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Transparency in the Budget Process

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We identify an ideal transparency regime for the federal budget process, one that optimizes the benefits and costs of transparency and opacity. Two institutional-design tradeoffs are critical. First, transparency allows the public, and others who bring information to the attention of the public such as the media and challengers, to monitor elected officials and hold them accountable. However, it also allows interest groups, whose interests may not be congruent with the larger public interest, to monitor legislators. Because interest groups are better organized than the public, transparency may unduly empower those representing minority interests at the expense of overall welfare. We propose some techniques of transparency – such as delayed disclosure, which provides information some period of time after the budgeting decision has been made – that empower the voters while reducing the ability of interest groups to influence outcomes. Second, we discuss the effect of transparency on legislative arguing and legislative bargaining. Transparency deters self-interested bargains, but can also encourage posturing and inflexibility that produces bad deliberation. We propose that opacity is generally beneficial at earlier stages of the budget process, as where committees develop the macro-level allocations embodied in the concurrent budget resolution, while transparency is

desirable at later stages of the process, when committees engage in concrete bargaining.

Finally, we discuss various institutional constraints and second-best problems at the implementation stage, including the question whether politics will block adoption of the optimal transparency framework, the risk that transparency will be circumvented by collusion, and the risk that opacity will be undermined by leaks. Although these problems are serious, we conclude that none is insuperable.

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Elizabeth Garrett and Adrian Vermeule

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We identify an ideal transparency regime for the federal budget process, one that optimizes the benefits and costs of transparency and opacity. Two institutional-design tradeoffs are critical. First, transparency allows the public, and others who bring information to the attention of the public such as the media and challengers, to monitor elected officials and hold them accountable. However, it also allows interest groups, whose interests may not be congruent with the larger public interest, to monitor legislators. Because interest groups are better organized than the public, transparency may unduly empower those representing minority interests at the expense of overall welfare. We propose some techniques of transparency – such as delayed disclosure, which provides information some period of time after the budgeting decision has been made – that empower the voters while reducing the ability of interest groups to influence outcomes. Second, we discuss the effect of transparency on legislative arguing and legislative bargaining. Transparency deters self-interested bargains, but can also encourage posturing and inflexibility that produces bad deliberation. We propose that opacity is generally beneficial at earlier stages of the budget process, as where committees develop the macro-level allocations embodied in the concurrent budget resolution, while transparency is desirable at later stages of the process, when committees engage in concrete bargaining.

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Transparency in the U.S. Budget Process

Elizabeth Garrett^{*} & *Adrian Vermeule*^{**}

The notion of “transparency” in government is very much in vogue both in the United States and worldwide, particularly in the arena of fiscal policy. The emphasis on openness is sensible because transparency serves crucial objectives in democracies. Transparency can promote public-spirited behavior by constraining bargaining based on self-interest, promoting principled deliberation instead. Even where self-interest is universal, providing information to principals about the action of their agents – here, elected officials – reduces the costs of monitoring, thereby promising to improve governance in a representative democracy.

However, the word “transparency” is often used imprecisely to refer to a number of characteristics of an open system without much independent analysis of each aspect. Moreover, adherents to transparency are often insufficiently inattentive to the costs of disclosure. Transparency is sometimes in tension with other important democratic values and may even, in some cases, be self-defeating. The unconditional embrace of transparency lies in the power of the word itself – it connotes the opposite of secrecy and skullduggery, putting those who would argue for a tempering of openness in a difficult rhetorical position. This is unfortunate: it diminishes the willingness of many who study transparency to forthrightly consider the costs as well as the benefits.¹

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¹ See James T. O'Reilly, “*Access to Records*” Versus “*Access to Evil*”: *Should Disclosure Laws Consider Motives as a Barrier to Records Release?*, 12 Kan. J.L. & Pub. Pol’y 559, 559-60 (2003) (discussing emphasis on ever-increasing transparency in laws regulating government). For a recent exception to this tendency, see Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 Minn. L. Rev. 277 (2004) (assessing costs and benefits of disclosure in the federal regulatory context).

In this paper, we propose to focus on one aspect of transparency in the federal budget process: requirements that deliberation and bargaining over budget policy occur publicly. There are several distinct arenas of budget policymaking; currently, each displays a slightly different mix of opacity and transparency. The arenas include decision making purely within the executive branch; policy recommendations by federal advisory committees; the legislative process including committee consideration, floor deliberation and conference committee decisions; and interbranch decision making in occasional budget summits. In each arena, there is a mixture of openness and secrecy; political players find private space for some deliberation, even in the face of aggressive open meeting requirements, by taking advantage of gaps in any rules or statutes.

Is the current mix optimal, or at least the best that can be achieved given political constraints? Even without legal requirements for transparency, there would be a certain amount of openness in decision making because some publicity is in the agent-lawmakers' interest.² However, there is no reason to believe that the degree of transparency reached by political actors on their own would necessarily be optimal from society's point of view. Self-interested agents also have incentives to keep secret some aspects of budgeting that their principals would be eager to monitor – namely, the use of budgets to provide benefits to well-funded and well-organized special interests that will reward lawmakers with campaign funds.³ It is hardly obvious that the status quo, where some deliberation occurs in secrecy notwithstanding open meeting requirements, maximizes the benefits of transparency while minimizing its costs.

