GOVERNMENTAL TRANSPARENCY AND OPENNESS IN A DIGITAL ERA:  
A U.S. PERSPECTIVE

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With the dawn of the Enlightenment, and the influence of writers such as John Locke¹ and Thomas Paine,² the concept of Divine Right³ fell into disrepute,⁴ and an entirely new conception of government and governmental authority began to emerge. In the United States, this new approach was reflected in the U.S. Declaration of Independence⁵ which implicitly rejected the concept of Divine Right, and declared the primacy of democratic principles: “Governments are instituted among Men, deriving their just powers from the consent of the governed.”

Over the centuries, democratic governance and the concept of the “consent of the governed,” have come to include two essential elements. First, a free and democratic society must include, and be premised upon, the right to freedom of expression.⁶ If the citizenry is free to decide who they will vote for, and which ideas or propositions they will support and promote, they must be free to communicate their ideas with each other, and to attempt to persuade others regarding their preferred candidates and positions.⁷ Second, the people must have access to information regarding the functioning of government. It is difficult to participate meaningfully in the democratic process, or to make democratic institutions accountable, when the government conceals information, and starves the public of information regarding its functioning.⁸

¹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689); JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE (1664).
² THOMAS PAINE, COMMON SENSE: 3 (1776) (Dover ed. 1997).
³ See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 96 (1996) (noting that “centuries ago” there was a “belief that the monarch served by divine right”).
⁵ U.S. DECLARATION OF INDEPENDENCE (July 4, 1776).
⁷ See id.
This article provides a short evaluation of the status of openness and transparency in the United States in the digital era. It begins by tracing the evolution of transparency principles over the last century, mainly from a non-digital perspective. As we shall see, while the U.S. has made significant strides towards creating a government that is more open and transparent, and more consistent with democratic ideals, the U.S. government falls far short of that ideal in important respects. Second, the article examines how digital technologies have enabled the creation of E-Government.

§ 1 – U.S. EFFORTS TO PROMOTE OPENNESS AND TRANSPARENCY: PROGRESS AND SET BACKS

Unquestionably, the U.S. government has become far more open and transparent than it was a century ago. Prior to the 1930s, neither the federal government, nor state governments, were subject to much in the way of transparency requirements. For example, even though the U.S. Constitution provides that “Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for,” may be confirmed only with the “advice and consent” of the U.S. Senate, for most of U.S. history these confirmation hearings were closed to the public. In addition, prior to the 1930s, administrative agencies were not required to publish proposed rules or regulations, much less their policy positions and choices, so that the process for promulgating rules and regulations was neither open nor transparent. Commonly, agencies would simply announce and implement their regulatory wishes. The U.S. government started moving towards greater openness and transparency in the early part of the twentieth century. The movement began with U.S. Senate’s processes for considering nominations to the U.S. Supreme Court. About a hundred years ago, the U.S. Senate broke with tradition and began holding public confirmation hearings. The result of that openness ve been both interesting and enlightening. Although many confirmation hearings were contentious prior to the open hearing era, the public became more interested and involved once the proceedings became public, and began to realize that a nominee’s views are important to how he/she decides cases, the public began to galvanize both for and against particular nominees. As a result, when Robert

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12 See Beth & Palmer, supra note 10, at 10.
13 Id. at 10-11.
14 Id.
Bork was nominated to the U.S. Supreme Court,\textsuperscript{15} public scrutiny of his nomination was intense, focusing on such hot button issues.\textsuperscript{16} Interest groups galvanized and actively opposed his nomination,\textsuperscript{17} objecting to his positions on civil rights\textsuperscript{18} and abortion.\textsuperscript{19} Attempts to influence Senate confirmation proceedings have now become commonplace with interest groups routinely mobilizing in an effort to influence the Senate and thwart nominations.\textsuperscript{20}

