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The Dark Side of Sunlight

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Lobbyists and Hurts the Public**

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How Transparency Helps Lobbyists and Hurts the Public

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The U.S. Congress is broken. Legislators prioritize political posturing and self-aggrandizement over the actual business of legislation. They have caused two costly and pointless shutdowns of the federal government in the past two years alone. Despite his campaign promises, President Donald Trump has not, in fact, drained the swamp. The Republicans' 2017 tax reform bill set off a frenzy of lobbying, and in the 2018 midterm elections, total campaign spending broke the \$5 billion mark for the first time. The only lawmakers who buck the party line tend to be those who have already announced their retirement—and even then, they dissent only rarely and with trepidation. No wonder 76 percent of Americans, according to a Gallup poll, disapprove of Congress.

This dysfunction started well before the Trump presidency. It has been growing for decades, despite promise after promise and proposal after proposal to reverse it. Many explanations have been offered, from the rise of partisan media to the growth of gerrymandering to the explosion of corporate money. But one of the most important causes is usually overlooked: transparency. Something usually seen as an antidote to corruption and bad government, it turns out, is leading to both.

The problem began in 1970, when a group of liberal Democrats in the House of Representatives spearheaded the passage of new rules known as “sunshine reforms.” Advertised as measures that would make legislators more accountable to their constituents, these changes increased the number of votes that were recorded and allowed members of the public to attend previously off-limits committee meetings.

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But the reforms backfired. By diminishing secrecy, they opened up the legislative process to a host of actors—corporations, special interests, foreign governments, members of the executive branch—that pay far greater attention to the thousands of votes taken each session than the public does. The reforms also deprived members of Congress of the privacy they once relied on to forge compromises with political opponents behind closed doors, and they encouraged them to bring useless amendments to the floor for the sole purpose of political theater.

Fifty years on, the results of this experiment in transparency are in. When lawmakers are treated like minors in need of constant supervision, it is special interests that benefit, since they are the ones doing the supervising. And when politicians are given every incentive to play to their base, politics grows more partisan and dysfunctional. In order for Congress to better serve the public, it has to be allowed to do more of its work out of public view.

THE DEATH OF SECRECY

The idea of open government enjoys nearly universal support. Almost every modern president has paid lip service to it. (Even the famously paranoid Richard Nixon said, “When information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies.”) From former Republican Speaker of the House Paul Ryan to Democratic Speaker of the House Nancy Pelosi, from the liberal activist Ralph Nader to the anti-tax crusader Grover Norquist, all agree that when it comes to transparency, more is better.

It was not always this way. It used to be that secrecy was seen as essential to good government, especially when it came to crafting legislation. Terrified of outside pressures, the framers of the U.S. Constitution worked in strict privacy, boarding up the windows of Independence Hall and stationing armed sentinels at the door. As Alexander Hamilton later explained, “Had the deliberations been open while going on, the clamors of faction would have prevented any satisfactory result.” James Madison concurred, claiming, “No Constitution would ever have been adopted by the convention if the debates had been public.” The Founding Fathers even wrote opacity into the Constitution, permitting legislators to withhold publication of the parts of proceedings that “may in their Judgment require Secrecy.”

One of the first acts of the U.S. House of Representatives was to establish the Committee of the Whole, a grouping that encompasses all representatives but operates under less formal rules than the House in full session, with no record kept of individual members' votes. Much of the House's most important business, such as debating and amending the legislation that comes out of the various standing committees—Ways and Means, Foreign Affairs, and so on—took place in the Committee of the Whole (and still does). The standing committees, meanwhile, in both the House and the Senate, normally marked up bills behind closed doors, and the most powerful ones did all their business that way. As a result, as the scholar George Kennedy has explained, "Virtually all the meetings at which bills were actually written or voted on were closed to the public."

