9-24-2010

Government Transparency and the Obama Era

Ross Schulman
American University Washington College of Law, rs6484a@student.american.edu

Follow this and additional works at: http://digitalcommons.wcl.american.edu/lpb

Part of the Administrative Law Commons, Ethics and Professional Responsibility Commons, Legislation Commons, Other Law Commons, and the Politics Commons

Recommended Citation

Government Transparency and the Obama Era

Ross Schulman

Government transparency has been a focus of President Barack Obama's campaign and administration, but effort has been expended on programs that have emphasized policy and legislative transparency over ethical and data transparency. This emphasis is misplaced. During the 2008 Presidential Election, the Obama campaign tapped into a large reserve of predominantly younger people who demanded a connection with the candidates before them.[1] A large part of that connection was focused on the transparency that came from this highly networked campaign.[2] President Obama's campaign in particular embodied that approach, both through its promises and its actions. Now that the Obama administration has taken office and governed for ten months, how has the Obama team done in their approach to transparency, and have those efforts led to better governance? A given transparency program should not be judged on how well it exposes the public to the details of a piece of legislation, but rather on how well it provides voters with information about the ethical actions of their representatives.

President Obama's Campaign Promises

President Obama's campaign focused a great deal of energy on the youth of the country. While the youth had been courted in the past, this was a segment of the population that had been notoriously hard to organize.[3] The campaign took many steps to reach out to this group, and was particularly successful at employing technology to make the campaign and the candidate appear

---

[1] *See* Jose Antonio Vargas, *Obama's Wide Web: From YouTube to Text Messaging, Candidate's Team Connects to Voters*, WASH. POST, Aug. 20, 2008, at C1.

[2] *See* Jose Antonio Vargas, *e-Hail to the Chief: Obama Won With Web's Help. Now, How to Govern Using that Community?*, WASH. POST, Dec. 31, 2008, at C1.

[3] *See* EMILY KIRBY & KEI KAWASHIMA-GINSBERG, THE YOUTH VOTE IN 2008, THE CENTER FOR INFORMATION & RESEARCH ON CIVIC LEARNING & ENGAGEMENT (2009) (showing that the 2008 election reversed a general trend of declining youth participation since 1972).

more accessible and open to the populace.[4] By blogging, using YouTube and Twitter, and

carrying an otherwise heavy web presence, the campaign created a culture of openness and

accessibility appealing to a generation used to instantaneous access to information and Internet-

fueled social interaction.

The campaign apparently took these approaches to heart in a policy sense as well. While

not a major crux of the arguments presented by then-Senator Obama, the need for transparency

in government was advanced by the campaign. Previous administrations had not given much

attention to the question. Heather West, a policy analyst with the Center for Democracy and

Technology, emphasizes that "President Obama's administration has an incredible amount of

institutional momentum to overcome . . ."[5] This desire to overcome was well received,

particularly among the open government groups.[6] Some of the campaign's proposals addressed

executive branch adjustments, while others would require legislative action to implement. A few

of these campaign promises deserve to be evaluated since Obama took office:

5-Day Waiting Period on Bills from the Legislature

One of the major promises made by President Obama during the campaign, receiving a

large amount of press both before and after Obama took office, had to do with the President's

procedures before signing congressional proposals into law.[7] In an effort at transparency,

Obama pledged to hold off on signing bills sent by the legislature until those bills were on the

---

[4] *See* Michael Geist, *Technology Plays Key Role in Obama Success Story*, Feb. 5, 2008,
http://www.michaelgeist.ca/content/view/2675/135/.
[5] E-mail from Heather West, Policy Analyst, Center for Democracy & Technology, to Ross Schulman, author (Nov. 11, 2009, 16:32 EST) (on file with author).
[6] *See, e.g.*, Posting of Paul Blumenthal to Sunlight Foundation Blog, http://blog.sunlightfoundation.com/ (Aug. 28, 2007, 16:50 EST).
[7] *See* BarackObama.com | Ethics, http://www.barackobama.com/issues/ ethics/index_campaign.php.

