social and economic conditions in New Orleans. This information should be disclosed to the public as part of a performance-transparency policy. Such policy should rely on uniform indicators, developed and measured by independent bodies and open for public scrutiny.

Measuring performance is, of course, a highly complex task. Nonetheless, much of this information already exists but is largely unavailable to the public. The performance of federal agencies is routinely scrutinized by the presidential Office of Management and Budget (OMB), professionally staffed congressional

228. See *infra* Part IV.A.3.

229. Staszewski, *supra* note 5, at 1289.

230. See *id.* (“[I]nsincerity does not eliminate our ability to evaluate the merits of [public officials’ and citizens’] choices or the explanations that they have provided to justify them. On the contrary, insincere explanations are more likely to be vulnerable to criticism.”).

committees, and the GAO.²³¹ The Government Performance and Results Act (GPRA) of 1993 requires agencies to submit to Congress and the OMB strategic plans with their goals and objectives for a period of not less than five years.²³² Detailed “performance plans” supplement these documents and explain how agencies intend to evaluate their proposed programs.²³³ As part of the annual “program performance reports,” agencies compare their original objectives to the actual performance of the programs and, if necessary, explain discrepancies.²³⁴ As the GPRA instructs agencies to measure their own performance, it is hardly a model for effective performance transparency.²³⁵ However, the Act demonstrates that the administrative state is regularly engaged in performance assessment.

The goal of performance transparency is to improve the quality of this information and make it accessible to civil society. Congressional reports and testimonies on agencies’ performance are largely available online, but they are not easily accessible, searchable, or comparable. A meaningful transparency policy requires that agencies find a way to make this information readily searchable. Reports filed under the GPRA are problematic in this respect since they are currently unavailable to the public. The new Government Performance and Results Modernization Act of 2010²³⁶ instructs agencies to place performance-related data on a designated website by October 2012.²³⁷ The website, Performance.gov, was launched in late August 2011. It already contains information on agencies’ performance in a variety of fields, such as acquisitions, financial management, human resources, technology, sustainability, and more.²³⁸ It is still early to assess the effectiveness of the Act and the website, but they represent a step in the right direction. While the precise form of performance measurement is outside the scope of this Article, this task should lie at the core of regulatory transparency policies.

231. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 140 (2006).

232. 5 U.S.C. § 306 (2012).

233. 31 U.S.C. § 1115(a) (2012).

234. *Id.* § 1116.

235. The Act allows agencies “to protect themselves by devising euphemistic performance goals in order to ensure that they can ‘pass’ their own grading criteria.” Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1744 (2008). For an alternative system of agencies’ performance measurement based on “positive metrics,” see *id.* at 1769-84.

236. H.R. 2142, 111th Cong. (2010), <http://www.gpo.gov/fdsys/pkg/BILLS-111hr2142enr/pdf/BILLS-111hr2142enr.pdf>.

237. The Act also requires each agency to appoint a senior executive as the agency “Performance Improvement Officer” and establishes a “Performance Improvement Council” that would oversee the implementation of the Act. *Id.*

238. *Id.* § 9.

In order to illustrate the practical implementation of the two transparency principles outlined above, consider two examples: railway construction and oil spill prevention. On September 27, 2011, the Department of Transportation announced a grant of \$48 million to the states of North Carolina and Virginia “to develop high-speed rail between Raleigh, North Carolina, and Washington, DC.”²³⁹ Under the existing transparency framework, a report would appear on Recovery.gov indicating the amount of funds granted to each state and the money paid to immediate subcontractors. But there would not be any information on the reasons and priorities that led the DOT to disburse federal funds to this specific project, nor any information on other projects that competed to receive these funds. Moreover, civil society would not have information on the performance of these contracts; as has been noted, disclosure requirements under the Recovery Act only cover subgrantees (cities, in our example) and do not proceed further down the line. A transparency policy that aims to strengthen agencies’ public accountability would target these missing pieces of information. Such a policy would offer an explanation of why this specific railway was chosen, who chose it, and what alternative spending options were rejected. The performance report on the construction of the railway would then be made public, so that interested parties could critique the agency’s decision.

A second example is the Spill Prevention, Control, and Countermeasure (SPCC) rule promulgated by the Environmental Protection Agency (EPA).²⁴⁰ The rule establishes procedures and methods to deal with discharges of oil and hazardous substances from onshore and offshore facilities. It imposes on oil-producing facilities a variety of obligations and it requires them to compile individual SPCC plans under strict deadlines.²⁴¹ Since the rule and its amendments underwent the notice and comment procedure, its basic rationale was explained to the public. However, the “process transparency” system suggested above would provide a valuable supplement to this information. Such transparency would shed light on the difficulties associated with the implementation of the rule, its effects, and the regulatory alternatives that were considered but ultimately left behind. Further, as part of the performance transparency requirement, the EPA would have to release information on industry performance and

239. *U.S. Department of Transportation Award N.C. and Va. \$48 Million to Develop High-Speed Rail Between Raleigh, NC and Washington, DC*, RECOVERY.GOV (Sept. 27, 2011), http://www.recovery.gov/News/press/Pages/20110927_DOT_HighSpeedRailNCarolinaVirginia.aspx (last visited Oct. 23, 2012).