The next major openness and transparency advance occurred in the 1930s when the U.S. Congress adopted its first major piece of “open government” legislation, the federal Administrative Procedure Act (APA).\textsuperscript{21} Prior to the adoption of that act, agencies had been free to unilaterally adopt regulatory changes without consulting the public or regulated entities.\textsuperscript{22} The APA altered the status quo by establishing two different procedures for creating rules, “formal” and “informal” processes.\textsuperscript{23} The APA required that formal rules, also known as “adjudicative rules,” be created by “trial-type” procedures, involving subpoenas, offers, of proof, and traditional “trial” procedures.\textsuperscript{24} Although formal procedures continue to exist, very few agencies use them because the process is regarded as difficult and too cumbersome. Today, most U.S. administrative agencies create virtually all regulations using “informal” procedures which require agencies to publish a NOPR (notice of proposed rulemaking) in the Federal Register,\textsuperscript{25} thereby providing the public with notice of the proposed rule.\textsuperscript{26} The NOPR must contain three specific types of information: “(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.”\textsuperscript{27} In addition to allowing interested parties the opportunity to comment on NOPRs,\textsuperscript{28} and requiring the agency to “consider” those

\textsuperscript{15} See Linda Greenhouse, Washington Talk: The Bork Nomination; In No Time At All, Both Proponents and Opponents are Ready For Battle, The New York Times A24 (July 9, 1987).


\textsuperscript{17} See Greenhouse, supra note 15.

\textsuperscript{18} Id.


\textsuperscript{20} Id. at 14; see also Neil A. Lewis, Gay Rights Groups Join Opposition to Ashcroft for Justice Department, The New York Times A15 (Jan. 9, 2001).

\textsuperscript{21} 5 U.S.C. § 551, et seq.

\textsuperscript{22} See FUNK, SHAPIRO & WEAVER, supra note 11, at 740.

\textsuperscript{23} 5 U.S.C. § 553.

\textsuperscript{24} 5 U.S.C. §§ 556-557.

\textsuperscript{25} 5 U.S.C. § 553(b).

\textsuperscript{26} Id. at § 553(b) (“General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.”).

\textsuperscript{27} Id. at § 553(e) (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.”).
comments, the APA also requires agencies to issue a “concise general statement” of the “basis and purpose” of any final rule that it issues. The APA exempts various types of information from its rulemaking processes. As with the U.S. Supreme Court’s confirmation processes, adoption of the APA’s rulemaking procedures have led to greater citizen involvement. When administrative agencies propose a new rule or regulation, it is not at all uncommon for affected individuals and entities to offer comments, changes and amendments. In some instances, regulated entities mobilize (much as they do in response to U.S. Supreme Court nominations), and present detailed arguments both for and against proposed regulatory changes.

The APA also promoted openness because it required administrative agencies to voluntarily disclose various types of information to the public, including publishing “interpretative rules and statements of policy.” However, even though the APA was beneficial, in that it was designed to require agencies to voluntarily disclose information to the public, the disclosure obligations were limited to certain types of information (e.g., certain documents related to rulemakings, interpretations and policy statements), and did not create a general right of access to agency documents. Moreover, the obligation to publish interpretative rules and statements of policy was frequently ignored by administrative agencies without consequence, even though FOIA purports to impose sanctions on agency’s that fail to satisfy their disclosure obligations.

Congress has also enacted other legislation designed to promote openness and transparency. For example, in the 1960s, Congress enacted the Freedom of Information Act (FOIA), which gives individuals and corporations a right of access to information held by the U.S. government. FOIA is a “disclosure” statute because Congress assumed that government would disclose rather than withhold requested documents. Indeed, FOIA specifically states that “upon any request for records which reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” However, agencies must decide within twenty days whether to comply with a request, and the time limit can be tolled if the agency requests additional information, or as necessary to clarify whether fees...
apply. If the agency fails to comply with the applicable time limits, it cannot require the requesting party to pay search fees absent “unusual or exceptional circumstances.”