Our principal aim is to propose an optimal transparency scheme for the federal budget process; however, we also consider institutional and political constraints on attaining that scheme. Section I provides a brief overview of transparency in the federal budget process, as it is currently structured. We then offer a two-stage analysis. In Section II, we address the optimal or first-best structure of transparency in the budget process, as though that structure could be imposed by an impartial designer of political institutions. We identify crucial tradeoffs that determine the costs and benefits of transparency. One tradeoff is that secrecy promotes good deliberation, while transparency deters self-interested bargaining. A second tradeoff is that transparency ensures both accountability to voters, which is good, and also accountability to efficiency-reducing interest groups, which is bad. In light of these tradeoffs, we sketch an optimal transparency structure for budgeting, a structure with two crucial features. First, the early stages of the budget process, including the formulation of a concurrent budget resolution by budget committees, will be secret or opaque, while the later stages

² See John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in *Democracy, Accountability and Representation* 131 (A. Przeworski, S.C. Stokes & B. Manin eds. 1999). Note, however, that the only extant test of this model reaches inconclusive results. See James E. Alt, *Three Simple Tests of Ferejohn's Model: Transparency and Accountability in US States 2005* (paper prepared for NYU Colloquium on Law, Economics and Politics).

³ See Alberto Alesina & Roberto Perotti, *Fiscal Discipline and the Budget Process*, 86 *Am. Econ. Rev.* 401, 403 (1996) (noting that “politicians do not have an incentive to adopt the most transparent practices” because they want to maintain their informational advantage). Ferejohn's work suggesting that legislative agents have incentives toward some amount of transparency to allow audit of their activities by principals does not suggest that these incentives will produce the optimal mix of transparency and opacity, but that “the agent has an interest in offsetting the effects of some of those [informational] asymmetries”). Ferejohn, *supra* note 2, at 149.

will be transparent. Here the dual aim is to encourage good deliberation where that is possible and to hamper self-interested bargaining where that is likely. Second, even for later stages of the budget process, disclosure will be delayed, perhaps until well into the election cycle. Here the aims are, first, to deny interest groups immediate access to the details of ongoing decision making; and, second, to sort good from bad accountability by giving voters information when they need it while denying information to interest groups when they want it. In Section III, we consider institutional and political constraints that might rule out the optimal structure. We conclude that it is an open question whether the optimal structure is attainable, given reasonable assumptions about legislators' motivations and relevant constraints; there is no knockdown reason to think the structure we propose is unattainable or infeasible.

I. Transparency in the Federal Budget Process

This Section defines some terms and broadly describes the current mix of transparency and opacity in the federal budget process.

Two Senses of "Transparency"

We focus on the transparency of the budget process, but this is only one sense of "transparency." The literature indiscriminately addresses both the transparency of the process, or of the inputs into the budget, and the transparency of the output itself, or of the budget documents produced by government officials.⁴ The latter concern, which might better be labeled "intelligibility," emphasizes the ease with which people, the press, financial markets, and others can understand budgetary decisions reached by policymakers. Are the tradeoffs involved adequately described? Are the economic assumptions clearly set forth? Are the methods of accounting for expenditures and revenues likely to provide a basis for an accurate assessment of the country's fiscal health? Are budgetary decisions made in one or a few documents so the entirety of the budget can be understood? Can outside, nonpartisan experts analyze the fiscal condition of the country on the basis of the budget documents? Indeed, much of the literature on fiscal transparency seems more concerned with intelligibility rather than the openness of the deliberations themselves.⁵

Although we will not directly assess transparency or intelligibility at the output stage, the two aspects of transparency are related. The more transparent the output, the more likely it is that outsiders can reason backwards to develop a sense of the inputs, without actually witnessing the process as it occurs. In the fiscal arena, however, the process of using the output to discover the inputs can be challenging. Budgets are complex, so it can be difficult to separate all the strands and exceedingly difficult to trace

⁴ Heald also identifies transparency of outcomes, as distinct from outputs, as a relevant aspect of transparency. Outcomes are how the budget actually links to policy: do budgetary decisions lead to effective uses of government money? See David Heald, *Fiscal Transparency: Concepts, Measurement and UK Practice*, 81 Pub. Admin. 723, 729, 731-32 (2003). Most of the literature, however, deals with either the budget process or its output, the budget itself.

⁵ See, e.g., George Kopits, *Transparency in Government Operations* (May 2000) (paper presented at the Interamerican Development Bank Conference on Transparency and Development in Latin America and the Caribbean); James E. Alt, David Dreyer Lassen, & David Skilling, *Fiscal Transparency, Gubernatorial Approval, and the Scale of Government: Evidence from the States*, 2 State Pol. & Pol'y Q. 230, 235-36 (2002) (providing variables relating to fiscal transparency).

decisions back to particular actors and particular motivations. Moreover, certain outputs can be the product of various inputs – some public-regarding, others the result of the influence of private-regarding behavior by interest groups. Even if the outcome is socially desirable, it may still be important in a democracy to understand whether it is the result of particular interest group pressure brought to bear on key legislators. Finally, if the process is open, outsiders can more easily provide helpful information as deliberations occur. Thus, we discuss the appropriate degree of transparency that should be accorded to budget deliberations in the context of a system where there is a substantial degree of transparency regarding the output, but where there are nonetheless reasons to be concerned about the openness of the decision making process.