240. 40 C.F.R. pt. 112 (2012); see also *Spill Prevention, Control, and Countermeasure (SPCC) Rule*, ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/emergencies/content/spcc/index.htm> (providing full information on updates and amendments to the rule).

241. For an overview of the rule, see Bill Jeffery, *Oops!—Accidents Happen: Oil Pollution Prevention at Onshore Production Facilities*, 49 WASHBURN L.J. 493 (2010).

assessments of its own effectiveness in the context of oil spill prevention, preparedness, and response.²⁴²

The next subsections discuss who the audience of these policies should be and how effective enforcement of these policies can be ensured.

2. Expanding the Audience of Online Transparency

Existing online transparency initiatives are largely oriented toward established interest groups (for example, online notice and comment and federal spending) and sophisticated programmers (for example, Data.gov). The online presentation of information—as raw datasets or technical federal award entries—hardly permits nonorganized individuals to use the information to monitor agencies’ activities. While public interest groups and programmers can at times serve as effective intermediaries between the data and the public, a viable policy of transparency and public accountability cannot depend on such intermediaries alone.

Online transparency policies should be more welcoming to broader civil society. In particular, regulatory information should be provided in plain language, within its regulatory context, and in a user-centric manner that would allow individuals to readily grasp, compare, and evaluate it.²⁴³ The Obama Administration has already begun working in this direction by passing the Plain Writing Act of 2010.²⁴⁴ A memorandum that offers agencies guidance on implementing the Act defines plain writing as “writing that is clear, concise, well-organized, and consistent with other best practices appropriate to the subject or field and intended audience.”²⁴⁵ The memorandum requires agencies to use plain writing in “every paper or electronic letter, publication, form, notice, or instruction” and “communicate with the public in a way that is clear, simple, meaningful, and jargon-free.”²⁴⁶ These prescriptions are intuitive and they should apply to all information that agencies release to the Internet.

There are at least two possible objections to this proposition. First, citizens, as opposed to interest groups, may not be interested in regulatory transparency. They largely lack the motivation, knowledge, expertise, and resources that are

242. As most of this information already exists but is distributed only internally, its public release should not be overly burdensome from the EPA’s perspective.

243. See ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* 59-65 (2007).

244. Pub. L. No. 111-274, 124 Stat. 2861 (2010) (codified at 5 U.S.C. § 301 (2012)).

245. Memorandum from Cass R. Sunstein, Admin’r, Office of Info. & Regulatory Affairs, to the Heads of Exec. Dep’ts & Agencies (Ap. 13, 2011), <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf> [hereinafter Sunstein Memorandum]. For additional policy suggestions, see FUNG, GRAHAM & WEIL, *supra* note 243, at 170-182.

246. Sunstein Memorandum, *supra* note 245, at 5.

required to inspect and evaluate agencies' actions.²⁴⁷ Hence, the argument goes, there is no reason to engage individuals—rather than civil society watchdogs and interest groups—in the public accountability game. This position is questionable. While it might have been accurate in the past, the Internet changed the rules. Even if an online participatory democracy is in the realm of fantasy, the Internet generates unprecedented opportunities for accessing and sharing information.²⁴⁸ The design of online transparency policies should therefore allow individuals or diffuse public interest groups to take advantage of these opportunities and provide meaningful regulatory information in a more contextualized manner. Even if the number of individuals who access or use this information will remain limited, it may still be a considerable improvement compared to the pre-Internet age. Moreover, accessible regulatory information may also generate positive externalities by drawing more citizens into political affairs and thus enriching the public sphere.

A second problem is that there are multiple incentives to provide the public with incomplete or even distorted information. This is particularly true when stakes are high and the manner in which information is framed influences the popular understanding of regulatory affairs. The advantage of the raw datasets that are released on Data.gov is that they contain “naked” data, which has not been subject to manipulation or interpretation. A contextualized account of administrative processes and performance surely cannot be neutral in the same manner. But even “naked” datasets can be subject to manipulation as long as agencies define their scope and form, and thus the problem is not unique to contextualized information. Moreover, a narrative can be more helpful for spurring public debate. While there are no complete solutions to this challenge, the development of uniform standards and templates would be an important step in the right direction. These mechanisms would meaningfully and accurately capture regulatory decisionmaking processes, thus allowing for a critical assessment of agencies' performance.

