Foreword
by Senator Tom Daschle

Winston Churchill is often credited with the statement, "You can always count on Americans to do the right thing—after they've tried everything else." There is actually no record of Churchill ever uttering these words, but the statement captures a number of attributes that make our country unique. America does stand for doing the right thing. We are a resilient partner with our allies and nations in need. And our democratic process can be absolutely infuriating. The struggle among competing interests in our diverse society creates intense debate, frustrating delays, and occasional setbacks. But the obligation to reconcile our differences has also led to effective and durable public policy. It has never been an easy or particularly graceful process. As the Democratic leader in the Senate, I took part in many battles with my colleagues across the aisle—and occasionally with my fellow Democrats as well. On many occasions, these arguments were animated and deeply felt. But a disagreement on one issue very rarely damaged my ability to work with a colleague on another topic the very next day.

I remember sitting next to my colleague and fellow Senate leader, Trent Lott, at a Pentagon ceremony one year after the September 11 terrorist attacks. We had led the Senate together for six turbulent years. At one point, he leaned over. "You know, we have been through a lot together," he said, "and while there have been times when I've attacked you and you've attacked me, and our relationship has been strained, we have gotten through all of this together. People will never know what an accomplishment that really is."

Senator Lott and I both have the distinction of winning our first Leader elections by just one vote. Neither of us had significant latitude to commit our colleagues without an extraordinary amount of consultation with them and with each other. For that reason, we did two things that were catalytic in carrying out our responsibilities. First, we installed

a "hotline" on each of our desks for whenever we thought the situation called for immediate and personal dialogue. Second, on many occasions we held joint caucus sessions where we could address whatever challenges we were facing together.

Looking back, I now regret that we didn't hold even more joint caucuses. But, that telephone got used frequently as we led the Senate through a presidential impeachment trial, the attack on September 11, the anthrax attack in my office, negotiating a governance framework for a Senate in 2001 (where both caucuses had fifty members), and countless matters regarding nominations, the enactment of legislation, and the Senate legislative schedule. But that was our job. And there was no one else who could do it.

America is certainly more divided today than it was when I left the Senate almost ten years ago. The wars in Afghanistan and Iraq, the recession, growing income inequality, and changing demographics have all deepened the political divisions in our communities. But the culture of the Congress has also changed in ways that have diminished its ability to solve hard problems.

City of Rivals explores the forces that have weakened the Congress and challenges many of the traditional notions of what is wrong with Washington. Look, for example, at the issue of transparency in government. Certainly the public must have access to the decision-making process. But the idea that Washington would work better if there were TV cameras monitoring every conversation gets it exactly wrong. We don't need smoke-filled back rooms, but we must protect the private spaces where people with different points of view are able to work through their disagreements. The lack of opportunities for honest dialogue and creative give-and-take lies at the root of today's dysfunction.

Nor is this book a nostalgic remembrance of better times past. To the contrary, Jason Grumet offers a clear-eyed account of the current polarization and presents practical ideas to get things moving despite these divisions. Politics has always been a contact sport. By embracing the critical role that constructive partisanship has played throughout history, Grumet offers a more realistic set of solutions than the traditional fix-Washington agenda.

Seven years ago, I joined with Jason, George Mitchell, Bob Dole, and Howard Baker to create the Bipartisan Policy Center. Our goal was not to take politics out of the equation or ask people to check their interests at the door. To the contrary, we have worked to create an environment in which fierce disagreements can be debated, informed by data, and thus resolved. Time and again, the BPC has developed detailed policy solutions not by splitting differences, but by combining the best ideas from the left, right, and middle. Like any good political process, there has also been plenty of hand-wringing, compromise, and the occasional horse trade. All of this has been enabled by bringing proud partisans together in an environment that builds trust and enables the exploration of new ideas.

City of Rivals traces how the elements that make the BPC so effective are being driven out of the federal government. America's leaders today don't know each other well enough and they don't trust one another deeply enough to harness the sort of collaboration we need to succeed as a nation. In addition, *City of Rivals* boldly explores how many well-intentioned and popular efforts to make government work better are doing just the opposite. If we want Congress to fix our broken immigration system, pass budgets on time, take on tax and entitlement reform, invest in infrastructure, and confront myriad other issues, we must take a hard look at the uncomfortable questions and creative solutions raised in the pages that follow.

Senator Tom Daschle
Washington, DC
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CHAPTER 5

The Dark Side of Sunlight

For decades, what people euphemistically called the "Troubles" had been one of Europe's most intractable problems. The conflict that pitted Catholics against Protestants in Northern Ireland had traumatized innocent civilians in Ulster for years, and defied multiple efforts to broker a peace. But that began to change during the early 1990s when the Clinton Administration took a more active interest in bringing the long-boiling and often deadly dispute to a resolution. In 1995, the president appointed former Senate majority leader (and later BPC founder) George Mitchell as his special advisor in Northern Ireland. The following year, the British and Irish governments asked Senator Mitchell to serve as the independent chairman of the peace talks in Northern Ireland—a role Mitchell would later describe as "the most difficult task I have ever undertaken, far more demanding than the six years I served as majority leader of the United States Senate."

At first, the senator's charge seemed nearly impossible. The factions were divided by decades of bloodshed and mistrust, and it took months of prodding and positioning simply to get them to the negotiating table. Moreover, the issues between them were complicated to resolve. What sort of political structure would give Catholics confidence that they wouldn't be subject to discrimination in a region dominated by Protestants? What would be done to assuage Protestant fears that the violence might start up again at a moment's notice? After a lengthy and challenging process, a final accord was signed on April 10, 1998. Named The Good Friday Agreement, it established a roadmap for peace.

But the Troubles didn't end there. Little more than a year later, on July 16, 1999, just as Queen Elizabeth was knighting Mitchell for his role in ushering through the accords, news broke that the ceasefire was falling apart. At issue was whether the combatants would "decommission" their weapons before or after the new government in Northern Ireland was set up. As Mitchell said at the time, "It is a sad irony that we received these honors just as the peace process is suffering . . . setbacks."