For 180 years, secrecy suited legislators well. It gave them the cover they needed to say no to petitioners and shut down wasteful programs, the ambiguity they needed to keep multiple constituencies happy, and the privacy they needed to maintain a working decorum. But by the late 1960s, liberals in the House of Representatives started to sour on secrecy. Although they represented a majority among the ruling Democrats, they lacked power. That lay in the hands of committee chairs, who, because they were assigned their positions on the basis of seniority, were nearly all conservative Democrats from safe districts in the South. These chairs worked hand in glove with the Republican minority to quash liberal initiatives, and given their complete control of their committees' agendas, they were not to be crossed openly. And so the liberal caucus, known as the Democratic Study Group, orchestrated a backdoor attack on the power of the committee chairs by tacking several transparency-related amendments onto a bill intended to modernize Congress, the Legislative Reorganization Act of 1970.

"The reform of longest-lasting significance," the scholar David King has pointed out, "provided that House votes in the Committee of the Whole be recorded on request." In the past, liberals had often not bothered to show up for votes in the Committee of the Whole, fatalistically accepting that the conservative chairs would fend off liberal amendments; now, because they could be recorded, the votes would count toward attendance statistics, which would encourage the liberals to turn up and show their strength. Recorded voting would also free up liberal Democrats to vote against their own chairs with-

out fear of retribution. "Sorry, I can't help you on this one," a member could credibly say; "my constituents are watching."

Recorded votes would also allow outside groups—labor unions, public interest nonprofits, environmental organizations—to enforce greater discipline. The AFL-CIO, for example, would be able to not just collect commitments from members on an upcoming vote but also, for the first time in history, reliably verify that they had voted as promised.

*Special interests today
thrive on transparency.*

Recorded votes would make it easier for the party itself to enforce discipline, too. Party leaders could use the additional data about how members voted as the basis for doling out rewards and

punishments. Lawmakers who toed the party line would get campaign cash and plum committee assignments—even desirable parking spots. Those who didn't might have their pet legislation put on hold.

The reforms also provided for greater transparency in the standing committees, which is where most of the real business of legislation takes place. Votes taken in committee would be recorded, and the doors of committee rooms would be open by default, even during markup sessions. Pointing to the greater scrutiny they would receive from their constituents, liberal representatives could more easily defy the conservative chairs.

The liberals couched their amendments as good-government reforms, organizing a media blitz lambasting secrecy in Congress. But they also quietly courted their lobbyist allies, meeting with groups that represented workers, farmers, and teachers to show how, by being in the room when key decisions were made, they might benefit from transparency. Thanks in part to the support of these lobbies, the transparency amendments were adopted, and the Legislative Reorganization Act passed handily.

The gambit paid off immediately. For years, liberals had been trying to defund the supersonic transport program, an aerospace venture that they considered a boondoggle, but it was only in 1971 that they succeeded. In a hotly contested vote in the Committee of the Whole, the liberal caucus managed to generate a high turnout and rally environmental groups to apply pressure. The same year, they succeeded in forcing the House to finally take a direct vote on the Vietnam War, something the more hawkish leaders of both parties had tried to avoid for years. And over the next few years, Congress passed major legislation on campaign finance, environmental pollution, employee benefits, and consumer protection. (These wins were aided by the uptick



in liberal lobbying in the Senate, which had followed the House's lead in opening up committee meetings.)

The liberals who pioneered transparency had a playbook that worked well: representatives of interest groups would sit in the committee room during a markup session, and if a member required a nudge to keep a piece of legislation on track, the groups could apply corrective pressure by mobilizing a deluge of letters and phone calls from supporters in the member's home district. The lobbyists, in other words, no longer had to wait in the lobby. But what the transparency advocates failed to appreciate was that the same measures would empower other lobbies, too—including those with much deeper pockets.