3. Strengthening the Enforcement of Transparency Policies

This Subsection focuses on the enforcement of regulatory transparency policies and their audience. The mandatory transparency policies surveyed in this Part demonstrate that agencies are often given wide *de jure* or *de facto* discretion to decide what types of information are disclosed to the public. Hence, it is plausible to assume that even if transparency policies targeted the regulatory process and performance, agencies would not comply. There can be several manifestations of such noncompliance. First, agencies may simply ignore the transparency requirements imposed on them, as happened with E-FOIA. Second, they may manipulate their transparency obligations, complying only

247. For a comprehensive analysis, see Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 647 (2011).

248. See Shkabatur, *supra* note 60.

formally and revealing meaningless information. This scenario can be particularly worrisome in the case of the suggested process transparency—a mandate that agencies explain their decisionmaking processes might generate cookie-cutter formulations that do not reveal much about the actual process. While these concerns can never be fully abolished, effective enforcement measures can help mitigate them. Nonetheless, such measures are surprisingly absent from the existing regulatory transparency policies.

As discussed below, there are several ways to mitigate these enforcement problems. None of the proposed mechanisms is sufficient as a stand-alone solution. My goal is merely to suggest a menu of practical tools that can complement each other in creating meaningful regulatory transparency.

These tools can be divided into three categories. The first category is *institutional measures*, which include such suggestions as establishing a transparency oversight commission and taking advantage of federal inspectors general. The second category is *civil society measures*, which include suggestions such as encouraging public oversight and facilitating public litigation to enforce transparency requirements. The final category involves *incentives*, which aimed to persuade agencies to comply with transparency requirements through the use of various sticks and carrots.

Institutional measures. These enforcement mechanisms rely on new or existing institutional entities that could improve the oversight and implementation of regulatory transparency.

Establishing an independent oversight commission is one example of such institutional measures. Congress could create an independent body to monitor agencies' compliance with transparency requirements and help them implement their own transparency obligations. Both the White House and Congress have expressed support for the establishment of a commission that would be charged with monitoring the implementation of the federal spending transparency legislation. In an executive order signed in June 2011, President Obama established a Government Accountability and Transparency Board, which would "provide strategic direction for enhancing the transparency of Federal spending and advance efforts to detect and remediate fraud, waste, and abuse in Federal programs."²⁴⁹ A similar initiative, the Digital Accountability and Transparency (DATA) Act,²⁵⁰ has passed the House of Representatives. This legislation would establish an independent body responsible for monitoring the implementation of federal spending transparency policies.²⁵¹

249. Exec. Order No. 13,576, 76 Fed. Reg. 116 (June 16, 2011). The Board shall consist of eleven members of the executive, including agency inspectors general, agency chief financial officers, and a senior official of the Office of Management and Budget, and any other members as the President shall designate. *Id.*

250. H.R. 2146, 112th Cong. (2012).

251. The DATA Act aims to consolidate the information contained on websites such as Recovery.gov and USAspending.gov, and it would offer a single government-wide platform for federal spending transparency. For an analysis of the proposed Act and its problems, see Craig Jennings, *DATA Act Would Be a Setback for Spending*

While these two initiatives represent a step in the right direction, they are quite narrow. Both President Obama's executive order and the DATA Act envision the commission as a toothless entity. An effective oversight commission would have measures to discipline agencies that do not comply with transparency obligations. For example, agencies that fail to comply with transparency requirements may be fined; the head of the agency may be required to justify noncompliance; and the internal review of the agency's proposed rules may be halted. Furthermore, the jurisdiction of the commission should not be limited to federal spending. An effective watchdog commission would need to cover additional regulatory domains. Such a commission could ensure, for example, the proper implementation of E-FOIA and oversee the contents of the Regulations.gov platform. As the primary institution in charge of regulatory transparency, such an oversight commission could play an important role in designing nuanced and harmonized transparency policies and help agencies with their implementation.

A second institutional measure that could strengthen the enforcement of transparency initiatives is inspectors general (IGs). Over seventy IGs currently serve in the federal government, and all federal agencies and departments ought to have at least one.²⁵² Under the Inspector General Act of 1978,²⁵³ IGs are independent government officers who are responsible for the prevention and detection of fraud, waste, and abuse in their respective agencies. IGs are typically appointed by the President and approved by the Senate, and are required to report their findings directly to Congress and agency heads.²⁵⁴ Because they are "structurally insulated from control by agency heads," IGs are recognized as an effective check on governmental fraud and mismanagement.²⁵⁵ As part of their work, IGs audit and approve financial statements produced by federal agencies.²⁵⁶

These audit and approval functions can be expanded to include a power to monitor agencies' compliance with transparency obligations. Because IGs are familiar with the political dynamics of their respective agencies and can monitor their activities from within, they are very well suited to supervise agencies' implementation of transparency requirements. While a transparency oversight

Transparency, OMB WATCH (June 21, 2011), <http://www.ombwatch.org/node/11734>.