It wasn't that the lead negotiators were having second thoughts—they had all staked their reputations and influence on the accord's success. But pressure had mounted from those *outside* the process to make things more favorable for each faction's interests. In the autumn of 1999, negotiators met at Stormont, a facility just east of Belfast that housed many of Northern Ireland's main government buildings. But Stormont also housed something else: throngs of press. Years later, Mitchell reflected in an interview, "You remember how it was—everybody walking into that building had to run the gauntlet of the press in or out." And the constant barrage of media camped out at the negotiating site served as more than a roadblock to entering the building; it made it impossible to avoid harmful leaks that undermined the ability of adversarial negotiating parties to build trust.

The negotiators couldn't publicly disavow their brethren and they couldn't trust that concessions made to secure a lasting peace would not be used against them by critics within their own faction. They needed a place to rebuild their mutual trust—away from the press, and protected from any leaks. And so they again turned to Mitchell. This time, the request was simply to find a location where the sides could engage absent the outside pressures that were threatening the accord.

For nearly a week, unbeknownst to the outside world, Senator Mitchell hunkered down with leaders on both sides behind closed doors at the US ambassador's residence in London. During that period, everything was done in private. There were no press conferences, and no post-negotiation interviews. Those attending didn't have to worry that exploring new ideas would make them look weak to their constituents. And it worked. Over the course of their time in London, they made enough progress, especially at rebuilding trust, that when they returned to Belfast they were able to get the process back on track. This was possible not because the two sides

developed a clever new solution. What got the negotiations back on track was simply the ability to rebuild confidence outside the prying eyes of the media and the public at large. Trust restored, a lasting peace was secured.

What Doors Are For

The story of Senator Mitchell's resuscitation of the peace process in Northern Ireland holds an enormously valuable lesson that goes far beyond its particulars. Even as Edward Snowden's 2013 release of secret national security information has alarmed many committed to keeping the country safe, the sense that transparency begets honesty has become a tenet of American political life. The two concepts have become so interchangeable that if you ask a person on the street what the opposite of "transparency" is, he or she might well answer "secrecy" or even "corruption." The chance that the answer would be "privacy" seems slim. After all, the tag line of the organization Transparency International is: "The global coalition against corruption." We've become so convinced that honest government must be done in public that it is hard to imagine what good might come of *anything* done behind closed doors.

It is not difficult to understand why that sentiment has emerged: Political misconduct is often incubated in dark rooms and hidden places. But much as openness and transparency now appear to be unmitigated goods, history suggests that there may also well be a dark side to sunlight. American history is rife with examples of *privacy*—transparency's true opposite—serving a crucial service to our democracy. As the Good Friday Accords showed, those open to collaboration needed room to maneuver absent the scrutiny of their critics and supporters. While many aspects of policy development depend on real-time public engagement, certain elements of the deliberative process can only be done behind closed doors.

The best example of privacy's crucial role in American democracy can be found at the beginning, in the years that followed our founding. The Constitutional Convention, in fact, was closed to the public-at-large.*

* Though we know very little about what was actually said in the convention, we still hold up the Constitution as a bastion of liberty. There are only a couple of sources, most famous of which are Madison's notes, which give us a window into what the Framers were thinking.

In determining the rules for the Constitutional Convention, the founders decided "to forbid 'licentious publications of their proceeding'"—and for good reason. (Essentially, all the sessions were closed to the public, and none of the participants was allowed to discuss the deliberations in the press.) Had the public been privy to the delegates' negotiations, it is almost impossible to imagine how they might have emerged with the thoughtful, balanced, and effective document we now hold up as the cornerstone of American government.

Think of the whole host of compromises forged during the course of that long, drawn-out deliberation. How would the various states be represented in the new Congress? Would the delegations be equally divided, or would the states be given delegations designed to approximate their populations? The deal that eventually dispatched that question, labeled "The Great Compromise," satisfied both sides by providing for *two* legislative bodies, a Senate in which states would be equally represented, and a House of Representatives, for which states would have delegations proportional to their size. With that arrangement, the small states felt protected against being swallowed in the legislative process, but their larger neighbors felt that their size counted for something a little extra.

Today, as much as we're frequently frustrated with the gridlock on Capitol Hill, we honor The Great Compromise, understanding it as a pragmatic solution to what might otherwise have been an intractable quagmire. And we can only imagine what would have happened had the deliberations been public: Convention delegates from smaller states like Delaware might well have felt pressure from those at home—particularly those disinclined to support *any* new constitutional framework—to reject any arrangement that failed to provide utterly equal representation. Maybe Delaware's delegates, seeking to prove their bona fides to the radicals back home, would have signed a pledge making an equal distribution of members a *pre*-condition for negotiations. Maybe the delegates from the larger states would have taken the opposite view, threatening to remove any of their own members who failed to honor the core value of proportional representation.

The same sort of dilemma might have applied on a whole range of other issues, from how the Executive Branch would be organized to the

status of slavery. A convention open to the public would have most likely fallen into acrimony, as the various sides delivered fiery speeches for those who would read about them in the newspapers back home. Absent the privacy afforded the delegates in Philadelphia, the Constitutional Convention might have been gridlocked before any document emerged for ratification. It is a poignant irony that a government, *of* the people, *for* the people, and *by* the people could only be developed *without* the people. The document extolled, promoted, and carried in myriad politicians' pockets and purses was written in a backroom by political insiders.

But that is hardly the end of the story. Throughout American history, whenever we've been faced with a deeply entrenched internal divide, the solution has nearly always been forged within a certain zone of confidentiality. One need only watch Steven Spielberg's film *Lincoln*, which traces the harrowing path that led to passage of the Thirteenth Amendment (banning slavery), to realize that the president's heroic stand could never have succeeded in a glass house.