White House website for public comment for five days.[8] This promise also included a provision allowing for an exemption in the case of "emergency legislation."[9]

This promise was designed to allow average citizens to review and comment on legislation that the government is about to pass into law. It is a promise to give people the opportunity to directly influence the law. It is a policy-based transparency—in that what is being made transparent are the policies that the government seeks to implement—as compared to data about government or governance.

Legislative Transparency

The Obama campaign made a number of transparency related promises on how the legislature shares data with the public. In two separate promises, the campaign addressed earmark reform and the conduct of legislative process.[10] It vowed to require earmarks to have a name and a written description associated with them for seventy-two hours before being voted on.[11] The campaign also announced that the legislative process would be more open—all committee mark-ups and conference committee meetings be held in public.[12]

The most obvious difference from the 5-day waiting period is that the executive branch has no means to actively enforce these promises, beyond persuasion.[13] In addition, the substance of both proposals leans toward the policy end of the spectrum, in that the information conveyed is about the topics of discussion in Congress, and not information about Congress itself.

---

[8] *See* Jeff Zeleny, *Obama Says New Rules Would Guide His Administration*, N.Y. TIMES, June 23, 2007, at A8.
[9] *See* BarackObama.com, *supra* note 7.
[10] *Id.*
[11] *But see* R. Jeffrey Smith, *Defense Bill, Lauded by White House, Contains Billions in Earmarks*, WASH. POST, Sept. 29, 2009, at A6 (bill loaded with $2.65 billion in earmarks has White House's approval).
[12] *See* BarackObama.com, *supra* note 6.
[13] *See* U.S. CONST. art. I, § 2 (separating powers between the executive and legislative branches).

Public "Contracts and Influence" Database

Another web-centered transparency promise made by President Obama during the campaign focused more on ethical than legislative grounds. The campaign planned to create a publicly accessible database containing information about federal contractors, including what they "spend on lobbying, what contracts they are getting, and how well they complete them."[14] Data along these lines is sometimes available as compiled by private third parties (FedSpending.org from OMBWatch), but never on a reliable basis or directly from the government.[15]

The public could use this database to explore the connections between federal contractors and their lobbying activities, similar to how many groups have created web applications to explore campaign donations.[16] Mass investigations of corruption in the federal space could be accomplished.[17]

The Effects of These Programs

These and other transparency programs proposed by the Administration have had varying effects where they have been implemented. Those programs focused on transparency in the policy development area have been either not implemented or useless to the public at large when they were implemented.[18] On the other hand, programs that focused on providing general government data to the public have generated interest and subsequent private action

---

[14] *See* BarackObama.com, *supra* note 6.

[15] *See* FedSpending, http://fedspending.org; OMBWatch, http://ombwatch.org.

[16] *See, e.g.*, Open Secrets, http://www.opensecrets.org.

[17] *See* JERRY BRITO, MERCATUS CENTER AT GEORGE MASON UNIVERSITY, HACK, MASH & PEER: CROWDSOURCING GOVERNMENT TRANSPARENCY 17-18 (2007).

[18] *See, e.g.*, Sheryl Gay Stolberg, *Omaba Finds That Washington's Habits of Secrecy Die Hard*, N.Y. TIMES, Apr. 5, 2009, at A20 (detailing Obama's failings in meeting transparency promises, including a violation of the five-day pledge in signing the Lilly Ledbetter Act of 2009).

manipulating the data into useful forms.[19] Ms. West comments that "the day one executive order on transparency was key and important, but follow-through has been slower than we would like."[20]

Transparency in Policymaking and Legislating

The governmental transparency movement spends a fair amount of focus on attempting to attain information about the policy machinery of the legislature.[21] There have been debates over access to bill language online (in easy to modify formats) and access to Congressional Research Service reports, amongst others.[22] Some of these battles have been won, some lost, and others are still being fought. All of them are aimed to increase the average American's knowledge of the policy decisions made by their legislators.