252. INSPECTOR GENERAL DIRECTORY, <http://www.ignet.gov/igs/homepage1.html> (last visited Oct. 23, 2012); see PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993).

253. Pub. L. No. 95-452, 92 Stat. 1101 (1978).

254. For a general discussion of the role of IGs, see Kathryn Newcomer & George Grob, *Federal Offices of Inspector General: Thriving on Chaos?* 34 AM. REV. PUB. ADMIN. 235 (2004).

255. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2347 (2006).

256. See Chief Financial Officers (CFO) Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838 (codified as amended at 31 U.S.C. § 3521 (2012)).

commission is an external mechanism that may put agencies in an unfavorable light, IGs can affect agency behavior internally. Avoiding potential controversy or critique, they may help administrators allocate resources to the implementation of their transparency requirements, and thus effectively drive transparency policies from behind the scenes. As IGs currently invest most of their efforts in audits, evaluations, and investigations,²⁵⁷ an additional check on agencies' implementation of transparency policies would not pose a significant challenge, and could yield major benefits.

Civil society measures. In addition to the above institutional measures, well-designed enforcement measures could turn civil society into an important player in the regulatory compliance game. Two mechanisms that can enhance the involvement of civil society in the enforcement of transparency policies are (1) public oversight and reporting of noncompliance and (2) public litigation.

First, public oversight could serve as an effective complement to the transparency oversight commissions and federal IGs suggested above. Rather than single-handedly monitoring agencies' compliance with transparency obligations, these entities could open online channels for communication with civil society and solicit reports of noncompliance. In order to incentivize individuals to report cases of noncompliance, they could receive a small monetary award that would originate from the budgets of noncomplying agencies.

As civil society organizations have effectively monitored agencies' transparency practices for decades,²⁵⁸ the potential for a public-private oversight partnership seems particularly attractive. Assuming that the oversight commission and IGs effectively respond to the reports and take measures against noncomplying agencies, civil society groups are likely to take advantage of these channels and provide helpful and targeted information. Nongovernmental organizations such as Pro Publica, OMB Watch, or Sunlight Foundation conduct a comprehensive analyses of regulatory decisionmaking and monitor agencies' compliance with transparency obligations. These groups could share the results of their work with a transparency oversight commission and the IGs, and help establish a synergic and effective oversight system.

Public litigation can also be an effective enforcement tool available to civil society. Under the general standing doctrine, however, the ability of civil society to redress "generalized grievances" in courts is limited: citizens cannot bring suits against the federal government "unless a 'concrete' and 'particularized' interest [is] at stake."²⁵⁹ Standing to enforce agencies' transparency obligations may, however, be different. Commentators have interpreted the Supreme Court decision in *Federal Election Commission v. Akins*²⁶⁰ to say that "if Congress

257. Newcomer & Grob, *supra* note 254, at 240-45.

258. For a list of some of these organizations, see *supra* note 50.

259. Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 632-33 (1999) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

260. 524 U.S. 11 (1998).

creates a legal right to information and gives people the authority to vindicate that right in court, the standing question is essentially resolved.”²⁶¹ Hence, by granting explicit standing rights as part of the transparency legislation (for example, E-FOIA, FFATA, or the Recovery Act), Congress could open the door for members of civil society to enforce agencies’ transparency obligations in courts. Such an approach could remedy, for instance, the massive non-compliance with E-FOIA, which requires agencies to publish online frequently requested records.²⁶²

Litigation is of course not a panacea to the enforcement of regulatory transparency. It requires a significant expenditure of resources from both agencies and civil society, and involves a lengthy and often inefficient process. However, if employed as a matter of last resort—particularly when other enforcement mechanisms fail—it can serve as a valuable sanctioning tool.

Incentives. Aside from institutional and civil society measures, agencies could also be incentivized to comply with their transparency obligations. An array of political, financial, and judicial incentives can be beneficial in this respect.

Political and financial incentives are one option. Federal agencies operate as a part of the executive branch. They are politically and financially dependent on Congress and the President.²⁶³ When leveraged properly, these dependencies could actually incentivize agencies to comply with transparency obligations. Both carrots and sticks could be helpful in this respect. Congressional committees may offer the carrot by conditioning the funding of federal programs on the fulfillment of transparency obligations. OMB may slightly increase the budget of the most transparent agencies or offer their public officials various political boons. In the alternative, agencies could be threatened with the stick. They might, for example, be fined for failing to comply with their transparency obligations. These measures, of course, require political will on the part of Congress and the President. Because that will is frequently missing, judicial incentives may be the more practical solution.