Spielberg's epic depicts a private conversation, in what looks like the basement of the White House, between President Lincoln and Congressman Thaddeus Stevens, leader of a more radical cohort of Republicans in Congress. Stevens lays out for Lincoln his intention to jam a vindictive plan for Reconstruction down the throats of the states that had seceded from the Union. Lincoln retorts that Stevens's radical agenda, which aimed to wipe out racial inequality in one fell swoop, was less likely to do any real good for the nation's former slaves. Real progress, the president argued, could only be made through small steps, like an amendment that provided citizenship (though not all its privileges) to former slaves.

Not to spoil the film, or the basics of US history, but Stevens acquiesced and the Thirteenth Amendment became the law of the land. Though many historians take issue with the film, Lincoln and Stevens's frank exchange of positions, whether accurate or apocryphal, depicts how crucial business has generally been conducted in Washington. Outside the view of reporters, and even of aides, politicians in positions of influence were able to negotiate over items of real disagreement.

And this is not a Ye Olde vestige of simpler times. As recently as the mid-1990s, the Senate's majority and minority leaders (Tom Daschle

and Trent Lott, BPC's co-founders) each had a phone on their desk that connected directly to the other. Some worried at the time that this direct interaction might compromise their partisan interests. (Their respective staffs had the additional anxiety that the leaders might actually make decisions by themselves.) But the regular interaction did not diminish their commitment to principle or their determination to win; it just meant that they sought, whenever possible, not to injure one another.

According to Senator Lott, when, on any given issue, he had the votes to win, he would tell Senator Daschle where things stood. But he was always willing "to do something to make the loss a little easier for Tom." That is a far cry from the dynamic connecting today's Senate leadership. Senators Harry Reid and Mitch McConnell, who recently touted an agreement to meet once every two weeks, seem more interested in scoring political points off each other than softening any blows.

Shouting At an Empty Room

In the abstract, people accept that the art of politics is about balancing the demands of competing interests and constituencies. However, in practice, the act of harmonizing different positions is often viewed in the public with considerable disdain. For many, the handshake behind closed doors signals the ultimate treachery: It is the moment when someone who promised to be *your* advocate abandons integrity in favor of expediency. Fearing the proverbial "sell out," many Americans have long pushed to shine a light into the darkened corners of the political world. A healthy suspicion of government is as old as the Republic itself. However, the "high crimes" perpetrated by the Nixon Administration created new urgency to expose and monitor our elected officials.

The Watergate scandal, combined with the public's outrage over the Vietnam War, convinced most Americans that our government was severely off track and unworthy of public trust. Once John Dean asserted that a "cancer" was growing inside the Nixon White House, it was easy to assume that anything hidden from the public eye was nefarious. And it wasn't just the bugging scandal or the "dirty tricks." Nixon's secret bombing of Cambodia and surprise expansion of the war gave credence to the supposition that the nation's leaders were wildly out of step with popular opinion.

But the country's stepped-up desire to know what was happening behind closed doors marked only half the equation. Over the course of the following decades, a series of technological advances dramatically increased the public's capacity to keep an eye on Washington. Four decades after Nixon left the White House in disgrace, every legislative hearing, floor speech, and position paper offered during the course of any given public debate are accessible in real time. And one need look no further than C-SPAN to see how powerfully the landscape has changed.

The House and Senate floors have always been public places. The galleries situated above each chamber have long provided the public with entrée into what was happening on Capitol Hill. But C-SPAN, which began broadcasting the proceedings of the House floor in 1979 and expanded to the Senate in 1986, has wrought at least two profound effects. The first, and more obvious, is that nearly anyone can now watch the public's business being done—or not done—live. Government has joined the ranks of reality television, albeit one that few Americans watch. It has become part of what is "on"—it is now available, open, and accessible.

The second change has been even more profound. Until congressional debate began to be broadcast around the country, floor speeches had been part of a conversation mostly among colleagues. That's not to suggest that those delivering remarks didn't hope to have their pithy quotes reported back to the public at large. But it did mean that the wells of the House and Senate were places where interested colleagues actually discussed legislation with one another.

The moment those speeches began to be broadcast on C-SPAN, Congress began speaking to a very different audience. In addition to the general interest of a relatively small number of engaged citizens, legislators could now direct their remarks to narrower bands of interests and supporters. Instead of exploring the nuance of complex legislative questions, speeches became advertisements aimed at very specific audiences: lawyers focused on medical malpractice reform; hedge funds intent on maintaining particular tax provisions; environmentalists opposing nuclear power. Members of the House today line up in the morning to give "one-minute" speeches that are designed exclusively to be sent out as YouTube clips to interested admirers.

Washington has become subject to what psychologists call the "observer" effect, whereby subjects who know they are being watched alter their behavior. Many predicted this result long before C-SPAN became a Washington institution. In the Senate, Howard Baker, the longtime majority leader, faced broad opposition to allowing cameras in the Senate chamber. His colleagues feared that senators would begin to talk to cameras instead of each other. Predictably, members of Congress now pay little to no attention to their colleagues' statements. C-SPAN hasn't simply exposed dialogue that was once partially shrouded; it has entirely changed the substance of the conversation itself.

Nothing illuminates that change more abjectly than the stunt that vaulted Newt Gingrich into the national spotlight during the 1980s. Taking advantage of the fact that C-SPAN was, at the time, restricted to showing only the podium, also known as the "well" of the House floor (and not the surrounding seats), the brash, young congressman from Georgia began delivering incendiary speeches late into the evening, accusing Democrats of being "blind to communism," among other things. It looked to the average viewer—most of whom were political junkies or insomniacs—as if Gingrich were accusing Democrats of transgressions to their faces, and that they were too cowed to defend themselves. But the truth was that the chambers were largely empty; most everyone had gone home for the night. Gingrich became a star by yelling at an empty room.