Transparency in the Budget Process: Current Rules

There are degrees of openness in the federal budget process, varying across different arenas of decision making. Generally, the process is an open one, particularly when it reaches Congress. In all stages of the process, however, players can find ways to bargain in private through informal interactions or negotiations with a subgroup of relevant decision makers that result in a deal later made public. In this section, we will not present a comprehensive or detailed description of the rules and laws that shape federal budget transparency; we hope only to give a sense of the different mixes of opacity and transparency to provide a background for our subsequent analysis.

Some of least transparent stages of the budget process are those that occur entirely within the executive branch. Most opaque are policy discussions that take place wholly within the executive branch among administrators, who are protected by the deliberative process component of executive privilege. This protection from disclosure is not absolute; for example, the D.C. Circuit has held that the Sunshine in Government Act⁶ requires that open meetings when multi-member agencies discuss budget matters unless the matters fall into an exemption, narrowly construed. Budget-related discussions among such agencies' heads, such as a deliberation about how to react to an Office of Management and Budget (OMB) decision to reduce the agency's budget request, was not found to fall within any exemption.⁷

Nevertheless, many budget discussions do not take place at this level, and those remain confidential. The White House avidly guards the privacy of this kind of policy deliberation. In 2001, the Deputy OMB Director reminded all agency and department heads of "the importance of continuing to preserve the confidentiality of the deliberations that led to the President's budget decisions."⁸ This memorandum aims to protect from disclosure documents developed before the President's Budget has been formally

⁶ 5 U.S.C. § 522b (applying only to collegial, multi-member agencies with members appointed by the President with the advice and consent of Congress).

⁷ *National Regulatory Comm'n v. Common Cause*, 674 F.2d 921 (1982). See also *Federal Communication Commission v. ITT World Communications, Inc.*, 466 U.S. 463, 471 (1984) (including within the term "meeting" "discussions [by the agency] that effectively predetermine official actions [and are] sufficiently focused on discrete proposals or issues as to cause or to be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.") (citations and quotation marks omitted).

⁸ Office of Management and Budget, Memorandum M-01-17, Memorandum for Heads of Executive Departments and Agencies, Confidentiality of Pre-Decisional Budget Information (Apr. 25, 2001), available at <http://www.whitehouse.gov/omb/memoranda/m01-17.html>.

presented to Congress, and it explicitly mentions keeping confidential budget requests sent to an agency from its component parts, the agency's requests to OMB, and OMB's responses to the agency.

Once the President's budget has been submitted to Congress, agencies and executive branch officials share some information with members of Congress through formal interactions like testimony and supplementary documents and also through informal interbranch discussions among staff. The White House continues to warn agency heads to keep confidential executive branch communications, such as agency justifications of budget request to OMB, that were part of the internal deliberative process, and it requires that all budget-related materials submitted to Congress be cleared first by OMB.⁹ A recent opinion from the Office of Legal Counsel reiterated the position that agency officials need clearance before releasing confidential documents protected by the deliberative process component of executive privilege to members of Congress.¹⁰

This desire to control the information sent to Congress is driven by the worry that an agency, perhaps disappointed with its budgetary allocation made by OMB and the President, will attempt to obtain more resources from Congress. The "unitary" executive consists of many players, some who may not share the President's vision of the appropriate budget priorities, so OMB must develop mechanisms to police the President's agents and reduce defections from the overall policy. Not surprisingly, members of Congress have often attempted to obtain information about executive branch budget deliberations from officials who may hope for a more sympathetic hearing from congressional committees; the OLC opinion was prompted by an attempt by Representative Rangel, the ranking member on the Ways and Means Committee, to obtain internal cost estimates from officials at the Department of Health and Human Resources.¹¹

The protection of executive privilege becomes murky when the executive branch consults with people outside the administration for expertise and advice in formulating the policy. When people other than executive branch officials play an important role in the formulation of policy, executive privilege may cease to apply and the interactions may become subject to the Federal Advisory Committee Act (FACA).¹² FACA is one of many "sunshine in government" acts passed in the 1970s and includes broad provisions requiring open meetings and public availability of documents.¹³

Once the budget reaches Congress, it is shaped by internal rules in the House and Senate which generally require that committee hearings and meetings to transact

⁹ Office of Management and Budget Circular No. A-11, Part I, § 22 (2005), *available at* <http://www.whitehouse.gov/omb/circulars/a11/02toc.html>.

¹⁰ Letter Opinion from Jack L. Goldsmith III, Assistant Attorney General, U.S. Department of Justice Office of Legal Counsel, for the General Counsel, Department of Health and Human Services, Authority of Agency Officials to Prohibit Employees from Providing Information to Congress (May 21, 2004), *available at* <http://www.usdoj.gov/olc/crsmemoresponse.htm>.

¹¹ Memorandum from Jack Maskell, Legislative Attorney, Congressional Research Service, for Honorable Charles Rangel, House Committee on Ways and Means, Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress (Apr. 26, 2004) (on file with authors).

¹² 5 U.S.C. App. 2.