As a complement to these political and financial incentives, judicial incentives might further encourage agencies to meet their transparency obligations. For instance, courts can take into account agencies’ compliance with the relevant transparency policies as part of their judicial review of other regulatory issues. Agencies that prove compliance with transparency requirements would be

261. Sunstein, *supra* note 259, at 617; see 524 U.S. at 36 (Scalia, J., dissenting) (“[I]t is within the power of Congress to authorize any interested person to manage (through the courts) the Executive’s enforcement of any law that includes a requirement for the filing and public availability of a piece of paper.”).

262. For a discussion of E-FOIA, see *supra* Subsection II.A.2.

263. For a discussion of congressional and presidential oversight of administrative agencies, see *infra* text accompanying notes 288-296.

granted a more lax judicial review, while nontransparent agencies would be subject to more stringent judicial scrutiny.²⁶⁴

In sum, one of the major reasons for the failure of previous transparency efforts is the lack of attention to the enforcement of transparency policies. The bulk of transparency legislation is not accompanied by enforcement measures. Noncompliance therefore becomes the norm. This Section proposed various solutions to that problem, including institutional and civil society enforcement measures and a variety of potential incentives. While none of these suggestions would be sufficient on its own, a combination of the proposed measures would surely lead to a more effective regulatory transparency policy.

B. *Methods of Holding Agencies Accountable*

Public accountability consists of two elements: the agency's explanation of its decision to the public and a public response to that decision. The previous Section discussed how agencies could fulfill the explanatory element of public accountability. The second requirement—public sanctions—is perhaps even more challenging than the first. Even when process and performance information effectively reaches the public sphere, how can civil society use it to hold agencies accountable? And what is the role of the Internet in the accountability framework?

The next Subsections discuss two important mechanisms that civil society can use to hold agencies accountable: judicial oversight and public advocacy. These Subsections demonstrate that, while the direct access of civil society to courts is limited, online transparency policies do play an important role in the public advocacy efforts of civil society.

1. Public Accountability via Litigation

If transparency requirements are robustly enforced, agencies will release a flood of information in order to avoid sanctions. That information, in turn, would allow civil society to take an agency to court, trigger judicial oversight, and force the agency to revisit its decision. As Louis Jaffe has noted, “[T]here is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and legislatures.”²⁶⁵

Several federal statutes contain “citizen suit” provisions that authorize any citizen to challenge agencies’ decisions in court. The Clean Air Act²⁶⁶ and the

264. This option follows the solution proposed in David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 72 *FORDHAM L. REV.* 81 (2005).

265. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 321 (1965).

266. Clean Air Act, 42 U.S.C. § 7604 (2012).

Clean Water Act,²⁶⁷ for example, include provisions that allow “any citizen” to commence a civil action on her own behalf against administrators who fail to carry out nondiscretionary statutory obligations. Legislation on motor vehicle safety, occupational health and safety, and consumer safety similarly allows any person who may be “adversely affected” by administrative action to file petitions against the responsible agencies.²⁶⁸

An important benefit of citizen suits is that they can reduce the effect of “agency slack”—underenforcement of statutory requirements because of political pressures, regulatory capture, laziness, or the self-interest of regulators.²⁶⁹ Due to the “grave distrust” of agencies’ ability to avoid capture by regulated firms, Congress sought to “reduce administrative discretion and expand public participation.”²⁷⁰ Citizen suits were supposed to substitute for agency enforcement if the agency fails to act,²⁷¹ or “prod an agency into action,” either by publicly “shaming it” or by “forcing it to intervene” and take the lead over the suit.²⁷² Indeed, in the environmental context, citizen suits generated “vigorous citizen enforcement of environmental laws.”²⁷³

Despite their promising potential, however, citizen suits cannot always be regarded as an effective vehicle for public accountability. There are several reasons for this. First, litigation requires substantial resources, expertise, and motivation on the part of the party who brings the suit; hence, only a relatively small number of cases can be brought to courts. Second, even if these challenges are overcome, the current scope of citizen suits is narrow. Such suits require an explicit statutory authorization, and, even more importantly, do not automatically grant standing. In *Lujan v. Defenders of Wildlife*, the Supreme Court held that “when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.”²⁷⁴ As the *Lujan* Court stressed, the standing

267. Clean Water Act of 1976, 33 U.S.C. § 1365 (2012).

268. National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. § 30161(a) (2012); Occupational Safety and Health Act of 1970, 29 U.S.C. 655 § 6(f) (2012); Consumer Product Safety Act, 15 U.S.C. § 2051-2059 (2012). For a general discussion, see Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1135, 1185-89 (2009).