The Speaker of the House at the time, Democrat Tip O'Neill, was so incensed when he found out that he took to the floor, wagged his finger at Gingrich and said: "You deliberately stood in that well before an empty House, and challenged these people, and challenged their patriotism, and it is the lowest thing that I've ever seen in my thirty-two years in Congress." But the die had been cast. Floor debate had transitioned from being a tool of internal deliberation to a platform for political posturing.

It is not hard to imagine what happened: The substantive conversations that were once held in the House and Senate chambers were moved to the cloakrooms, or at least to private deliberations held away from C-SPAN's cameras. At one point the franker debates were still held in

committee hearings—though eventually even many of those were put on C-SPAN as well. The real negotiations began to be held in leadership offices. Rather than expand access to decision-making to a wider range of viewers, C-SPAN has in fact done the opposite: It has inadvertently pushed real deliberation *further* into the shadows by centralizing power among a smaller group of leaders.

No member of Congress these days would try to kick C-SPAN off of Capitol Hill. Beyond the fact that any effort to re-cloak the Congress would look like an attempt to separate Americans from their government, most members like the fact that they can talk to their constituents directly through the cameras recording House and Senate proceedings. That ship has sailed. But there are ways to walk back the coverage, even marginally.

And there's precedent for doing so.

One setting that has transitioned from private to public and back again is the weekly (or biweekly) party caucus meeting. Often, some of the most intense political battles occur not in two opposite extremes engaging but rather *within* the political parties. For a short period in the mid-1970s, the Democratic Caucus—a group deeply divided between southern conservatives and northern liberals—decided to open their caucus meetings to the public. Some hoped that airing these meetings would make them more consequential, drawing power away from powerful southern committee chairmen and conferring greater authority on the caucus majority and party leadership. But the experiment failed in large part because members quickly tired of the grandstanding that took place at these "open" meetings and simply stopped attending. The cameras were kicked out and caucus meetings have since remained private affairs.

Overexposed

The corrosive effect of publicity on candor and deliberation doesn't just apply to Congress. Across the federal government, there are myriad government activities that even the most ardent transparency advocates agree are entitled to some privacy. Just because you're a member of the civil service doesn't mean, for example, that every draft memo you write should be posted on a government website. Few would suggest that the pursuit of transparency should extend to recording and posting the text of the US president's phone

calls—though German chancellor Angela Merkel might. We wouldn't think it appropriate to bug the offices of cabinet officials or agency heads. Neither would we demand that all senior staff meetings be posted on YouTube.

That said, there are things that nearly all of us do think should be public: We expect the decisions that come out of those meetings to be subject to public scrutiny. In some cases, we expect to know who participated in major decisions. We want to know that no one is profiting privately from decisions made purportedly in the public interest. There is a crucial balance to be struck—and while certain stages in the deliberative process require privacy, others have to be kept open. Expectations about where to strike this balance have changed dramatically over the last several decades.

A critical arbiter of the lines between public and private communication are two laws that were established and strengthened during the 1960s and 1970s: the Freedom of Information Act (FOIA)*, and the Government in the Sunshine Act. It is hard to dispute the altruistic motives behind the movement to increase transparency in government—a guarantee that, in many cases, both laws have managed to provide. And it is a blessing that American government, unlike repressive regimes around the world, is committed to the spirit of public accountability. For official meetings, FOIA sets a high bar, requiring, with limited exceptions, that "every portion of every meeting of an agency shall be open to public observation."

But the changes haven't only given the public access to more information; they've actually changed the way the men and women staffing the government perform their jobs. In cases where the most efficient way of sharing an idea might make them subject to public scrutiny (e-mail to a dozen of their colleagues), they will often find less efficient ways to

* As much as we see it as a commonsense law today, President Lyndon Johnson strongly resisted signing the 1966 Freedom of Information Act (FOIA). As Johnson's White House press secretary Bill Moyers said years later, "LBJ had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets; hated them challenging the official view of reality. He dug in his heels and even threatened to pocket veto the bill after it reached the White House." Things were even tougher when the 1974 FOIA amendments were sent to President Gerald Ford for his signature. Ford was counseled by White House chief of staff Donald Rumsfeld and his deputy Dick Cheney to veto the amendments. Others in the administration, including the head of the Justice Department's Office of Legal Counsel, Antonin Scalia, were also organizing opposition. In the end, Ford did veto the legislation, but Congress easily overrode his decision.

deliberate (tracking their colleagues down individually for conversations in the hall). Worse yet, government officials from scientists and engineers to lawyers and political appointees have grown afraid to express doubts, or raise challenging questions for fear that they'll be made public and used to undermine agency action—embarrassing them along the way. In 1996, NewsHour's Jim Lehrer asked then first lady Hillary Clinton whether she kept a diary, or at least took good notes. "Heavens, no!" she laughed. "It would get subpoenaed. I can't write anything down."

This concern is not reserved to the Clintons nor to the president's inner circle. As one longtime civil servant explained to me, the clear understanding among staffers at executive agencies is, "don't write it down unless you want Congress to see it." When briefing a cabinet secretary, agency staff will often go "paper free"—not to save the trees. It is simply too high of a risk that memos weighing the pros and cons of different decisions might wind up in public. Instead, a general agenda is often prepared and lead staff provide a verbal briefing. The process is profoundly inefficient; it is rarely possible to assemble all the experts in one place to brief the boss. Moreover, there's often no effective internal record to organize issues for further reflection. According to former Clinton speechwriter Jeff Shesol, "The climate of fear in the Clinton White House exerted, without doubt, a dampening effect on the Administration's internal dialogue."

Diligent public servants doing their best to grapple with complex problems never know what among their thoughts and written utterances will be made public. And like the cameras now pointed at the floors of the House and the Senate, that has fundamentally altered the substance of government documents themselves.

We're Listening

But it's not just that government officials have become fearful of writing down what they really think. As our hunger and penchant for transparency has grown, the ways in which information is passed between colleagues has also evolved. As we've moved from analog to digital, and from inter-office envelope to instant message, more of the ideas and opinions considered among members of the government have become subject to capture. Face-to-face meetings and conference calls have been replaced

with quick e-mails. Regional administrators spread across different time zones can now commiserate through their smartphones. There can be little doubt that the advances of the last several decades have offered the promise of greater efficiency. What is less obvious is the effect that change has had in balancing the demand for transparency with the need for deliberation.