Although FOIA is a disclosure statute, it does not require disclosure of all governmental documents. Despite the assumption of disclosure, FOIA explicitly authorizes administrative agencies to withhold various types of information, including classified information, internal agency rules and practices, information specifically exempted from disclosure by statute; private commercial or trade secret information, inter-agency or intra-agency privileged communications, personnel, medical, or similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy; information compiled for law enforcement purposes, information related to reports for or by an agency involved in regulating financial institutions, and geological information concerning wells.

In addition to the APA and FOIA, Congress has enacted the Federal Advisory Committee Act (FACA), the Government in the Sunshine Act, and amendments to FOIA. Both statutes were designed to allow individuals and organizations to understand the functioning of government, and enhance governmental openness and transparency. In addition, many state legislatures have adopted their own open records provisions that are similar to FOIA.

Despite the advances towards openness and transparency that have occurred in the U.S., the ability of Americans to participate in the governmental process is curiously beset by a significant lack of transparency. There are many different reasons for these problems. For example, in regard to FOIA, many agencies do not fully comply with FOIA’s requirements, do not create indices of their adjudicatory decisions, do not comply with FOIA’s production deadlines, and suffer from “substantial FOI request backlogs that preclude timely determinations.”

There are various reasons for these problems, including a lack of sufficient funding, and a lack of adequate systems so that the “public has no efficient and accurate way of learning what information the agency has [and no idea] how the files are arranged, how long they are kept, or where

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40 Id. at § 552(a)(6)(A)(1) & (2).
41 Id. at § 552(b).
44 5 U.S.C. s 552(b)(b), (h) (1994).
45 See FUNK, SHAPIRO & WEAVER, supra note 11, at 667-668.
46 Kentucky Open Records Act, KRS 61.878(1)(b).
47 See FUNK, SHAPIRO & WEAVER, supra note 11, at 742.
48 See GENERAL ACCOUNTING OFFICE, FREEDOM OF INFORMATION ACT: NONCOMPLIANCE WITH AFFIRMATIVE DISCLOSURE PROVISIONS (1986).
49 See FUNK, SHAPIRO & WEAVER, supra note 11, at 742.
50 Id.
52 See id. at 424.
they are stored.” Although Congress has amended FOIA, in an effort to solve some of these problems, many difficulties remain.

§ 2 – THE IMPACT OF DIGITAL INNOVATIONS ON OPENNESS AND TRANSPARENCY

The advent of the digital age has improved transparency in important respects, and has transformed interactions between the U.S. government and the citizenry. The movement to digitization was driven in part by the Paperwork Reduction Act of 1995 and the Government Paper Elimination Act of 1998 which required governmental agencies to reduce their use of paper. However, the movement has also been encouraged because it affects government-citizen relations. Digitization has increased “citizen involvement including electronic voting, virtual town hall meetings, cyber campaigns, feedback polls, public surveys, community forums, and access to meeting agendas and minutes.” In other words, “information technology initiatives, now known as electronic government, are changing the way that the public sector works and interacts with citizens, businesses, and other governments.”

Illustrative of the impact of digitalization are illustrated by government websites. Under the E-Government Act of 2002, federal agencies are required to maintain websites that include various types of information. One commentator has estimated that this law has led to the creation of some 10,000 government Web sites at the federal, state, and local government levels. These websites provide many different types of information, including “the names of government officials, agency addresses and phone numbers, online publications, e-mail addresses, as well as other things pertinent to that particular government entity.”

