What Do We Want from Open Government - and What the Heck is "Open Government"?

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• Harlan Yu & David G. Robinson, The New Ambiguity of "Open Government", 59 UCLA L. Rev. Disc. 178 (2012).
• Jennifer Shkabatur, Transparency With(out) Accountability: The Effects of the Internet on the Administrative State, 31 Yale L & Pol. Rev. -- (forthcoming), available at SSRN.

Jotwell prefers that its contributors "like" one piece of scholarship at a time. But (a) I have to atone for submitting my contribution late, and (b) the two manuscripts that have caught my fancy most recently are wonderfully complementary and deserve to be attended to jointly.

Literally from Day One, a welcome mantra of the Obama Administration has been "open government," to which the Administration has variously linked the adjectives, "transparent," "participatory," and "collaborative." As both conceptualized and practiced, however, the very idea of "open government" is highly ambiguous. Even its arguably most straightforward aspiration – transparency – is rife with uncertainties. Two important steps forward in understanding the Obama open government "moment" are The New Ambiguity of "Open Government", by Princeton doctoral student Harlan Yu and Yale law student David G. Robinson, forthcoming in Discourse, the online journal of the UCLA Law Review, and Transparency With(out) Accountability: The Effects of the Internet on the Administrative State, by Jennifer Shkabatur, an SJD candidate at Harvard Law School, forthcoming in Vol. 31, No. 1, of the Yale Law & Policy Review. Each is a significant contribution to a much undertheorized domain.

The Yu-Robinson paper traces the conceptual history of "open government," pointing out the rhetorical and political slippage between the demand for institutionally significant disclosures that would make government more accountable for its decision making (think, "FOIA") and the movement towards government provision of valuable data in machine-readable structured formats that would support various forms of public knowledge and entrepreneurship (think, "U.S. Census"). As documented by the authors:

> Public policy has increasingly blurred the boundaries between the technologies of open data and the politics of open government. This blurring paves the way for frustration and disappointment. Open government and open data can each exist without the other: A government can be an "open government," in the sense of being transparent, even if it does not embrace new technology (the key question is whether stakeholders end up knowing what they need to know to keep the system honest). And a government can provide "open data" on politically neutral topics even as it remains deeply opaque and unaccountable. The Hungarian cities of Budapest and Szeged, for example, both provide online, machine-readable transit schedules, allowing Google Maps to route users on local trips. Such data is both open and governmental, but has no bearing on the Hungarian government's troubling lack of transparency. The data may be opening up, but the country itself is "sliding into authoritarianism."

The authors' point that "open data" may or may not support actual accountability has been made by others, e.g., Steven Waldman and the Working Group on Information Needs of Communities, **The**

[**Information Needs Of Communities: The Changing Media Landscape In A Broadband Age**](#)
202-211 (FCC 2011), but the independent sources and eventual tangling of the intellectual roots undergirding the "open government" and "open data" movements have never, as far as I know, been elaborated with such care.

This is not to say, of course, that open data are irrelevant to government accountability. Congressional members' votes, government officials' financial records, and the geographic distribution of public spending are all potentially critical to improving public accountability. Yet, as Yu and Robinson detail how the 2008 Obama campaign and then the Obama Administration conflated "open data" with "freedom of information," it becomes clear how rhetorical slippage poses a risk that government claims for increased "openness" may be unaccompanied by matching levels of improved transparency. The authors likewise relate how "the ambiguity of open government remains alive and well in the international sphere," with governments abroad launching splashy new data portals while simultaneously deprioritizing genuine open government reforms.

A final contribution by Yu and Robinson is a suggestive schematic of how the "open data" and freedom of information movements intersect both normatively and in operation. The "open data" movement is, at its core, really about taking data in the hands of government and making it more adaptable. The freedom of information movement is really about securing access to data, adaptable or not, that increases accountability. Governments maximize joint value for both movements when they release adaptable data that relate to government performance. FOI champions, however, are inevitably disappointed if government releases data, adaptable or not, that has more to do with service delivery than transparency; open data champions are equally disappointed when government releases its information in "inert" forms that are difficult to analyze or reorganize for public value.

Jennifer Shkabatur's paper springs from very much the same motivating insight, but she attacks it from a different angle. Transparency, Shkabatur notes, is arguably the central device through which U.S. administrative law seeks to foster accountability for the regulatory bureaucracy. She outlines what she calls the "architecture" of government transparency, which comprises mandatory components (e.g., notices of proposed rulemaking; required statements of regulatory basis and purpose), discretionary transparency (wherein she places the open data movement), and "involuntary transparency," i.e., government openness through leaks. In each sector, she regards public policy as having the capacity to marry transparency with accountability, but, in each sector, she sees the U.S. government falling short. She believes our rules of mandatory transparency are not well-tailored to "offer the public a meaningful explanation and justification of agencies' decisions and activities." Voluntary transparency gives agencies too much discretion to disclose information that puts them in a positive light to an undeserved degree. Our policies on "involuntary transparency," in Shkabatur's judgment, undervalue the positive contributions of leakers and thus under-protect whistleblowers.

Unlike Yu and Robinson, Shkabatur accompanies her diagnosis with a series of suggested improvements in policy and institutional practice that go beyond the call for more precise rhetoric and analysis. In general, these suggestions have three aims: to focus government disclosure efforts on "the decision-making processes of agencies and their performance"; to " lower[] access and participation barriers for individual citizens or diffuse social groups" and to toughen up the enforcement of transparency obligations. As much as I like some of these suggestions, readers may well feel, in canvassing the concluding sections of both Shkabatur, and Yu and Robinson, that we are simply "not there yet" in terms of identifying all that could or should be expected from efforts of governments to hold their own feet to the fire. But you will also come away from these papers with a far clearer sense of how we got to where we are, the multiple dimensions to both our challenges and opportunities, and why a lot of frustration still accompanies so much of what appears to be a sincere and, to some extent, consequential effort on the part of the Obama White House to make government more open.

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