The prime benefit is obvious: More can be done at much less cost. How much can taxpayers save if those regional administrators don't all have to travel to Washington to meet on a subject that might otherwise be debated online? How much efficiency is born of the fact that they don't have to schedule a conference call that can delay a final determination on an issue by a matter of weeks or months?

Moreover, the *new* way of deliberating offers the promise of even greater transparency. The substance of debates handled in the old, inefficient way would have remained largely outside the scope of any transparency expectation. Few would expect that a transcript be made available for a spoken interaction—be it a meeting or phone call. But if the deliberation is done on a computer screen, our expectations are different: E-mails exchanged by members of the government are considered to be written records that should be subject to public disclosure. Somehow, if it is written down and sent across fiber-optic cable, many seem to think it should be subject to no greater privacy protection than an official government report. Anyone who has mistakenly distributed a private e-mail understands the panic in this proposition.

That shift in perspective has been made evident in litigation, like in the Competitive Enterprise Institute's (CEI) efforts to gain access to text messages sent by the Environmental Protection Agency administrator Gina McCarthy. According to the organization's website:

> *CEI first asked for her texts on 18 specified days when she was known to have testified before Congress and been seen sending texts. After EPA acknowledged no such records existed, CEI obtained information relating to McCarthy's PDA bill that showed she sent 5,392 text messages over a three-year period.*

CEI has since filed suit in the US District Court for the District of Columbia asking the court to "enjoin and prevent the destruction of certain EPA text message transcripts, by EPA pursuant to a policy and practice that violates the Freedom of Information Act and the Federal Records Act." It feels as though we're careening toward a place where *everything* is fair game, without even considering the necessity or the consequences. Paul Wester, the chief records officer for the National Archives recently told the *Washington Post*:

> *The notion is all e-mails should be captured. Certain people in an organization are called "capstone" officials: Their e-mails are permanent. One of the things we're looking at is having a schedule that identifies certain senior positions within the agency and the e-mail accounts for them, the assistants to them; those would be presumed to be permanent, captured and transferred to the archives.*

Having every e-mail written from your office stored for posterity in the National Archives will certainly have a chilling effect on electronic communication. But Wester's comment hints at a much broader shift in expectation. If e-mails and text messages sent on government-purchased smartphones are now public domain, telephone conversations and voicemails—all of which can be digitized—cannot be far behind.

In his recent novel *The Circle*, Dave Eggers explores a future dominated by complete transparency. In the author's dystopic portrayal, a company called The Circle (an amalgam of Google, Facebook, PayPal, and other Internet behemoths) demands transparency in all things—both within the company and, as their power grows, in society at large. Two of its many slogans are, "secrets are lies," and "privacy is theft." While anyone over thirty will see this future as the horrifying obliteration of personal freedom, it is sadly not that far from the obligations that many would impose upon our federal officials.

Regardless of whether you believe we are careening toward the complete obliteration of privacy in all things, our unencumbered embrace of transparency is certainly not making government any more efficient. Ideas that might be vetted and disposed of in a quick series of e-mails

now must wait for a meeting to be scheduled, be resolved without broad input, or simply not be raised at all. But it's not just that the government is taking longer to make decisions.

The far greater problem is that our leaders are being deprived of the information needed to make good decisions. The disincentive for staff to raise challenging issues, flag weaknesses in analysis, or do *anything* contrary to the perceived interests of senior political leadership runs contrary to the public interest. It is no mystery why a system so rife with transparency so frequently falls short of our expectations. A private sector company run this way would go belly up within a year.

Driven Underground

But the government hasn't been entirely flat-footed in the face of this evolving dynamic. Indeed, as the number of FOIA requests has skyrocketed, the Executive Branch has been redesigned to essentially work *around* the challenge of transparency. The principal safe-harbor that members of any administration have from prying eyes is "executive privilege," namely the power the Supreme Court has proffered to the White House to resist subpoenas and other demands for information. If, for example, Congress were to ask for the minutes of a meeting held between the president and his chief of staff, the White House could claim that the notes were protected, and a court would likely back the president up.

But there's a wrinkle: Executive privilege is the prerogative of a limited number of senior White House staff, and so it's not available to the members of the president's cabinet or to senior officials in Executive Branch agencies. The predictable result has been to insulate the White House and diminish the role of expert agency staff in favor of a small cluster of White House "czars" who are not subject to Senate confirmation and who function largely outside the scope of congressional oversight. At the outset of the Obama Administration, health care and climate change were two domestic policy priorities. And in both cases, rather than leave the debate to the expert agencies with Senate-confirmed leaders and legions of civil servants capable of bringing vast experience and expertise to the discussion, the administration opted to

hire a White House policy czar to lead each respective legislative campaign. It is becoming increasingly common for the White House to disenfranchise the more expert advisors outside the building for fear that their honest assessments and private advice cannot be protected from public scrutiny. Here again we see the double edge of transparency's sword. While some government actions are brought to the surface, others are driven farther underground. In the latter case, the unique attribute of the decisionmakers is not their expertise but their ability to secure privacy.

Take, for example, the President's Council on Environmental Quality (CEQ), created in 1970 to coordinate decision-making on environmental issues within a more political lens than is appropriate for the seventeen thousand people who work at the Environmental Protection Agency. CEQ is a relatively nimble bureaucracy that has ranged from thirteen to seventy staffers over the past few administrations. But the council's influence today has been diminished because President Obama chose to create a three-person office within the White House to perform the same role. Why replace several dozen staffers with a mere three? One reason, a White House staffer privately told me, is that CEQ staffers aren't protected by executive privilege. I'm not suggesting that White House staff are doing anything inappropriate behind the shield of privilege. However, it does reveal that three people having an honest conversation is viewed as producing a better decision than the collective wisdom of seventy people who cannot express themselves freely.