THE LOBBYIST INVASION

The 1970s was the decade when corporate lobbying in Washington became turbocharged. Membership in the U.S. Chamber of Commerce more than doubled, and its budget more than tripled. Between 1971 and 1982, the number of firms with registered lobbyists in Washington grew from 175 to 2,445. Between 1968 and 1978, the number of companies with public affairs offices in Washington grew fivefold, and those offices expanded rapidly. General Motors' operation there, for example, grew from a staff of three to a staff of 28.

A number of factors may have contributed to the explosion of corporate lobbying. An onslaught of environmental and consumer regulations in the late 1960s and early 1970s provoked an antiregulatory backlash, and the authorization of political action committees in 1974 encouraged business to take sides in elections. But the most compelling explanation is the revolution in transparency that unfolded at the same time. Before the sunshine reforms, lobbyists could rarely tell for sure whether their targets were voting as intended. That lack of assurance proved crucial to keeping special interests on the back foot. During the deliberations that led to the Tax Reform Act of 1969, for example, members of Congress approved all kinds of special giveaways in open session, but when the conference committee met behind closed doors to draft the final language, it quietly stripped the pork away, dashing the hopes of scores of special interest groups. As the political scientist Lester Milbrath had noted in the early 1960s, "A lobbyist who thinks about using bribery . . . has no assurance that the bribed officials will stay bought."

Transparency changed that. After the liberals' winning streak in the early 1970s, the business lobby caught on to how the game was

played and began playing it for even higher stakes. The Chamber of Commerce, for example, took a page straight from the playbook of liberal groups and sent staffers to sit in on committee meetings to follow what legislators said and did, and it activated a grass-roots network of businesspeople to bombard those who stepped out of line with letters and phone calls. The result was that although Congress underwent no major shift in its ideological composition, by around 1977, it had stopped passing liberal legislation and started doing the bidding of big business. Members voted to cut taxes and weaken air pollution standards. They shot down plans to restrict television advertising aimed at children and defeated bills that would have strengthened labor unions and created a federal consumer protection agency.

Other special interests took advantage of the open-door policy, too. Boutique lobbying firms sprang up to secure subsidies for clients that had previously steered clear of politics, such as universities and hospitals. Israel, Japan, Saudi Arabia, and other countries upped their efforts to shape U.S. policy on foreign aid, military sales, trade, and tariffs. By 1985, foreign governments and businesses accounted for more spending on lobbying in Washington than the 7,200 domestic lobbyists registered with Congress.

That same year, when Congress announced that it would begin work on a bipartisan tax reform bill, lobbyists flooded the Capitol to preserve their loopholes. Committee rooms were packed; lines stretched around the block. The bill attracted so much special interest attention that some took to jokingly calling it “the Lobbyists’ Relief Act of 1986.” Besieged committee chairs realized they would never be able to repeal giveaways with lobbyists breathing down members’ necks, so they risked public outcry and closed the committee room doors, forcing the lobbyists back into the lobbies. The strategy worked: the Tax Reform Act of 1986 simplified the tax code and eliminated \$60 billion annually in loopholes. “When we’re in the sunshine, as soon as we vote, every trade association in the country gets out their mailgrams and their phone calls in twelve hours, and complains about the members’ votes,” explained Bob Packwood, the Oregon Republican who chaired the Senate Finance Committee at the time. “But when we’re in the back room, the senators can vote their conscience.”

Special interests today thrive on transparency. Although the media prefer to focus on the influence of money, lobbyists derive most of their power from their ability to closely track how legislators vote.

Consider the National Rifle Association. While it does contribute to members' campaigns, the NRA's real influence comes from the threat of "taking out" friendly legislators who step out of line. This is the tactic it employed with Debra Maggart, a Republican in the Tennessee House of Representatives and a lifetime NRA member who in 2012 dared to oppose a bill that would have allowed people to leave guns unattended in parked cars. The NRA entered the fray, releasing an

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onslaught of ads against her during a primary race, and successfully unseated her. A public execution like this sends a clear message to every legislator in the NRA's orbit: do what we say or else.