¹³ In practice, federal advisory committees are able to do a great deal of their work outside the public eye. See *infra* text accompanying notes 53 through 61.

legislative business, including mark-ups, be conducted in open session. Although the rules allow meetings to be closed, they limit executive sessions to circumstances where disclosure would “endanger national security, would compromise sensitive law enforcement information, [or] would tend to defame, degrade, or incriminate any person.”¹⁴ As with all internal rules, these are enforced within the body so that members can raise points of order and other objections if they believe a meeting has been closed contrary to the rules. All the relevant committees in the budget process – appropriations, budget, and tax-writing committees – operate under similar open meeting requirements.¹⁵ Thus, meetings where testimony is taken or business is conducted can be closed only in limited circumstances, such as committee meetings concerning the budget of intelligence agencies where discussions implicate national security. In particular, committee mark-ups and votes on legislation relating to the budget must occur in public. Similarly, House and Senate rules require that conference committees conduct their business in open meetings.¹⁶

Notwithstanding open meeting rules in Congress, a great deal of the bargaining related to the federal budget occurs in private. Congressional parties discuss broad policy issues in party caucuses that are not subject to open meeting requirements. Increasingly, party leaders have used task forces made up of selected lawmakers – sometimes only from the majority party – to formulate legislative proposals, some which may be incorporated into budget reconciliation bills.¹⁷ Once the proposal goes to a committee or the full body, the meetings to debate and amend it are open to the public, but the preliminary work of the task force occurs largely in private and may crucially shape the ultimate product. Even during committee deliberations and conference committee negotiations, discussions occur between the committee leadership and individual members, among co-partisans on the committee, between staff of members and the committee, or in other groups of lawmakers and staff that are not considered official “meetings” or “hearings” subject to the transparency provisions of the internal rules. Conference committees in particular routinely hold key gatherings behind closed doors, sometimes only among members of the majority party in both houses or, more frequently, just their leaders who negotiate deals in private before the overall bargain is presented to the whole committee in a pro forma public meeting.¹⁸

¹⁴ House Rule XI, cl. 2(g)(1). See also Senate Rule XXVI, para. 5(b) (providing similar reasons for executive session with some additional justifications such as relating “solely to matters of committee staff personnel or internal staff management”).

¹⁵ See, e.g., Rules of the House Committee on the Budget, Rule 5; Rules of the House Committee on Appropriations, sec. 4(d)(1); Rules for the Senate Committee on Finance, Rule 2.

¹⁶ House Rule XXII, cl. 12(a)(1); Senate Rule XXVIII, para. 6.

¹⁷ These informal task forces are different from task forces appointed by some committees, e.g., Rule of the House Committee on the Budget, Rule 12, which are the equivalent of subcommittees. For a discussion of the use of task forces, see Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, Issues in Leg. Scholarship, Dynamic Statutory Interpretation (2002): Article 1, page 9, available at <http://www.bepress.com/ils/iss3/art1>.

¹⁸ See, e.g., Lewis Deschler, 16 Deschler’s Precedents of the United States House of Representatives, H.R. Doc. No. 94-661, ch. 33 (1976). It was not until the 94th Congress that the House and Senate adopted rules requiring that conference committee meetings be held in open session. *Id.* at § 5.2. However, all that is required for a valid conference is a quorum on the signature sheet of the conference report and a public

Budget deliberations on the floor of the House and Senate are public and televised. It is highly unusual for either house to go into a closed session, and consideration of the various budget vehicles – the concurrent budget resolution, appropriations bills, budget reconciliation acts, and the various conference reports – are not likely to trigger an executive session. Again, although the deliberations, amendments, and votes are public, and constitutionally required to be memorialized in a journal of proceedings,¹⁹ many of the key deals are made in the cloakrooms or members' Capitol hideaways and not made public except as they can be discerned from the provisions of the law ultimately enacted and any public claims of responsibility from the lawmakers involved.

Because the open meeting requirements affecting congressional committees are contained in internal rules of the bodies or of the committees themselves, enforcement is a purely internal matter. As long as the members are content with the mix of transparency and opacity in the congressional budget process, no outside watchdog can challenge either the decision to hold some meetings behind closed doors or the validity of the legislation that emerges from the process on the basis that transparency rules were violated. In the post-reform Congress, more of the work of committees has been done in public, and committee hearings and mark-ups are broadly publicized through television and other press coverage.

The force of the congressional rules is not clear, for several reasons. First, legislative rules requiring transparency are often partially evaded by members who need to negotiate in private. They take advantage of gaps in the rules' coverage to discuss important issues informally behind closed doors. However, requiring transparency in formal rules is a signal to the public of lawmakers' commitment to openness and may increase the political cost of defecting from the rules if intermediaries like the press or challengers successfully make secret deliberations an issue for voters. Second, lawmakers might carry out a great deal of their work in public even without rules requiring them to do so. Ferejohn suggests that elected officials have an incentive to conduct a significant portion of their activities in public as a way to signal to their principals – the voters – that they are trustworthy. By adopting transparent practices, lawmakers offer voters better tools to monitor their responsiveness; voters are therefore more willing to trust officials with control over more resources.²⁰ However, empirical tests of this suggestion have not been conclusive, in either direction.²¹

One final stage in the budget process has an entirely different transparency profile. In some years, the legislative and executive branches clash over budget policy, and interbranch negotiations are required to pass the appropriations and reconciliation bills necessary to implement budget objectives and to keep the federal government operating. This occurred, for example, in 1990 when the first President Bush's vow of "no new taxes" collided with a fiscal reality that threatened to result in substantial across-

meeting of the conferees. *Id.* at § 5.8. The result is that a great deal of preliminary deliberations can be held behind closed doors.