The federal government now uses websites to publish many different types of information. For example, the federal courts have “established the Public Access to Court Electronic Records (PACER) system” and Congress has created Congress.gov which

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55 See Tankersley, supra note 51, at 450.
57 Id.
58 Id. at 1246.
61 Id.
62 Lavigne, supra note 59, at 1247.
64 https://www.congress.gov.
electronically publishes every piece of legislation introduced into Congress as well as other information regarding congressional activities. Other websites address specific topics. For example, the Federal Funding Accountability and Transparency Act (FFATA) and the American Recovery and Reinvestment Act of 2009 mandate disclosure of information on government “spending data in an effort to better monitor for waste, fraud, and abuse in government.” These acts led to the creation of USASpending.gov and Recovery.gov, “websites where the public can access and search government spending information that federal agencies have collected.” In addition, Grants.gov “provides the public with a centralized bank of information on grant and contract opportunities from all federal agencies.”

The Federal Funding Accountability and Transparency Act of 2006, which also correlates to USAspending.gov, enables the public “to search, aggregate, and evaluate the information provided by the recipients of federal monies and contracts” and thereby search “for waste and inefficient spending by the federal government.” There is also the American Recovery and Reinvestment Act of 2009 which created the Recovery Accountability and Transparency Board (RATB) to oversee the spending of recovery-related funds and “[to detect and prevent fraud, waste, and mismanagement.” RATB publishes this information on line on Recovery.gov.

In subject specific areas, individual governmental agencies are beginning to release large amounts of information. For example, the Environmental Protection Agency (EPA) is illustrative. At one point, it was relatively difficult for ordinary individuals to obtain and analyze environmental information. This work largely left to large environmental organizations who could afford to hire large staffs. With the advent of the Internet, the calculus has changed. Professor William Gilles is a strong advocate of the idea of “sousveillance” – the idea that members of society can observe the actions of governmental actors and attempt to influence their

65 See Raines, supra note 60, at 322.
66 Id.
67 https://www.usaspending.gov
68 https://www.recovery.gov
69 See Raines, supra note 60, at 322.
70 http://www.grants.gov/
71 See Raines, supra note 60, at 327
72 Id. at 328.
74 See Raines, supra note 60, at 333.
75 Id.
76 Keith Harley & Holly D. Gordon, Public Participation and Environmental Advocacy in the Internet Era, 16 NAT. RESOURCES & ENVIRONMENT 296 (2001) (“Ten years ago, [the] logistics of participating in simple permitting proceedings, let alone complex rulemakings, were overwhelming. In this pre-Internet era, the environmental movement inevitably was dominated by environmental organizations that could afford to maintain staffs of scientists, organizers and lawyers. Such organizations could accomplish internally driven policy initiatives, fueled by membership contributions and grants from large foundations.”).
77 Id.
He describes sousveillance as involving the “increasing tendency of the citizenry to watch, gaze, look and monitor, from the bottom, the practices of their governments, or even more widely, everyone’s action thanks to the democratization of ICT tools.” In the modern era, sousveillance is possible. As one commentator noted, “Today, one environmental advocate with a 56k modem and a $20 per month Internet account has more power to acquire information, to communicate, and to participate than a whole staff of people did ten years ago.”

There are a number of websites, including governmental websites, that allow the public to access environmental information. For example, the United States Environmental Protection Agency (EPA) maintains a website entitled “Envirofacts” that is designed to provide “multi year information about stationary sources of air pollution; large-quantity generators of hazardous wastes; treatment, storage and disposal facilities; Superfund sites; facilities required to develop Risk Management Plans under the Clean Air Act; facilities that submit Toxic Release Inventory reports characterizing multimedia releases of toxic chemicals; and facilities required to report wastewater discharges pursuant to the Permit Compliance System.” Some analysts tout Envirofacts as “one of the best sources of environmental information on the Internet” because it is available in multiple formats (e.g., “as a map, as well as lists by facility, chemical, and media), is easy to use because it is accessed though a “fill-in-the-blank” form, and “almost all of the information on the site is derived directly from industry self-reporting to the U.S. EPA and/or its state counterparts, pursuant to mandates imposed by law.”