It's a winning strategy. In 2013, as the Senate considered a gun control bill in the wake of the Sandy Hook shoot-

ing, the NRA sent a seemingly innocuous letter to each senator noting that the organization might "make an exception to [its] standard policy of not 'scoring' procedural votes"—an announcement that surely sent panic into members worried about their standing with the NRA. Even though the measures in the bill enjoyed the support of a majority of Americans, the legislation failed. The key factor was not money but intimidation. And the NRA's ability to issue a credible threat depends entirely on its ability to see precisely how legislators vote.

Would legislators vote differently if they were not under a microscope? One natural experiment occurred in the Florida Senate in 2018, when the legislature was debating a two-year moratorium on the sale, delivery, and transfer of AR-15-style rifles. When the legislature held a voice vote—in which individual members' positions are not recorded—the bill passed. But when, for procedural reasons, the vote was repeated as a recorded roll-call vote, it failed.

THE DEATH OF BIPARTISANSHIP

At the same time that Congress has been under assault from moneyed interests from the outside, it has been beset by growing political polarization from within. In both the House and the Senate, study after study has found, the ideological gulf between the voting patterns of Democrats and Republicans is growing and growing. As with lobbying, multiple factors appear to be behind the trend, but the sunshine reforms have played an important role. For one thing, they have made it easier for

party leaders to keep their members in line, just as the liberal reformers had intended. Tip O'Neill, the Massachusetts Democrat who served as Speaker of the House from 1977 to 1987, owed a good deal of his power to the detailed records he kept of how his rank and file were voting, which he wielded to discourage members from straying from the party line. Republicans have done the same. In 2003, as the House considered an overhaul to Medicare, the party's leadership issued threats against disobedient Republicans who saw the bill as a giveaway to pharmaceutical and insurance companies. Leaders told one representative that they would make sure his son would lose the election to succeed him; another member was reduced to tears by the arm-twisting. In 2012, John Boehner used his power as Speaker to strip four fellow Republicans of important committee posts on the basis of their voting records, warning everyone else, "We're watching all your votes." And during the debate over whether to repeal Obamacare, Trump threatened to campaign against individual Republican senators for their stands on procedural votes.

The rise of special interest groups has also widened partisan divisions in Congress, as those groups themselves have increasingly self-sorted. Groups representing trial lawyers and environmentalists, for example, almost exclusively support Democrats, while those representing businesses and gun owners have thrown their lot in with Republicans. As a result, interest groups, empowered by transparency, pressure members to follow the party line. Thanks to the surge in recorded voting, these groups are also able to score members of Congress on increasingly arcane votes, producing seemingly scientific (but often disingenuous) metrics of how legislators have performed on a given issue. Such ratings often resonate with voters, and the mere announcement that a specific vote will be scored can be enough to induce extreme caution among lawmakers.

Transparency has exacerbated partisanship in other ways, too. Legislators tend to be more civil and collegial when meeting in private and more willing to engage in the give-and-take that can lead to win-win solutions. In the presence of an audience, by contrast, they tend to grandstand and take hard-line positions. In the words of Robert Luce, a twentieth-century Republican congressman from Massachusetts who wrote a manual on legislative procedure, "Behind closed doors compromise is possible; before spectators it is difficult."

The appearance of television cameras in Congress made this problem even worse. Authorized by the Legislative Reorganization Act,

cameras were introduced at full scale in the House in 1979 and in the Senate in 1986. Television made it possible in the 1980s for a group of radical Republicans led by Newt Gingrich, a scrappy young representative from Georgia, to turn House proceedings into a circus. During regular sessions, he and his allies played to the cameras by disrupting normal business with repeated demands to debate constitutional amendments on school prayer and abortion. After hours, they would deliver fiery speeches to an empty chamber. Since protocol called for the camera to remain tightly focused on whoever had the floor, it seemed as if opponents had been cowed into silence. (O'Neill eventually got his revenge by instructing the camera operator to pan and show the empty chamber, but the stunt set off a miniature scandal, known as "Camscam," that netted Gingrich even more attention.) Gingrich's spectacles made him a household name, and they showed that degrading the comity of the House made for both good television and good politics.