¹⁹ U.S. Const., § 5, cl. 3.

²⁰ See Ferejohn, *supra* note 2.

²¹ See *supra* note 2.

the-board cuts (sequesters) in federal programs.²² The framework for deficit reduction put in place in the mid-1980s by Gramm-Rudman-Hollings had proved unworkable, and without a comprehensive restructuring and a deal to cut spending and raise taxes, a budget crisis was unavoidable and threatened a larger financial disaster. Accordingly, in a budget summit held entirely in private, key lawmakers and executive branch officials negotiated the Budget Enforcement Act of 1990²³ and a budget reconciliation bill that included a mix of tax increases and spending reductions. The ultimate product of the summit was presented to Congress as a conference report (at first rejected by the House, although a revised version was subsequently passed²⁴), but the deals reached to produce the compromise occurred in closed sessions.

This informal device – the budget summit – has been used on several occasions when interbranch compromise was difficult but necessary. Because summits are not formal entities with rules governing their conduct and because the only people involved are elected officials from Congress and executive branch officials from the White House and departments, open meeting rules do not apply. When it occurs, this final stage of deliberations concerning the federal budget is entirely opaque.

Given all this, the difficult question is whether the equilibrium with respect to openness that has been reached in the federal budget process – whether by explicit rule or by practice – is optimal. In the remainder of the paper, we will assess two dimensions along which the degree of transparency can be evaluated. First, it can be measured according to what sort of discussion and deliberation it tends to encourage, namely, how transparency affects the mix of arguing and bargaining, and which type of deliberation is most suited to making decisions about the various aspects of budgeting. Second, we will assess how transparency may increase the power of interest groups to monitor and punish lawmakers, rather than empowering voters to hold legislators accountable on Election Day, and whether different structures of disclosure could more effectively benefit voters without similarly benefiting organized special interests.

II. Optimal Transparency

We will first identify the key tradeoffs that determine the costs and benefits of transparency across different arenas of the budget process. We then propose a framework of budget-process transparency that is plausibly optimal and might be imposed by a benevolent institutional designer.²⁵ Subsequently, in Section III, we identify some institutional constraints and motivational problems that threaten to make this optimum unattainable.

²² For a discussion of the 1990 budget summit, see Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Process in the U.S. Congress 77-79* (2d ed. 2000). For discussions of budget summits generally, see John Gilmour, *Strategic Disagreement: Stalemate in American Politics* 148-52 (1995); Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 *Colum. L. Rev.* 702, 724-29 (2000).

²³ Pub. L. No. 101-508, 104 Stat. 1388 (1990).

²⁴ See Aaron Wildavsky & Naomi Caiden, *The New Politics of the Budgetary Process* 142-43 (3d ed. 2001).

²⁵ The federal budget process is structured by framework laws that set up the rules of deliberation and decision making, primarily for Congress but also for other budget actors. Elizabeth Garrett, *The Purposes of Framework Laws*, 14 *J. Contemp. Legal Iss.* 717, 723-24 (2005).

Two Tradeoffs

In any arena, the mix of transparency and opacity has two principal effects. One effect is that transparency can alter, at least marginally, the extent to which relevant actors engage in principled argumentation, on the one hand, or overt bargaining, on the other hand.²⁶ Both arguing and bargaining are indispensable processes for aggregating judgments or preferences into collective decisions, so optimal structures will combine both in some mix. Another effect is that transparency promotes accountability. The crucial question, however, is accountability to whom? Accountability can be good, when it runs from agents to principals, such as voters or constituents generally; it can also be bad, when it runs from agents to third parties such as transfer-seeking groups. We take up these points in turn and then sketch an optimal transparency structure for federal budgeting.

As a preliminary note, in the following discussion we will bracket and ignore the distinction between two familiar accounts of what it means for legislators to offer public-spirited representation. On one account, legislators act as trustees to promote the general interest of the polity as a whole; on another, legislators act as delegates who are charged with promoting the interests only of their constituency, usually defined along geographic lines. The difference between these accounts, while important, is immaterial to our discussion. Instead we contrast both these accounts, on the one hand, with legislative capture by organized interest groups, on the other. By “capture” we mean systematic legislative behavior that exclusively promotes the interests of narrowly-defined groups (much smaller than even the smallest constituency); such groups seek transfers that, while beneficial to themselves, inflict larger harms on disorganized constituents and society generally. That sort of representation is objectionable on either the trustee account of representation or the delegate account, so we need not engage the deeper issues here.

Our picture does assume that not all interest-group activity is good from the social point of view; to that extent we reject the most optimistic versions of pluralist theory. Whatever the general case, this assumption should not be very controversial in the budget setting, where socially harmful transfers and wasteful competition to obtain such transfers are hardly unprecedented. Of course some interest-group activity is also socially beneficial, as when organized groups monitor each other, offset each other’s influence, or supply voters and constituents with useful information. Nothing in these points is inconsistent with our proposals, as we discuss below.