President Obama presumably intended the same result from the policy-based transparency programs that he announced as part of his campaign platform. His pledge to place bills that the White House received from Congress on the White House website for five days before signing them is intended to allow Americans to read and comment on ongoing legislation while it is being debated.[23]

The program's actual history, however, is somewhat less glorified. The first bill that President Obama signed after taking office, the Lilly Ledbetter Fair Pay Act of 2009, was signed only a day after the White House received the bill from Congress.[24] The bill had retroactive

---

[19] *See, e.g.*, Apps for America 2: The Data.gov Challenge, http://www. sunlightlabs.com/contests/appsforamerica2/.
[20] E-mail from Heather West, Policy Analyst, Center for Democracy & Technology, to Ross Schulman, author (Nov. 11, 2009, 16:32 EST) (on file with author).
[21] *See, e.g.*, OpenCRS, http://www.opencrs.com/; OpenCongress, http://www.opencongress.org/.
[22] *See generally* The Open House Project Email List Archives, http://groups.google.com/group/openhouseproject.
[23] *See* BarackObama.com, *supra* note 7.
[24] *See* Library of Congress THOMAS Search for S. 181, http://hdl.loc.gov/ loc.uscongress/legislation.111s181 (showing the bill passed both houses of Congress Jan. 27, 2009 and was signed by the President Jan. 29, 2009).

affect, so a five-day delay in signing would affect no legal rights and it would therefore be hard to argue that the act could be said to be a piece of emergency legislation.[25] The White House has since used the five-day waiting period in many of the bills that have come before it, but it has had other exceptions, including the expansion of the State Children's Health Insurance Program (SCHIP) in February of 2009[26] and the Credit Card Accountability Responsibility and Disclosure Act of 2009 in May.[27] In both cases the provisions of the act did not take effect until at least a few months after the bill arrived on the President's desk.[28]

President Obama's promises regarding legislative transparency in the Congress itself have fared little better. Despite promising that business in Congress would be done in the open, perhaps the most crucial public policy discussion of the year—that of healthcare reform—was negotiated to a large degree behind closed doors.[29] Committees have taken few steps toward opening their mark-ups to the public (if they were not open before) and conference committees have not taken noticeable steps to open their process either.[30]

President Obama is relatively unable to effect this change, even if it is a high policy priority for him. Other than his personal influence as President, his office has no power to tell Congress how to conduct their business.[31]

Additionally, even if it were an accomplishable goal, as it would be to properly implement the five-day rule discussed above, it remains to be asked whether it would be worth

---

[25] *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (codified as amended in 42 U.S.C. 2000e-5 (e) and 29 U.S.C. 626(d)).

[26] *See* Library of Congress THOMAS Search for H.R. 2, http://hdl.loc.gov/ loc.uscongress/legislation.111hr2 (showing the bill passed both houses of Congress Feb. 4, 2009 and signed by the President the same day).

[27] *See* Library of Congress THOMAS Search for H.R. 627, http://hdl.loc.gov/ loc.uscongress/legislation.111hr627 (showing the bill passed both houses of Congress May 20, 2009 and signed by the President May 22, 2009).

[28] *See* SCHIP, Pub. L. No. 111-3, 123 Stat. 8 § 3 (SCHIP does not take effect until April 1, 2009); Credit CARD Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 § 3 (Credit CARD Act becomes effective nine months after enactment).

[29] *See* Chris Frates, *Closed-door Health Care Reform Decried*, POLITICO, Oct. 27, 2009, at http://www.politico.com/news/stories/1009/28750.html.

[30] *See* The Note, http://blogs.abcnews.com/thenote/ (Feb. 11, 2009, 14:14 EST) (reporting on backroom deals that led to a conference committee resolution, without public reporting).

[31] *See* U.S. CONST. art. I.

the effort. Transparency of legislation, while important to a small set of the population used to reading statutes, is likely less useful to the broad populace who learn what they know about legislation through intermediate sources such as the press and other media. In addition, those who do value first-hand knowledge of the legislative process already have access to much of it from both official government sources such as the Thomas service from the Library of Congress and the Government Printing Office, as well as non-governmental sources such as OpenCongress.org.[32] Finally, and particularly in the case of President Obama's five-day pledge, informing the public about the text of a bill once it has already been passed by both Houses of Congress and is sitting on the President's desk is too little too late.[33] Any comments submitted by the public at that date are highly unlikely to affect the President's decision over whether to veto or not (the only decision left to the President at that late a date).