There are also private websites that can be used to supplement the EPA website. For example, the Right-To-Know Network “offers information from government files about chemical accidents and unpermitted releases, chemical testing and federal civil enforcement action, and also includes other information (e.g., census, environmental, and mapping information).” In addition, Environmental Defense maintains the website Scorecard, which publishes information in an effort to “encourage and sustain activism,” focusing on matters “like lead poisoning and runoff from animal lots,” and including “a report card ranking system by which states (and in most cases, smaller geographic areas) and

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79 Id. at ___.
80 See Harley & Gordon, supra note 76.
81 See id.
82 www.epa.gov/enviro
83 See Harley & Gordon, supra note 76, at 297.
84 Id.
85 www.rtknet.org
86 See Harley & Gordon, supra note 76, at 297.
87 www.scorecard.org
facilities are contrasted with each other. Another website is maintained by the Natural Resources Defense Council’s (NRDC) which posts information related to the EPA’s Cumulative Exposure Project (CEP), involving comparisons of “modeled concentrations of toxins in ambient air to EPA health-based benchmarks.” Through maps and other graphics, NRDC’s site (www.nrdc.org/air pollution/cep) describes the ratio by which these air toxins cumulatively exceed healthy standards in different parts of the country. There are other similar websites. More importantly, there are governmental websites that individuals can use to locate scientific and technical information that will allow them to evaluate the environmental information that they find on sites like Envirofacts. For example, the Office of Air Quality, Planning and Standards maintains the Technology Transfer Network which provides a “clearinghouse of the scientific and engineering information used to generate EPA's multiple Clean Air Act activities.” The website includes the Maximum Achievable Control Technology (MACT), including emissions and pollution control information reported by industry sector, and the Ozone Transport Assessment Group, which documents “nitrogen oxide (NO) transportation across the eastern United States.” Of course, individuals can also use search engine directories to access private websites that provide technical information such as the Google Web Directory which “offers numerous subcategories of websites under ‘environment,’ including ten sites on environmental ethics, seventy-six sites on forests and rainforests, and 385 sites on biodiversity.”

In addition to accessing technical and scientific information on the Internet, individuals can also access legal information related to the environment through such sites as “Findlaw” and the Government Printing Office’s “GPO Access.” Findlaw “provides a wide array of useful legal documents and links to legal resources for environmental advocates.” For example, it includes the United States Code, the Code of Federal Regulations and Federal Register notices, as well as statutes and administrative codes for many states, and some U.S. Supreme Court opinions and lower court information and opinions. “Findlaw also provides links to websites for nonprofit legal groups and information regarding the U.S. House of Representatives, Senate, and Council on

88 See Harley & Gordon, supra note 76, at 297.
89 Id.
90 Id.
91 Id.
92 Id.
93 www.epa.gov/ttn
94 See Harley & Gordon, supra note 76, at 297.
95 Id.
96 Id.
97 Id. at 297-298 (“Acquiring legal information on websites such as “Findlaw” or “GPO Access” offers advocates a relatively inexpensive substitute for costly legal information providers such as Westlaw and Lexis.”).
98 www.findlaw.com
99 See Harley & Gordon, supra note 76, at 298.
Environmental Quality.” GPO Access provides many of the same documents available on Findlaw, including a collection of earlier U.S. Supreme Court opinions, as well as “congressional bills and hearing reports, House and Senate reports and Congressional Records.”

In addition to simply publishing information online, the digital age has better enabled ordinary citizens to participate in governmental decisionmaking. Agencies can inform the public regarding proposed rulemakings through the Internet by publishing Notices of Proposed Rulemakings (NOPRs) both in the Federal Register and online. For example, the EPA's rulemaking process can be accessed through the web. On a local level, many states and regional EPA now place online draft permits, public notices, final permits, summary documents, and point-of-contact information online. In Illinois, air permits are posted on a single website (www.epa.gov/ARD-R5/permits). In addition, agencies can allow the citizenry to submit comments on NOPRs through online “click here to comment” boxes. It is also possible for agencies to allow participants to view and respond to the comments made by others, and possibly even rate or evaluate other comments. Of course, unbridled citizen participation is not necessarily all good because online comment processes can be abused or result in overload.