Arguing and Bargaining. Arguing, let us say, is deliberation (whether or not sincere in some subjective sense) that is pragmatically constrained to rest on impartial and internally consistent reasons.²⁷ The stuff of bargaining, by contrast, consists of credible threats and promises, usually, though not inevitably, in the service of the self-interest of the bargainers. Transparency dampens overtly self-interested bargaining and pushes officials in the direction of principled argumentation. In the glare of transparency,

²⁶ Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. Penn. J. Constl. Law 345, 405-15 (2000).

²⁷ See *id.* at 372-3.

people tend to offer neutral principles related to the public good, not bargains based solely on private interests.

This marginal effect can either be good or bad, depending on the setting. Bargains may represent corrupt deals by which agents enrich themselves at principals' expense, but bargains also permit logrolls that may allow the legislative process to register the intensity of constituents' preferences,²⁸ and that help to appease policy losers by giving everyone something. Argument by reference to neutral principles, by contrast, often pushes policy towards the extremes, resulting in total victory or total defeat. Transparency also subjects public deliberation to reputational constraints: officials will stick to initial positions, once announced, for fear of appearing to vacillate or capitulate, and this effect will make deliberation more polarized and more partisan. The framers closed the Philadelphia convention to outsiders precisely to prevent initial positions from hardening prematurely.²⁹ Finally, transparency may simply drive decision making underground, creating "deliberations" that are sham rituals while the real bargaining is conducted in less accessible and less formal venues, off the legislative floor.

Although the relevant questions and answers relating to deliberative transparency vary from setting to setting, it is possible to offer a general guide to the relative costs and benefits of arguing and bargaining across contexts. The principal benefit of transparency is to dampen self-interested bargaining – including in this category bargaining by legislators who act as tightly constrained agents for self-interested private groups, a topic we take up shortly. The principal cost of transparency is that the glare of the public spotlight can produce bad deliberation that is not conducive to necessary compromise – deliberation infected by posturing and ideological polarization. This suggests a rule of thumb: in general, the less information legislators have about how decisions will affect their interests, the less self-interested bargaining is possible in any event; the deliberative distortions produced by transparency are then all cost for no benefit. On this logic, to the extent that legislators must necessarily act behind a partial "veil of uncertainty,"³⁰ opacity is better, all else equal, whereas transparency is better in settings where legislators have thick information about the effect of particular decisions on their interests.³¹ As we will suggest below, this suggests that earlier stages in the budget process should be more opaque than later stages, because earlier stages occur behind a partial veil of uncertainty.

Accountability: Good and Bad. One of the primary rationales for increased transparency in government is to reduce the monitoring costs borne by the principals –

²⁸ Logrolling may, of course, either permit socially beneficial trades or inflict socially harmful externalities on nontraders. Much depends on the details of the situation. "Today, no consensus exists in the normative public choice literature as to whether logrolling is on net welfare enhancing or welfare reducing, that is, whether logrolling constitutes a positive- or a negative-sum game." Thomas Stratmann, *Logrolling*, in *Perspectives on Public Choice: A Handbook* 322, 322 (D.C. Mueller, ed., 1997).

²⁹ For details and references, see Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. Chi. L. Rev. 372 n.30 (2004).

³⁰ See Geoffrey Brennan & James M. Buchanan, *The Reason of Rules* 28-31 (1985); James M. Buchanan, *The Calculus of Consent* 77-80 (1962). The source of the idea, although not of the phrase, is John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk Taking*, 61 J. Pol. Econ. 434, 434-435 (1953).

³¹ Cf. Jon Elster, *Legislatures as Constituent Assemblies*, in *Legislatures and Constitutionalism: The Role of the Legislature in the Constitutional State* [22] (R. Bauman & T. Kahana, eds. 2006) (forthcoming).

voters – to ensure that their agents – lawmakers – pursue their objectives. The principal-agent relationship does not fully describe the relationship between voters and elected officials, nor is it the only motive for transparency,³² but it captures a great deal of the interaction and provides a framework for analysis. We have already noted that the framework explains why, even in the absence of open meeting requirements, one would expect to observe some level of transparency in democratic governments as lawmakers seek to increase voter confidence and therefore cause voters to allocate more resources to lawmakers' control.³³

Many who advocate strong transparency thus appeal to explicit or implicit principal-agent models. They argue that transparency will increase the ability of voters to hold elected officials accountable for their decisions because monitoring costs are reduced. Knowing that their behavior is observable, agents act differently, and principal-agent slack is reduced. Corrupt deals – meaning self-interested deals among agents, or between agents and third parties – will be deterred or chilled. All this assumes that legislators respond to electoral incentives, but even if one imagines legislators as good types or bad types in some fixed and exogenous sense, one might still defend transparency by reference to selection effects.³⁴ Putative candidates who value public office merely to further their self-interest might decide that a relatively transparent environment is not conducive to achieving their goals; thus, if transparency works as intended, only more trustworthy agents will seek elected office.

However, there is an intrinsic cost to transparency, even from an agency perspective, and even subject to the point that not all bargaining is bad. Transparency produces not only good accountability that promotes informed democratic participation and voting, but also bad accountability that promotes capture, in the sense described above. Once decision making is open to public view, it is not only voters in the lawmaker's district or state who observe the behavior; sophisticated and organized interest groups seeking inefficient transfers, and their lobbyists, can also monitor legislative behavior that occurs in transparent institutions.³⁵ Although some interest groups might prefer the secrecy of closed meetings, open sessions provide them a more direct way of monitoring whether lawmakers keep their promises and how hard lawmakers work to deliver benefits or to protect the groups from harm.³⁶ Organized interests seeking transfers can weigh in while the legislation is being written; indeed, in a

³² See Christopher C. Hood, *Transparency*, in *Encyclopedia of Democratic Thought* 700, 701 (P.B. Clarke & J. Foweraker eds., 2001) (identifying rule of law concerns as also supporting greater transparency).