269. Matthew C. Stephenson, *Public Regulation of Private Enforcement*, 91 VA. L. REV. 93, 110 (2005).

270. Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL L.J. 81, 83 (2002).

271. Magill, *supra* note 268, at 1188.

272. Stephenson, *supra* note 269, at 110.

273. Zinn, *supra* note 270, at 84.

274. 504 U.S. 555, 562 (1992) (internal quotation marks omitted). For a discussion of the requirement of “injury in fact” in general and under *Lujan*, see Cass R. Sun

requirement is grounded on the notion that “[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.”²⁷⁵ Since *Lujan*, the Court has frequently “refrained from adjudicating ‘abstract questions of wide public significance’ which amount to ‘generalized grievances,’” because they would be “most appropriately addressed in the representative branches.”²⁷⁶

This judicial interpretation of standing requirements has been subject to substantial criticism.²⁷⁷ Because it largely prevents civil society from accessing courts on the basis of “generalized grievances,” this position erects a substantial barrier to public accountability.

2. Public Accountability via Public Advocacy

Because civil society’s access to courts is limited, public advocacy becomes the major vehicle for public accountability. Under this framework, citizens do not turn to the judiciary in order to hold agencies accountable for their decisions, but rather avail themselves of other channels of influence. Two major channels are publicly “naming and shaming” agencies in hopes of changing their behavior, and taking advantage of the capacities of other political institutions (i.e., the President and Congress).

Effective transparency policies have always been a prerequisite for the sustainable success of such advocacy efforts. The role of online transparency policies in this framework is twofold: making relevant information easily accessible to civil society and effectively disseminating the message on regulatory misbehavior to the media or other political institutions. The discussion that follows elaborates on these mechanisms.

The media is probably the most common mechanism of public advocacy. Indeed, the role of the media as the ultimate watchdog of executive power is central to any functioning democracy. Before the Internet, this role was largely reserved to the “mainstream” media. Critical coverage of a malfunctioning regulatory policy in an influential newspaper or on popular television could exert

stein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 183-93, 202-06 (1992).

275. *Lujan*, 504 U.S. at 576. The main rationale of this decision was that unfettered standing rights would “turn the judges into overseers, and usurpers, of the President himself.” Sunstein, *supra* note 274, at 201.

276. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)). For an analysis of the “pro-democracy” function of standing and the Court’s reluctance to pursue it, see Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 475-492 (2008). For an analysis of the reasons that led the Court to take this approach, see Magill, *supra* note 268, at 1195-98.

277. See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Magill, *supra* note 268, at 1183; Sunstein, *supra* note 274, at 202-23.

pressure and compel agencies to change their course of action. These hubs of influence were very limited, as only a small number of civil society players had access to them.²⁷⁸

The Internet has changed this distribution of power, multiplying and amplifying potential hubs of influence and pressure.²⁷⁹ It has generated a new “networked public sphere,” allowing “individuals and groups of intense political engagement to report, comment, and generally play the role traditionally assigned to the press in observing, analyzing, and creating political salience for matters of public interest.”²⁸⁰ In the context of regulatory information, politically motivated individuals or diffuse groups with shared political interests can collaborate. They could analyze the online data released by agencies, flag issues of concern, and disseminate their findings via a range of media platforms—from social networks and private blogs to widely read blogs and mainstream media.²⁸¹

The example of Wikileaks demonstrates how a small online organization can acquire global influence by choosing an effective strategy for collecting and disseminating information.²⁸² Social networks, such as Facebook and Twitter, allow individuals and organizations to amplify their messages, mobilizing and engaging wide constituencies as part of effective public advocacy campaigns. Collaborative journalistic platforms, such as *The Huffington Post*, expand the traditional boundaries of reporting and journalism.²⁸³ Technological platforms developed by organizations such as the Sunlight Foundation in the United States or MySociety in the United Kingdom allow citizens to play a more active role in monitoring and analyzing political events.²⁸⁴ Naturally, the initiation of an online debate on a problematic regulatory matter cannot guarantee a regula-

278. See generally BENKLER, *supra* note 60, at 176-211 (discussing the fundamental and constitutive role that mass media has played in liberal democracies and the democratic critique of mass media).

279. For an overview of the new media landscape, dubbed the “emerging networked fourth estate,” see Benkler, *supra* note 178, at 376-79.

280. BENKLER, *supra* note 60, at 220. Some commentators have lamented that these new hubs of influence are not as democratizing as originally envisioned. See, e.g., MATTHEW HINDMAN, *THE MYTH OF DIGITAL DEMOCRACY* (2009) (arguing that traditional elites still play key roles in the networked public sphere). However, there is no doubt that technology improves the ability of civil society to take part in public policy debates.