While members of Congress are indignant whenever an administration from the other party takes steps to protect the privacy of its decision-making, Congress doesn't embrace the unadulterated value of transparency when considering its own deliberative needs. A recent example of that hypocrisy was revealed when certain members of the legislative branch began to explore changes to the nation's tax code—a body of legislation that has not been seriously amended since 1986. In the spring of 2013, senators Max Baucus (D-MT) and Orrin Hatch (R-UT), who led the Senate Finance Committee, sought to conduct a wide-ranging review of ideas to improve the complex US tax system. They proposed starting from a "blank slate" and asked their colleagues for suggestions. They were not

seeking detailed proposals or any commitments of support—just ideas to begin a deliberative process.

They received no responses. Not a one. No member of Congress wanted to be on record calling for either the elimination or continuation of a tax provision favored or reviled by anyone. So to prompt more meaningful input, the senators wrote a memo to their colleagues on July 19, promising that any records of lawmaker suggestions would be locked in a safe near Capitol Hill. Baucus and Hatch promised that any ideas written and transmitted to them would be transferred to the National Archives and stored in a special vault, separate from the committee's other records, and sealed until December 31, 2064. Though widely ridiculed for its absurdity, the plan worked and the committee received over one thousand pages of proposals.

Process Overload

Often, when confronted with a particularly vexing challenge or actual

disaster, Congress and the White House outsource their work. Rather than allow a committee or a bureaucratic department to handle a particular investigation, the nation's leaders assign a federally chartered panel of experts the task of studying the problem. Roughly one thousand of these committees are currently in operation. Most are quite technical and not particularly controversial, but several have addressed major national crises. The Rogers Commission, for example, was assigned the task of looking into the 1986 Space Shuttle *Challenger* disaster. More recently, there have been two high-profile commissions: The Financial Crisis Inquiry Commission was created to examine the domestic and global causes of the 2008 financial crisis, and The National Commission on the Deepwater Horizon Oil Spill and Offshore Drilling was created to make recommendations after one of the worst environmental disasters in US history.

Commissioners are selected to represent a wide range of different perspectives to ensure that the solutions they recommend are the product of vigorous debate. Former regulators, academics, nonprofit advocates, CEOs, and politicians might be placed together on the same panel. Consumer advocates and industry insiders who would normally be adversaries might be asked to collaborate on a new regulatory regime. And after

careful fact-finding and deliberation, the hope is that representatives with wildly different preconceived impressions will be able to come to some sort of comprehensive conclusion. *E pluribus unum.* From many, one.

In the early 1970s, Congress established the basic oversight structure for these committees via adoption of the "Federal Advisory Committee Act" (FACA). Over the last several decades, an accretion of requirements designed to increase public engagement has become an obstacle to effective deliberation. A federal official who spent thirteen years leading a variety of advisory committees noted the process tradeoffs:

> *For timely issues it is very difficult for the FACA to offer effective guidance. You need to post when you will meet, prepare minutes from the last meeting, and create and circulate a meeting agenda before you can even get in the room. As a result, we generally don't look to FACA for advice on really pressing problems.*

At first glance, most of the rules seem reasonable. Meetings of the full committee must now be noted in the Federal Register at least fifteen days ahead of schedule. In practice, this requirement prevents a group meeting with less than a month's advance planning. While a hindrance to spontaneity, it is appropriate to require reasonable public notice for these formal sessions. Often expert testimony is presented and there are opportunities for public statements and general input. In addition, each commission's investigative material must be made available for public review.

However, a series of additional requirements seem designed to directly confound the very deliberative purpose of these diverse advisory bodies. Committee members are often prevented from interacting with experts outside of the restricted committee process. In one committee, a leader

of a large technical organization was told not to consult with her expert staff as that would be an unfair advantage of her group over others—as if a level playing field, and not the best solution, was the point.

Even interactions among commission members are highly constrained. For example, it is unlawful for more than three members of a committee to have a conversation outside of a formal public meeting.

Committees often have a dozen or more members and it would seem obvious that a group of five to six members might desire to have a series of conference calls to think through some tough issues.

To get around this obstacle, committees often divide up into mini-groups of two to three members and try to conduct "shuttle diplomacy." Different federal agencies interpret the rules differently and sometimes even two members are discouraged from engaging outside of the formal recorded sessions. In addition to being highly inefficient, the goal of broad-based exploration is lost. Worse yet, there are practically no opportunities for these committees to honestly hash through their differences. All deliberations by full committees must occur in public. In cases where there is inadequate meeting space or members are remote, a phone line is

required so that interested parties can listen in. Committees are allowed to have private "planning meetings," to think through logistical issues like where and when to hold meetings, but there is a federal "minder" at all such sessions to ensure that the conversations do not become substantive. These rules are not just an inconvenience. Alumnae of the process complain that the red tape makes it much harder to fulfill their assignments and often shrinks the scope of their exploration.

In the recent National Commission on the Deepwater Horizon Oil Spill and Offshore Drilling, for example, most of the attention was appropriately devoted to understanding the proximate cause of the accident so that the commission could make recommendations to avoid a recurrence. But the Spill Commission co-chairs subsequently realized that their work could be even more useful if they explored the relevance of their recommendations to other challenging offshore environments—in particular, the questions surrounding new offshore production in shallow waters off Alaska. Ultimately, they chose not to. According to commission staff, the inability to have frank and private discussions on these extremely sensitive issues was a factor in preventing them from even trying.

According to a senior advisor to the Spill Commission:

> *The FACA rules demanded such constant public disclosure of full Commission deliberations that they inhibited rather than fostered frank discussion, turning the full Commission meetings into a type of kabuki*

theater exercise. Honest discussion of the political ramifications of recommendations—that is, how they would be greeted in the real world, for example by Congress—was impossible. My personal view is that this restricted greater policy impact by the Commission despite incredibly hard work and dedication by all involved.