JUST FOR SHOW

Another important outcome of the sunshine reforms was the rise of so-called show votes, or messaging votes. These votes, often on amendments to unrelated bills, are designed not as constructive efforts to improve legislation but as pieces of political theater. Sometimes, the goal is simply to make certain members look good to their constituents. At other times, it is to force rival legislators to take a stand on a difficult issue or entrap them into a vote that will serve as fodder for negative campaign ads that make extreme claims about a candidate's voting record. Frequently employed for partisan purposes, these votes also give rise to unique forms of legislative dysfunction.

As with lobbying and partisanship, the surge in show votes dates precisely to the rise in transparency. With legislators more frequently voting publicly, the temptation to pin them down, on the record, proved irresistible. As the congressional scholar Donald Ritchie has written, Jesse Helms, a conservative Republican senator from North Carolina, "pioneered the tactic of repeatedly proposing controversial amendments and demanding roll-call votes, even though his side would likely lose." Soon, other members joined in, demanding repeated recorded votes on hot-button issues, such as abortion, same-sex marriage, and school prayer. The number of these weaponized amendments skyrocketed, gumming up the legislative process.

The introduction of electronic voting in the House in 1973—another measure authorized by the Legislative Reorganization Act—only made matters worse. Instead of lining up for a head count or responding to a roll call, legislators now had only to press a button. Many more votes could be packed into a day. By the late 1970s, the volume of recorded votes had grown so outrageous that many of the same liberals who had championed recorded votes in the Committee of the Whole were scrambling for ways to discourage their use.

With so many votes to be taken, no legislator could credibly claim to understand more than a fraction of what he or she was voting on. Before the transparency reforms, Congress passed around

2,000 pages of legislation per year; now it churns out more than 7,000. Furthermore, much of the language is written by special interests looking to hide their tracks. As Jack Abramoff, the disgraced former lobbyist, once explained in an interview, “What we did was we crafted language that was so obscure, so confusing, so uninformative, but so precise.” In other words, reforms intended to foster transparency have instead resulted in legislation so opaque that no one can comprehend it.

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BRINGING BACK SECRECY

If excessive transparency is at the root of Congress’ problems, the simple solution is to roll it back. A law that restored something like the status quo ante would quickly bring back some of the balance between openness and privacy that was lost with the sunshine reforms. Committee markup sessions would be conducted behind closed doors (even as committee hearings remained open). The Committee of the Whole would go back to unrecorded votes, and standing committees would stop recording how individual members voted. Final votes on all legislation would still be on the record, just as they always have been. Television cameras might not be removed entirely, but their use could be limited to final votes and the speeches and debates surrounding them.

Congress could also go a step further. For votes in committee and on amendments, it could adopt a secret ballot, in which the positions taken by members would not only be unrecorded but also be hidden from everyone present. When it comes to the chief complaint of the

liberals behind the sunshine reforms—the near-dictatorial power of committee chairs—what allowed the chairs to coerce their junior colleagues was the ability to see those legislators' votes. A secret ballot would have solved that problem. In other words, had the reformers pushed for less transparency, rather than more, they would likely have done much more for their cause.

A legislative secret ballot is not such a radical idea. The ancient Athenians made extensive use of it, as did French parliaments in the first half of the nineteenth century, and the Italian parliament still does under some circumstances. Indeed, members of Congress themselves regularly use a secret ballot when meeting in their party caucuses. Just as the introduction of the secret ballot in popular elections in the late nineteenth century put an end to widespread bribery and voter intimidation—gone were the orgies of free beer and sandwiches—it could achieve the same effect in Congress. In fact, in the age of ubiquitous cell phone cameras, a secret ballot might be the only way to keep an unrecorded vote truly unrecorded.