Transparency in Data and Ethics

Another category where transparency in government is a public benefit is government data, especially where that data implicates the ethics of government officers.[34] There can be an obvious deterrent to government officers themselves digging through this data (although Inspectors General's offices do what they can), so providing the means for the private sector to sift the data and make their own reports is one way of obtaining many free (and sometimes more effective) Private Inspectors General.[35] Even in areas not directly related to ethics, crowd-

---

[32] Open Congress, http://www.opencongress.org/.

[33] Katherine Q. Seelye, *White House Changes the Terms of a Campaign Pledge About Posting Bills Online*, N.Y. TIMES, June 22, 2009, at A11 (quoting Ellen Miller of the Sunlight Foundation as saying "[t]here isn't anybody in this town who doesn't know that commenting after a bill has been passed is meaningless").

[34] *See* Brito, *supra* note 17; Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495 (2005).

[35] While there is a general movement of Independent Private Sector Inspectors General (IPSIGs) based on a law developed in New York (in which corporations who have committed fraud are forced to hire a person who reports to

sourcing government data can lead to more efficient discovery of connections between data sets, statistical correlations, or other unique approaches to government data.[36]

It was this type of data that President Obama intended to open up to the public when he promised during the campaign to launch a database of federal contractors. That information could be used by any number of individuals and organizations across the political spectrum to perform watchdog functions on the executive and corporations that work for the federal government.[37] Many critical eyes can do much more than the greatest Inspectors General can accomplish even if they have all the funding they could wish for. Unfortunately, the proposed database has not been launched.

President Obama's administration did, however, open the doors to federal government data in an unprecedented way in May of 2009 with the launch of data.gov.[38] The data website, maintained by the Chief Information Officer of the federal government, allows access to almost 600 data sources, including the Federal Register, census data, and Medicare costs, among many others.[39] The site also aims to deliver the data, wherever possible, in machine-readable formats to allow for automatic transfer and analysis of data.[40] While not specifically discussed during the campaign, data.gov is a perfect example of how President Obama intends to use transparency to improve government.

That plan is already coming to fruition. As one example, the Sunlight Foundation ran a competition over the summer of 2009 seeking developers and programmers who could create

---

the State's Inspector General), the term here is used by analogy to Private Attorneys General. *See* Davidde A. Stella, *Public Corruption Symposium: An Introduction*, 52 WAYNE L. REV. 1351 (2006).

[36] *See, e.g.*, This We Know, http://www.thisweknow.org/.

[37] *See* Brito, *supra* note 17.

[38] Data.gov, http://www.data.gov/.

[39] *See* Data.gov Catalog List, http://www.data.gov/catalog (searchable list of available databases included in data.gov).

[40] *See* Kim Hart, *Sites to Behold: White House Rolls Out Online Initiatives*, WASH. POST, May 22, 2009, at A19 ("[t]he launch includes the debut of Data.gov, a site on which agencies will post data that can be culled by Web developers to make applications").

applications that did new and unique things with the data exposed by data.gov.[41] Called Apps

for America 2, the competition drew forty six entries. The winner, aptly named DataMasher,

allows the user to pick two data sets from a broad range of geographically tagged data from

data.gov and a mathematical operator and see the result on a map.[42] Some fascinating results

have come from the Internet community when given this tool, including federal spending per

representative in Congress,[43] State energy spending per capita,[44] and CO2 emissions per capita.[45]

The government's implementation of a website dedicated to increasing transparency in

how the stimulus money is spent has also been essential to those watching the operation of

government.[46] Ms. West cautions, though, that "[k]ey initiatives like recovery.gov . . . are good

starts, but the real test is how the lessons learned can be distributed across the government."[47]

These projects provide the model, but no single solution is a silver bullet.