Like with the White House's use of executive privilege, FACA committees have tried to find workarounds. While no one wanted to get too specific, several participants in FACA processes acknowledged that it simply would not be possible to deliver a solid product without skirting the rules.

Many states employ equally aggressive "open-government" requirements to similar effect. In the state of Washington, the desire for government transparency has collided with the equally progressive aspiration to end gerrymandering. Throughout 2011, former senator Slade Gorton (R-WA) was one of four leaders appointed to lead a redistricting commission to draw new election lines based on the 2010 census data. Senator Gorton believes that Washington state's process is the best in the country, in large part because the legislature appoints an even number of commission members—two Democrats and two Republicans—which obligates real interaction and a true consensus.

According to Senator Gorton, the biggest challenge in the entire process was the application of Washington open meeting law. Under state law, the public had to be included in any discussion among a quorum (i.e., three or more) of commission members. "It was simply impossible to even begin to explore trade-offs or design a strategy with all the inter-

ests listening in," Gorton explained. "After a couple of sessions that were reduced to posturing, we did the only thing we could and split the Commission in two. This allowed us to grapple with the most challenging issues through informal discussions." From there, the deliberative work was largely conducted in private and the commission achieved an effective consensus within the time allotted.

If the American public is going to get what it expects out of its blue ribbon commissions, it needs them to be able to operate with independence and internal trust. The balance between transparency and deliberation has come undone, and we need to find a new equilibrium.

Glass Houses

Anyone who is part of the decision-making process is acutely aware that openness, for all its virtues, also has its vices. But, for most everyone in

public life, there's very little upside to pointing the problem out. No one pushed back when, in the aftermath of President Obama's election, a group of advocates labeling itself the "Right to Know Community" published a long set of recommendations on openness that took little account of the effect their proposals might have on deliberation. The day after his inauguration in January 2009, the President issued a memorandum that began with the following statement:

> *My Administration is committed to creating an unprecedented level of openness in Government . . . Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing.*

The same rhetoric had flavored the Obama campaign's core critique of the Bush Administration in the run-up to the Iraq War. The upstart candidate embraced the populist narrative that "special interests" were crowding out the voices of regular people. In politics, it's a truism that before you get to do the job, you have to get the job and it's never a bad campaign strategy to say, "I want you involved." The 2008 Obama campaign soared on the wings of small donors and newly engaged voters.

It's not just Democrats who are drawn to the easy populism of open government. Several conservative groups joined the "Right to Know Community" in calling upon the incoming Obama Administration to champion sunlight without limits. Less than two years after the Obama Administration pledged its commitment to transparency, House Republican leader John

Boehner included the following in his preelection "Pledge to America":

> *Americans have lost trust with their government . . . Backroom deals, phantom amendments, and bills that go unread before being forced through Congress have become business as usual. Never before has the need for a new approach to governing been more apparent . . . We cannot continue to operate like this.*

Unfortunately, while the rhetoric of transparency appeals to everyone, when push comes to shove, pride in open government often gives way to humiliation. The administration's drive for ever-increasingtransparency hit a rhetorical pothole when Edward Snowden began disseminating state secrets while camped out in Moscow. It's obvious that certain information needs to be kept under wraps in the realm of national security—even if it is reasonable to want certain elements to be public. Shouldn't a similar

balance be struck in other spheres of public life?

As it turns out, even those who tout the "right to know" at the outset of their terms in office tend, over time, to seek a better balance between openness and collaboration. Congressional Republicans certainly didn't lay bare the internal deliberations that eventually brought the 2013 government shutdown to an end. If they had, the voices of wisdom who stopped the madness might have stayed silent or been shouted down in a frenzy to impress the Republican base.

At the same time, President Obama has retreated from the pledge to keep his administration entirely open. When a contractor working on HealthCare.gov was subpoenaed for information by the House Oversight Committee, the Obama Administration tried to prevent them from producing what the committee had asked to see. Even fellow Democrats were troubled by a lack of transparency when the administration was telling the public that Syria's Assad regime had used chemical weapons while refusing to reveal its evidence. Republicans have frequently sought to contrast the administration's rhetoric and actions. As Iowa senator Charles Grassley once complained: "There's a complete disconnect between the President's grand pronouncements about transparency and the actions of his political appointees."

Openness is an important value that should be pursued and celebrated. But transparency must be balanced against candor and efficiency. There's a dark side to sunlight, as articulated famously by former vice president Dick Cheney, who argued: "What I object to . . . is mak[ing] it impossible for

me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said." You don't have to embrace the intensity of Cheney's view of executive privilege to concede that he has a point.

Deliberative Bodies

Fortunately, there are institutions in Washington that effectively balance public accountability with private deliberations, and they can point a better way forward.

Take, for example, the House Permanent Select Committee on Intelligence, known colloquially as the HPSCI. Congressional committees, which were once beacons of deliberation, are today shadows of their former glory. Their hearings have become too vitriolic and partisan, with members trying to impress those sitting in the galleries and watching

on television. Rather than providing a forum for thoughtful debate and discussion, legislative panels have become arenas for showmanship and sparring.

The HPSCI, however, has sidestepped the plight of most other committees. For reasons of national security, many of its hearings and deliberations are held behind closed doors. There are no cameras for members to play to and no journalists to impress. Some of their legislative findings are kept under wraps—but most are made public. Absent the pressure to score political points they need, members are given the latitude to develop much more deep-seated relationships with their colleagues. The result is a level of collegiality and collaboration too frequently absent in other important committees. According to Michael Allen, former HPSCI staff director, "When members are in the cocoon of the intelligence committee, they are able to dedicate undivided attention to their constitutional oversight duty. The atmosphere frequently promotes careful deliberation and study from which extraordinary cooperation can develop."