³³ See Ferejohn, *supra* note 2; Alt, *supra* note 2. See also Alt, Lassen & Skilling, *supra* note 5 (fiscal transparency in states increases the scale of government and gubernatorial approval, suggesting voters are willing to trust politicians with more resources when fiscal policy is transparent).

³⁴ See generally Timothy Besley, *Political Selection*, 19 *J. Econ. Persps.* 43 (2005); Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 *Va. L. Rev.* 953 (2005).

³⁵ For other discussions of this cost to transparency, see Cass R. Sunstein, *Government Control of Information*, 74 *Cal. L. Rev.* 889, 896 (1986); Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life* 22 (1999) (Oxford Amnesty Lecture).

³⁶ For work suggesting that interest groups use their campaign contributions to obtain greater energy and attention on their issues from politicians, see David P. Baron, *Service-Induced Campaign Contributions and the Electoral Equilibrium*, 104 *Q.J. Econ.* 45 (1989); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 *Am. Pol. Sci. Rev.* 797 (1990).

world of wireless, instant communication, lobbyists not only provide legislative language and expertise before mark-ups, they also email input to staff via blackberries while the meetings are occurring, ensuring that lawmakers hear their views at crucial moments and that they are aware that they are being watched closely. In a world of closed meetings, interest groups must rely on second-hand accounts and often cannot be sure what negotiations had occurred. Furthermore, because most interest group bargains in the budget context are not obviously corrupt, and many are low salience bargains that voters will overlook even if they are made in the open,³⁷ the threat of disclosure may not appreciably reduce the level of private-regarding behavior. Thus, transparency may empower interest groups and their lobbyists in one realm without substantially harming them in another.

Contrast this with the situation of the ordinary voter. Although she now can more easily monitor legislator behavior because of open meeting requirements, she faces a significant collective action problem if she chooses to closely watch committee hearings. She bears all the costs of monitoring, yet there is little she can do on her own to punish a wayward representative. If she succeeds in changing legislative behavior through timely input or other intervention, all voters in her circumstances benefit without helping defray any of her monitoring costs. The chance that she will succeed in changing legislative outcomes is low: she lacks the ability to provide the same level of input in real time that interest groups and lobbyists can. There are intermediaries like the press and challengers who can use transparency to monitor lawmakers on behalf of voters and bring egregious examples to their attention near Election Day. But lawmakers know that it is not certain voters will pay attention to press stories, and ordinary citizens are not organized to mount effective action even if they do notice the news. Certainly, lawmakers will be concerned that particular kinds of behavior will affect voters' decisions,³⁸ but most decisions made in a budgeting context are not sufficiently noteworthy to produce electoral consequences.

Our contrast between good and bad accountability, to voters and to interest groups, is deliberately overdrawn to clarify the issues. Of course, some interest groups are good, either because they supply pluralistic political competition that increases efficiency and overall accountability, or because they act as informational intermediaries. An example of the latter case involves good-government groups who use their access to supply voters with cues about the position of particular legislators, intelligible accounts of budgeting decisions, or other useful information. By and large, however, the threat in the budget setting is that total transparency will increase damaging special-interest transfers, by exposing decision makers to intensive scrutiny and threats of electoral retaliation. In the budget setting, the groups that benefit most from fishbowl transparency and immediate access to details of ongoing negotiations are tightly organized groups seeking transfers to particular economic interests, rather narrowly defined.

Two Proposals

³⁷ See Kay Lehman Schlozman & John T. Tierney, *Organized Interests and American Democracy* 396-98 (1986).

³⁸ See R. Douglas Arnold, *The Logic of Congressional Action* 82-87(1990). Empirical work suggests that voters do make electoral decisions based on budget policy. See, e.g., Robert C. Lowry, James E. Alt & Karen E. Ferree, *Fiscal Policy Outcomes and Electoral Accountability in American States*, 92 *Am. Pol. Sci. Rev.* 759 (1998).

In light of these tradeoffs, we offer two proposals that would, if feasible and if implemented, improve the transparency framework of the federal budget process. Our guiding principles are (1) that opacity becomes more costly as the budget process proceeds and legislators gain more specific information about how decisions will affect their interests; (2) that where disclosure does occur, it should be delayed if doing so will maximize the benefits of information to voters and constituents generally while minimizing information benefits to organized interest groups. Given these principles, we propose that decision making at the stage of overall budget allocation should be nonpublic, and that decision making at later stages should be made transparent, but only through delayed disclosure.