**CONCLUSION**

Freedom of expression is an essential element of the democratic process. In order to choose their representatives, or express their opinions on policy ideas or proposals, the citizenry must have the right to freely and openly express their beliefs. However, in order for free expression to be effective, openness and transparency are also essential. Unless the public has information regarding the functioning of government, it is impossible for the citizenry to fully and effectively exercise their right to comment on governmental actions. As a result, democratic accountability is inextricably intertwined with transparency.

Over the last century, the United States has made significant strides towards increasing openness and citizen participation. Senate hearings on U.S. Supreme Court nominees, which were once held in secret, are now open to public participation and scrutiny. In addition, Congress has passed various pieces of legislation designed

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100 Id.
101 www.access.gpo.gov
102 See Harley & Gordon, supra note 76, at 298.
104 www.epa.gov/fedrgstr
105 See Harley & Gordon, supra note 76.
106 Id.
107 Id. at 441.
108 Id. at 442.
109 Id. at 442-443.
to open up government, including the Administrative Procedure Act, the Freedom of Information Act, the Federal Advisory Committee Act, and the Government in the Sunshine Act. Many of these efforts to increase openness have enhanced the ability of the citizenry to participate in the functioning of governmental processes.

The advent of the digital era has the potential to further the drive towards openness and transparency. Agencies are publishing large amounts of information on their websites. In some areas, such as the environmental area, this information can provide much information to the public. When coupled with other technical and legal information, sometimes available through government websites, and at other times through non-governmental Internet sources, individuals and organizations can find the information they need to engage in environmental advocacy.

Of course, the situation is not perfect, and the progress towards open government has been halting and incomplete. Even though both the APA and FOIA require agencies to publish various types of documents, those laws are frequently honored in the breach. Moreover, although FOIA requires agencies to disclose various types of information on request, FOIA is beset by numerous exceptions, as well as delays and calculated efforts to avoid disclosure. The net result has been less than perfect, and less than that which might otherwise be considered desirable. As a result, the goal of open government remains a work in progress in the United States in both the digital and non-digital arenas.

Moreover, there are significant other “transparency gaps.” Even though government has enacted various pieces of legislation designed to promote greater openness and transparency, the government has maintained secrecy regarding major aspects of its operations.110 In particular, the government has operated a massive and secret cybersurveillance operation.111 Had it not been for Edward Snowden, an NSA contractor who stole and released thousands of National Security Agency (NSA) documents,112 the American people might never have known about the size and scope of the cybersurveillance program.113 And the size of the NSA surveillance and collection program was absolutely staggering,114 with the NSA spending some $10.8 billion per year115 and maintaining a staff of some 35,000 employees.116 For many years, the NSA was systematically collecting data about virtually

110 For a more comprehensive discussion and analysis of this program, and its democratic implications, see Russell L. Weaver, Cybersurveillance in a Free Society, 72 Wash. & Lee L. Rev. 1207 (2015).
113 E.g., Scott, supra note 111, at A18.
114 See Shane, supra note 112, at A10.
115 See id.
116 See id.
everyone, including millions of cell phone call records, e-mails, text messages, credit card purchase records and information from social media networks. In addition, the NSA created a system (muscular) that enabled it to easily access Yahoo and Google accounts. The end result was that the NSA intercepted some 182 million communication records, including “to” and “from” e-mail information, as well as text, audio and video information. From the perspective of openness, transparency and democratic accountability, the NSA program was particularly disturbing. Undoubtedly, government has an interest in shielding aspects of the program from terrorists. The difficulty is that the NSA program has been shrouded in almost complete secrecy without any semblance of democratic accountability.

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