This mode of transparency is one that has the potential to benefit the populace greatly. It

leverages the interest of talented citizens, and gives them all the tools they need to explore the

ramifications of the government's data stores without the limitations that relying on the

government to analyze that data would bring.[48]

---

[41] Apps for America 2: The Data.Gov Challenge, http://www.sunlightlabs.com/contests/appsforamerica2/.
[42] About | DataMasher, http://www.datamasher.org/page/about.
[43] Federal Spending Per Representative in Congress, http://www.datamasher.org/mash-ups/federal-spending-representive-congress.
[44] State Energy Expenditures Per Capita, http://www.datamasher.org/mash-ups/state-energy-expenditures-capita.
[45] Metric Tons of CO2 Per Person, http://www.datamasher.org/mash-ups/metric-tons-co2-person.
[46] Recovery.gov, http://www.recovery.gov/.
[47] E-mail from Heather West, Policy Analyst, Center for Democracy & Technology, to Ross Schulman, author (Nov. 11, 2009, 16:32 EST) (on file with author).
[48] *See, e.g.*, Show Us A Better Way, http://showusabetterway.com/ (imploring the British people to crowdsource UK government data to help their own government analyze their information and improve communication of public information).

Focusing Transparency's Effects

The transparency movement in the United States should be working to focus its effects on areas where transparency can make an appreciable difference. For various reasons, this is emphatically not the area of policy positions and legal drafting. The transparency movement should instead be concerned with improving access to hard data that may illuminate information about corruption in elected officials or their staffs, or allow the public to explore vast data sets that the government collects through the course of its operation.

> *Policy Transparency Falls on Deaf Ears and Is Relatively Less Useful in a Republican System of Government*

One of the primary goals of the transparency movement has always been informing citizens about the actions of their legislators in a policy sense. There has been a focus on getting the text of bills, regulations, and laws in the hands of citizens so that they can make personal decisions about their relative worth, and inform their elected representatives about that decision.[49] This preference in the transparency movement has always been based on an idea that this type of transparency leads to better policy, as the representatives will be more accurately portraying the desires of their constituents. This approach ignores, however, two facts about our democracy that counsel against this form of transparency.

First, the complexity of modern legislation does not lend itself to easy understanding in the abstract. The actual text of proposed legislation requires considerable man-hours invested in order to determine the actual effect that would, in the end, become law.[50] This is particularly true for bills that purport to amend various provisions of the U.S. Code and do so by listing

---

[49] *See* Open Congress, http://www.opencongress.org/; Open CRS, http://www.opencrs.org/.
[50] *See* Codification Legislation, http://uscode.house.gov/codification/legislation.shtml (detailing the process that lawyers with the House of Representatives Law Revision Counsel office take to turn enacted law into codified statutes in the United States Code).

provisions by code citation or by act name. The process of reconciling an act's provisions with

the Code to arrive at the true impact of a piece of legislation is complicated and time intensive.[51]

Members of the press often take courses in legislation for the purpose of being better able to

parse bills as a part of their job.[52] While it is by no means inconceivable that members of the

public would take that opportunity, the fact also remains that for those who desire the text of

legislation, it is already available online, in a number of formats.[53]

Second, this sort of transparency raises a question of the structural place of the body

politic in our representative government. Campaigns to get the broadest possible legislative

material into the public's hands beg the question of whether the public needs that material to do

their "job" within the political system? While knowledge of the broad principles that the elected

representatives hold are vital for making electoral decisions every two or six years, as is

information about how well or poorly the representative has held to those principles, the actual

text of pieces of legislation is unlikely to impact that electoral choice. As was envisioned by the

Founders behind the Constitution, the federal republic does not demand perfect legislative

knowledge by the voters.[54] It requires instead that the voters have knowledge of the personality,

ethics, and general policy goals of their representatives.

> *Ethical Transparency Gives The Public the Information They Need to Make Electoral*
> *Decisions*

In contrast to policy transparency, releasing data about the ethical choices that their

elected representatives make actually provides the electorate with useful information that they

---

[51] *See* Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279 (1991)
("[t]he complexities of the law-making and law-interpreting tasks in the third century of this republic cry out for
systematic dialogue between those who make and those who interpret legislation").
[52] *See, e.g.*, Masters of Study of Law for Journalists at Georgetown,
http://www.law.georgetown.edu/graduate/journalism.htm.
[53] Open Congress, *supra* note 32; Library of Congress THOMAS, http://thomas.loc.gov/.
[54] *See* THE FEDERALIST NO. 10 (James Madison) (a democracy involves delegation of the government to a small
number of citizens elected by the rest).

can use to make future judgments at the ballot box. This data can be understood relatively easily

by the public (it often involves only who-gave-money-to-whom questions), and can form the

basis behind journalistic pieces as well.[55] In fact, in a number of ways, access to this sort of

information encourages citizen investigative journalism, just as access to government data

discussed above encourages something we might call citizen statisticians.