281. While not all of these voices are heard, “clusters of moderately read sites provide platforms for vastly greater numbers of speakers than were heard in the mass-media environment.” BENKLER, *supra* note 60, at 242.

282. See Benkler, *supra* note 178, at 315-30.

283. See *id.* at 377.

284. See, e.g., *Projects*, MYSOCETY, <http://www.mysociety.org/projects> (last visited Oct. 23, 2012); SUNLIGHT FOUNDATION, <http://www.sunlightfoundation.com> (last visited Oct. 23, 2012).

tory response, much less a policy change. However, the availability and accessibility of these pressure points are central for democracy.²⁸⁵

The availability of meaningful online information on agencies' decision-making processes and performance can allow diverse members of civil society to cooperate on issues of mutual concern.²⁸⁶ By sending a message about administrative misbehavior into the networked public sphere, members of civil society exert public pressure on agencies, with the hope to name and shame an agency into changing its behavior and satisfy the punitive element of public accountability.²⁸⁷

While naming and shaming would not necessarily lead to meaningful policy changes, a more institutionalized approach to public advocacy is also available. Such advocacy efforts can rely on established oversight bodies, such as the President and Congress. Both the President and Congress possess substantial oversight authority over agencies' actions. The bulk of presidential oversight²⁸⁸ is executed through OMB, which was authorized by President Reagan in 1981 to review administrative rulemaking and facilitate coordination among agen-

285. For a more detailed discussion of the viral effects generated by old and new media, see Archon Fung & Jennifer Shkabatur, *Viral Engagement: Fast, Cheap and Broad, but Good for Democracy?* (Dec. 12, 2012) (unpublished manuscript) (on file with author).

286. See, e.g., Bruce Bimber et al., *Technological Change and the Shifting Nature of Political Organization*, in HANDBOOK OF INTERNET POLITICS 72, 72 (Andrew Chadwick & Philip N. Howard eds., 2009) (discussing “ways in which new communication technologies enable the development of a diverse array of organizational forms in the pursuit of collective interests” (emphasis omitted)).

287. A possible example of this scenario is the scandal that involved the expenses of British Members of Parliament (MPs). Transparency advocates used the British Freedom of Information Act to request information about the discretionary expenses of MPs. The requests were at first declined but eventually the information was released and published by the *Daily Telegraph*. The publications “exposed systematic abuse by MPs from across the political divide, ranging from fraud to frivolous or grandiose claims, symbolized by claiming costs of biscuits and moat cleaning.” Robert Hazell et al., *Open House? Freedom of Information and Its Impact on the UK Parliament*, 90 PUB. ADMIN. 1, 14 (2012). These publications had a watershed effect on British politics, leading to the resignation of high-level public officials and the establishment of the Independent Standards Authority—an independent commission that is now in charge of paying MP salaries and expenses. *Id.*

288. In recent decades, the presidential model has become the dominant approach to agencies' oversight. David S. Rubenstein, “Relative Checks”: *Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2199 (2010). For an overview and a critical account of this approach, see Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

cies.²⁸⁹ Operating as part of OMB, the Office for Information and Regulatory Affairs reviews preliminary regulatory plans submitted by agencies as a precondition for their implementation. This form of review offers the President a convenient vehicle to enforce his policy preferences and restrain “overzealous bureaucrats bent on promoting their agencies’ narrow agendas.”²⁹⁰

Congressional oversight of administrative agencies is similarly thorough. The Congressional Review Act²⁹¹ requires agencies to submit all final rules for review by Congress and the congressional “investigative arm”—the GAO—before they can take effect.²⁹² Aside from reviewing final rules, the GAO also studies the general performance of the executive branch and investigates potential cases of waste, fraud, and abuse by federal agencies.²⁹³ This oversight system is complemented by a wide array of professionally staffed committees in both the House and the Senate, which make it “very easy for members of Congress with an interest in a particular agency to assume an oversight function.”²⁹⁴ The monitoring activities of these committees typically involve hearings in which administrators are required to explain the performance of their agencies.²⁹⁵ These interactions often result in “tacit agreements between committees and agencies” that require agencies to commit to a certain course of action.²⁹⁶

The Internet can play a key role in this respect by facilitating communication and cooperation between civil society groups and political oversight bodies. Although most congressional committees and the OMB have contact information on their websites, they currently do not solicit public input into issues that may require further scrutiny or investigation. This should be

289. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,196 (Feb. 17, 1981); see also Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 11-16 (1995) (noting that the review process of the OMB “has become a permanent part of the institutional design of American government”).

290. Bagley & Revesz, *supra* note 288, at 1261; Bressman & Vandenberg, *supra* note 288, at 50.

291. 5 U.S.C. §§ 801-808 (2012).