The same basic dynamic is true at the Supreme Court. The justices have vehemently resisted requests to have court proceedings broadcast on television, and there is no serious consideration of publishing draft opinions, internal memos, or transcripts of their internal meetings. People may not like the decisions made by the Supreme Court. But the questions the justices pose to counsel are meant to sway their dark-robed colleagues, not the public at large. If they were instead more prone to influence public opinion, the reflective dynamic that is supposed to characterize the court would surely decline.

The Federal Reserve's Open Market Committee, the powerful board that makes most of the nation's important monetary policy decisions, marks yet another example of the same phenomenon. To balance transparency and deliberation, minutes are kept of its meetings, and they are released to the public—but not until weeks *after* the committee has made its decisions. By design, the delayed release provides those who sit on the committee with the opportunity to have a full and fair hearing of any given policy proposal. None of the members have to worry that their comments might affect the financial markets, for good or ill. If cameras were allowed in the room, this carefully designed system would be upended. Members would calibrate all their comments based on the public or the market's reaction, and, most likely, their deliberations would grind to a halt because of the scrutiny.

The Fed, the Supreme Court, and the House Permanent Select Committee on Intelligence all have their quirks, shortcomings, and critics. But on balance, they are high-functioning government institutions.

Reducing the Glare

Why can't we apply a similar balance of measured privacy and ultimate accountability to the less functional parts of the government? How do we intentionally create protected places that allow, foster, and encourage real deliberation? How, in the end do we protect policymakers from the glare of too much sunlight?

Despite the fact that unmitigated openness is harming productive deliberation, few politicians want to go on record waging a campaign against transparency. Fortunately, the things we need to do to recalibrate the essential balance are incremental. At the core, we need to re-legitimize the idea that there are stages in the public policy process where the imperative for deliberation trumps the imperative for access. Federal officials

need to have confidence that they can raise challenging questions and doubts at the early stages of a policy discussion without being humiliated down the road—or diminishing their own latitude in addressing the underlying challenge. Blue-ribbon commissions must be enabled to confer offline—even as we continue to require that the rationale for their decisions be made public. The conversations that the participants

themselves have in small groups—over lunch maybe, or on an ad hoc conference call—should be private.

Second, we should urge each house of Congress to meet with some regularity behind closed doors, in a bipartisan manner, with the cameras turned off. What if, for three hours each week, the floor of the House and Senate were closed off to the public? No votes would be taken. No decisions would be made. But members would at least have time to talk to one another—rather than addressing everything to the television audience.

It's not an idea without precedent. During President Clinton's impeachment trial, the arguments made to the senatorial jury—all of which were broadcast live on television—were followed by private dis-

cussions. The cameras were turned off, and members of the Senate spoke privately in the Senate chamber. According to Senate Democratic leader Tom Daschle, the conversations were profoundly meaningful—and almost entirely at odds in tenor from the vitriol that emerged inevitably whenever the cameras were turned on. Given the space to voice their honest opinions, people "poured their hearts out . . . they really talked in a very candid way." Moreover, senators learned profound lessons from that experience. "As much as it is important to have transparency and media scrutiny," Daschle later said, "there are times when not having media, so people can open up, be more expressive and more honest with each other, really can make a difference."

Finally, it is time to reconsider which sorts of internal communication should be subject to outside inquiry—whether from Congress or the broader public. But to do that, we need a better sense of how the existing regulations are being used. It's not John and Jill Q. Public who are seeking frequent access to the notes and memos circulating within the Consumer Product Safety Commission, the Department of Transportation, or Environmental Protection Agency. It is big organizations like the Sierra Club, the National Trucking Association, and the National Retail Federation who are employing FOIA and other laws intended to open the government up. The irony is that we've come full circle: Efforts to open up government to the public have, by and large, expanded the tool kit and influence of highly organized and well-funded "special" interests.

In practice, tenets of a movement designed to diffuse power have, instead, further consolidated it.

That is not to suggest that organizations with lobbyists aren't the legitimate representative of substantial and broad-based interests; they play a critical role in the democracy. But the supposition that transparency uniquely empowers regular folks is quaint fantasy. By and large, those combing the public records and filing information requests are not your neighbors. Generally, they are junior associates at big law firms searching for some detail that can be used to challenge a federal decision that is at odds with their client's interests.

The popular distrust of government officials has taken a toll on a political system that requires the collaboration of divergent interests. It is time to dispel the simplistic notion that transparency in government is an unmitigated good and recognize the role of privacy in nurturing honesty, creativity, and collaboration. The United States is and will always be a participatory democracy. Our goal must be to draw an effective line between active engagement and voyeurism. It's good to watch. We just need to allow our public servants the respect to remain clothed while at work.

No reasonable private-sector company would allow itself to operate under the naked and constrained conditions that paralyze government agencies. To turn a profit or to execute an effective strategic plan, businesses need to be nimble and adaptive; messages need to be timely and frank; ideas need to be inventive and collaborative. And if those roaming the halls of federal bureaucracies are spending considerable time worrying that what they put on paper, or on e-mail, will be interpreted by any variety of readers down the line, they are liable to be less responsive to the demands of their office. The Administrative Conference of the United

States, looking specifically at the Sunshine Act, agreed, recently concluding that:

> *A longstanding criticism of the Act has been that, despite its laudable goals, its actual effect is to discourage collaborative deliberations at multi-member agencies, because agency members are reluctant to*

> *discuss tentative views in public. Rather than deliberate in public, agencies resort to escape devices, such as holding discussions among groups of fewer than a quorum of the agency's membership (which are not covered by the Act), communicating through staff, exchanging written messages, or deciding matters by "notation voting" (i.e., circulating a proposal and having members vote in writing).*

In American democracy, privacy and transparency are partners, not enemies. As we strive to eliminate corruption and increase public engagement, we also have to protect opportunities for creativity and collaboration. The disdain for government combined with the explosion of information technology has conspired to sabotage deliberation in the blind pursuit of disclosure. Meanwhile, our government is frozen in the camera's lights, but at least everyone can watch the show.