Access to ethical data is not without potential concern. Lawrence Lessig has written

recently about the negative repercussions for a democratic system if the elected representatives

are constantly scrutinized.[56] This is particularly true in the U.S. system, which fundamentally

requires the influx of large amounts of money in order to get elected. The conflict for an elected

official between needing money and wishing to appear above corruption is the fundamental

concern for Lessig.[57] He believes that ethical transparency is detrimental because it creates the

appearance of corruption where there may be none, and because the truth of any given story is

likely to be lost in the noise of everyday life.[58]

While Lessig may be correct that ubiquity of data may lead to assumptions of corruption

where there are none, he is dismissive of the possibility that this free flowing access to data will

lead to journalists of all stripes determining the truth of a matter and distributing it in various

ways.[59] It is far more likely that the same technology that allows the transmission of the data

will also encourage discussion amongst constituents, reporting by journalists, and conversations

---

[55] *See, e.g.*, Lori Montgomery & Binyamin Appelbaum, *Dodd Looks to Distance Himself from Financial Firms*, WASH. POST, July 21, 2009, at A10 (using data from OpenSecrets.org to show monetary connections between Senator Dodd and the financial industry).

[56] Lawrence Lessig, *Against Transparency: The Perils of Openness in Government*, NEW REPUBLIC, Oct. 9, 2009, http://www.tnr.com/article/books-and-arts/against-transparency.

[57] *Id.*

[58] *Id.*

[59] *But see* Ellen Miller & Michael Klein, *TNR Debate: Too Much Transparency (Part II): More Scrutiny of Government is the Solution, Not the Problem*, NEW REPUBLIC, Oct. 11, 2009, at http://www.tnr.com/article/tnr-debate-too-much-transparency-part-ii.

with the representative herself to place the information in context. Through those processes, the truth of where money is going and why it is there will be found.

Access to other forms of government data, while not concerned with ethical matters, are also a flavor of transparency data. This form of transparency will not necessarily lead to discoveries of corruption, but the value of having the data available vastly outweighs any cost that might be accrued.[60] That access will lead to the public learning important information that might not otherwise be found. While not transparency in the traditional sense, this process will have a positive effect on governance. Unfortunately, as Ms. West points out, the available information at data.gov "suffers from accuracy issues, and many useful data sets are not made available."[61] Data.gov is not yet as useful a tool as it could be.

The Obama Administration Should Focus Transparency Energy on Ethical and Government-Sourced Data

In looking forward toward the next years of the administration, the Executive should focus transparency related efforts on ethical data. The campaign promise of a publicly accessible federal contractor database would be an excellent place to start. This data would allow the public to judge for themselves which companies are improperly abusing the federal contracting process. It could harness the power of the Internet to create a Public Inspector General corps that would drive the press to write about and the government to address contractor malfeasance.

The administration should also continue the work it started with the release of data.gov. The site is immensely useful now, but not all the departments and agencies have added their own particular data sets to the website. The Office of the President should encourage the various executive branch agencies to move their databases to the data.gov portal as quickly as possible so

---

[60] *See* posting of Andrea DiMaio to Gartner Blog Network, http://blogs.gartner.com/ (May 22, 2009).

[61] E-mail from Heather West, Policy Analyst, Center for Democracy & Technology, to Ross Schulman, author (Nov. 11, 2009, 16:32 EST) (on file with author).

the American people can work with the data and discover innovative ways to interact with it, as they did in the Apps for America competition.

There is a lot that President Obama's office can do to encourage transparency in government. By focusing the limited available bandwidth on those issues that will have the desired effect and do the most good, the administration can encourage good governance and citizen involvement. **L&P**