292. *Id.* § 801(a)(1)(A)-(B). In principle, Congress can pass a joint resolution that disapproves of the rule upon review and thereby annuls it. *Id.* § 802(a). The use of this procedure is rare. See Beermann, *supra* note 231, at 84; Rubenstein, *supra* note 288, at 2210.

293. Beermann, *supra* note 231, at 129. The GAO states on its website that it made 2,132 recommendations in fiscal year 2011 to improve government operations. Eighty percent of recommendations made five years prior had been implemented by 2011. See *GAO at a Glance*, GAO, <http://www.gao.gov/about/gg glance.html> (last visited Oct. 23, 2012).

294. Beermann, *supra* note 231, at 122-23; see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2257-60 (2001).

295. Beermann, *supra* note 231, at 125.

296. *Id.*

changed. With the help of technology, civil society could take advantage of the mechanisms of presidential and congressional oversight in order to hold agencies accountable. Relying on online information released by agencies, civil society could assist political oversight bodies by triggering a “fire alarm”—drawing their attention to socially pertinent and problematic regulatory matters that might have been overlooked.²⁹⁷

Easily accessible online channels of communication complemented by presidential or congressional oversight bodies can motivate politically engaged individuals to monitor agencies on the basis of the information agencies disclose, and help presidential and congressional bodies in their own oversight endeavors.²⁹⁸

Although existing online transparency policies have largely failed to achieve their goals, a few simple reforms would allow these policies to begin playing an important role in ensuring the accountability of administrative agencies.

This Part began the development of the appropriate design of these reforms. First, I examined the optimal scope of online transparency policies. I suggested that transparency policies should cover two categories of information: the decisionmaking processes of agencies and their performance. Further, I argued that although public interest organizations are the most likely monitors of administrative agencies, online transparency policies should be designed in a way that lowers access and participation barriers for individual citizens and diffuse social groups. Lastly, I discussed how to improve the enforcement of online transparency policies by using a range of institutional and civil society monitoring instruments.

Second, this Part examined the mechanisms available to civil society to hold agencies accountable. In some cases, public interest groups or politically engaged members of civil society can file citizen suits in order to challenge agencies’ actions in court. This option, however, is limited by the restrictive

297. The fire alarm metaphor refers to the seminal article by McCubbins & Schwartz, who argued that there are two major techniques for political oversight of administrative agencies: police patrol and fire alarms. Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984). The police patrols analogy stands for a “centralized, active, and direct” form of oversight, by which Congress proactively monitors agencies, aiming to detect and remedy possible statutory violations. *Id.* The fire alarm oversight, in contrast, is responsive rather than proactive: “Instead of sniffing for fires, Congress places fire-alarm boxes on street corners . . . and sometimes dispatches its own hook-and-ladder in response to an alarm.” *Id.* Fire alarms are thus sounded by affected stakeholders in order to trigger formal investigations or political counteraction in response to agencies’ activities.

298. Naturally, in some cases these bodies do not intervene in problematic regulatory decisions because they lack political will, and not because they have overlooked these decisions. In such cases, public advocacy efforts should concentrate on the media.

standing doctrine. A more viable possibility is to trigger “fire alarms” or to compel the legislative and executive branches to activate their own oversight mechanisms. While the concept of fire alarms has been recognized for decades, the Internet can make these alarms more effective by engaging many more public monitors and by generating improved channels of communication and cooperation with congressional and presidential oversight bodies.

CONCLUSION

Regulatory transparency is traditionally regarded as the primary means for strengthening the public accountability of administrative agencies. Nonetheless, the effectiveness of transparency policies is often undermined by agencies’ resistance to public exposure and by their lack of public engagement. The introduction of technology into regulatory transparency policies has been envisioned as a powerful game-changer that could overcome these past hurdles. This Article challenges this common perspective, complicating the links between transparency, technology, and public accountability.

This Article demonstrates that the existing policies of online transparency are largely developed for the sake of public accountability, but fail to achieve it. In some cases, appropriate transparency requirements exist but are not enforced. In other instances, transparency policies allow agencies considerable discretion to decide which information will be disclosed. In still other cases, transparency policies target information that is irrelevant for purposes of public accountability. To realize the unfulfilled potential of open government, an alternative regulatory regime is required.

This Article proposes such a regime, advocating for process and performance transparency and articulating improved enforcement measures. The implementation of these suggestions would likely improve agencies’ accountability to the public, but could also entail some social costs. If the suggested measures are too burdensome to implement within the existing political system, the accountability rhetoric of regulatory transparency should be abandoned. Instead of introducing ambitious policies that consistently fail to achieve public accountability, transparency policies should openly target other objectives. However, as long as regulatory transparency policies declare that public accountability is their ultimate objective, the current means are inappropriate to the ends.