These reforms would allay the lobbying, partisanship, gridlock, and soaring campaign costs that have crippled a once proud institution. Lobbyists would lose leverage, and their clients would stop injecting so much cash into the legislative process. Senators and representatives would once again feel free to reach across the aisle, hammer out compromises, and dig in to the actual work of writing and debating bills. Amendments could no longer be weaponized, putting an end to show votes and freeing up vast amounts of time. Congress could regain its purpose.

Critics might argue that something would be lost—namely, the ease with which constituents can hold democratically elected leaders accountable. After all, what better way is there for a voter to evaluate a candidate than by looking at his or her voting record? But study after study has shown that citizens simply do not follow congressional actions. (Two months after the Senate confirmed him to the Supreme Court, a Pew Research Center poll found that only 45 percent of Americans knew who Neil Gorsuch was.) The public didn't pay attention to Congress before the transparency reforms—when the number of votes and hearings was more manageable—and it certainly doesn't now that Congress' total output of legislation, transcripts, and other essential documents often exceeds one million pages per year. And if Congress went back to its pre-1970 levels of secrecy, citizens would

still have ample data on which to judge their representatives. Before the sunshine reforms, people could attend hearings, watch congressional debates, read bills under consideration, and see what positions members took on all final votes.

Others might argue that as nice as it might be to go back to the way things were, it's just too late. In the good old days, special interests didn't have such a death grip on American democracy; now that they do, perhaps secrecy would only empower them. But on the occasions when Congress has reverted to secrecy since 1970, the tactic has succeeded in producing public-spirited legislation. Consider not just the 1986 tax reforms but also the 1990 amendments that strengthened the Clean Air Act, which took shape in private meetings of senators from both parties and White House representatives, and the 2015 legislation that set Medicare on a sustainable footing, which was hatched in closed-door meetings between Democratic and Republican leaders in the House at a time when they were at each other's throats publicly.

Others might contend that the real problem is too little transparency in campaign fundraising. But the evidence suggests otherwise. For one thing, it is difficult to establish a causal relationship between the campaign donations a legislator receives and the way he or she votes. Although researchers have found some correlation between receiving money from a group and voting the way that group prefers, it is important to note that special interests are likely to give to lawmakers who are already friendly to their cause, and instances of naked quid pro quos are rare. For another thing, it's worth pointing out that the rise in campaign spending correlates closely with the rise in congressional transparency. Indeed, donors appear to be interested in supporting only the campaigns of members of Congress whose legislative actions they can track. If the goal is to reduce the amount of money in politics, then restoring legislative secrecy may well be the best way to accomplish it.

Admittedly, the politics of returning to secrecy are tough. There is probably a good deal of pent-up demand for greater secrecy among legislators, many of whom must regret having cast certain ballots simply to avoid an onslaught of negative ads or the wrath of a powerful donor. But the politician who argues against transparency risks being seen as having something to hide. That's why the effort might best be led by civil society groups.

For the time being, however, the status quo prevails, and Congress is unlikely to restore secrecy anytime soon. Usually, what gets in the

way of bold policy proposals is a fear of the unknown: potential downsides tend to loom larger than potential upsides, and the safest course is to do nothing. But in the case of rolling back transparency, the end state is not some unknown future. It is a return to a system that was envisioned by the Founding Fathers and that, for close to two centuries, functioned far better than the system that replaced it.

“Sunlight,” the future Supreme Court justice Louis Brandeis wrote in 1913, “is said to be the best of disinfectants.” Brandeis was speaking of big banks, not Congress, but his adage came to be adopted by those pushing for less secrecy in politics. More than a century later, the true nature of transparency has become clear. Endless sunshine—without some occasional shade—kills what it is meant to nourish. 🌍