Closed committee sessions for overall allocation. Within Congress, the first basic stage of the budgetary process is the allocation of overall spending levels across budget categories or functions. The allocation is developed by the budget committees in both houses and then formalized through a concurrent budget resolution, which sets out a five-year budget plan. The concurrent budget resolution is the internal congressional vehicle that sets forth macro-budgetary objectives: it sets spending limits for discretionary programs; determines the amount of revenue that should be raised in taxes; reveals congressional priorities by dividing resources among various budget functions, which are the major categories of governmental activities; and provides for the debt limit. It does not require that any particular programmatic changes be made to achieve its broad goals, although the budget committees often include nonbinding recommendations for specific changes or members add such suggestions on the floor. Filling in the details of the budget resolution is the province of the appropriations committees, the substantive committees with jurisdiction over entitlement programs, and the tax-writing committees.³⁹

This concurrent resolution stage of the budget process is in some ways analogous to the process of constitution-making. It puts in place a framework within which bargaining can occur at subsequent stages; in effect, the resolution sets out constraints and then delegates authority to tax-writing committees, appropriations committees and some other committees to make specific policy choices within those constraints, just as a constitutional convention sets out constraints within which later legislatures and agencies work. The constraints of the budget resolution are enforced through internal parliamentary devices such as points of order, some of which can be waived only with supermajority votes in the Senate.

The analogy is contestable; perhaps the real analogue to the constitution-making stage is the enactment of framework statutes such as the 1974 Budget Act.⁴⁰ The only point we need, however, is that the overall budget allocations are established behind a partial veil of uncertainty about how macro-level decisions will affect legislators' specific interests. At the stage of overall allocation, it is simply unclear what particular programs and appropriations will emerge from the later stages of the budget process, and hence unclear exactly how legislators' interests will be affected by large-scale choices. We do not mean to overstate the opacity of the veil; certainly, members think about the

³⁹ See Allen Schick, *The Federal Budget: Politics, Policy, Process* 110-17 (rev. ed. 2000) (describing the structure of the concurrent budget resolution).

⁴⁰ Pub. L. No. 93-344, 88 Stat. 297 (1974).

particular programs and tax provisions that will emerge from the entire budget process when they make macro-budgetary decisions in the concurrent budget resolution.⁴¹ However, the overall allocations are reminiscent of constitution-making because they make value choices at a relatively high level of abstraction, choosing overall priorities – more for guns or butter? – and then leave it to later periods to connect those priorities to particulars. Moreover, there is a separation of powers or responsibilities here: large-scale allocative decisions and priority-setting are done by budget committees, whereas specific spending decisions at later stages are made by different committees with different memberships. This difference in control contributes to the uncertainty afflicting members at the earlier stage, thickening the veil.

At the overall allocation stage, then, legislators will be somewhat uncertain about how decisions affect their interests, which reduces the risk of self-interested bargaining. The remaining risk, however, is that transparency will induce bad deliberation, through posturing, premature hardening of positions, and highly conflictual or principle-ridden debate. For the same reasons that closing off the federal constitutional convention was plausibly a successful decision – framers lacked sufficient information to pursue their own interests, while the lack of transparency produced better deliberation – so too it seems plausible that large-scale allocative choices might best be made behind closed doors. To be sure, the outputs of this opaque process will eventually be made public, when the concurrent resolution is enacted and the committees begin connecting allocations to particular programs, but the deliberation in the budget committees that produces the outputs need never be publicized, at least in principle. (Below, we consider whether such a scheme is in fact feasible, given the incentives of relevant actors and the political and institutional constraints.)

Finally, at the allocation stage there is a connection between the two senses of “transparency” identified in Section I. The budget resolution is a relatively intelligible document. It allocates money to general government functions, not to detailed programs or tax subsidies that are hard for outsiders to fully understand; a decision about how government trades off guns against butter is less detailed and less obscure than the decision about how to design the various programs to deliver the guns or butter. The relative intelligibility of the budget resolution strengthens the case for opacity during the committee deliberations that produce the resolution; any reduction in good accountability is less here than in other settings. Conversely, the budget resolution, because it proceeds at a high level of generality, tends to be the majority party’s statement of its principles. This makes any public compromise particularly costly for the minority, which in turn encourages posturing. Here opacity can lower the reputational and political stakes of disagreement, helping to avert bitter strife over principles and easing negotiations at later stages of the budget process.

At those later stages, the calculus changes. As legislators gain highly specific information about particular programs, as the veil of uncertainty shreds, there is increasing reason to fear that opacity will produce unchecked self-interested bargaining. Conversely, the principal cost of transparency – the poisoning of deliberation –

⁴¹ See Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 Harv. J. on Legis. 387, 409-15 (1998) (describing the interaction between allocations among budget functions and determinations of programmatic details).

diminishes in any event, just because there is less deliberation of any kind occurring. Bargaining over specifics comes to the fore, and transparency can help to chill or deter the most self-regarding bargains. The legislative work in the wake of the concurrent budget resolution is drafting appropriations bills to allocate money within the budget functions to various specific programs, writing revenue legislation with detailed tax subsidies, or constructing or revising actual entitlement programs. This is the prototypical arena of logrolling; the discussions in these committees tend to be less partisan and more pragmatic, at least for the vast majority of programs that are below most voters' radar screens. Organized interests seeking transfers are vitally concerned in all aspects of appropriation, entitlement and revenue bills because they actually receive their benefits from this legislation. In contrast, the concurrent resolution merely defines the likely universe of resources available to fund the actual programs and tax subsidies.⁴²

How do these prescriptions match up with the current rules? Committee meetings considering appropriations bills, tax proposals, omnibus budget reconciliation acts, and entitlement programs are where much concrete bargaining takes place, and these hearings are generally subject to strong transparency requirements. This is as it should be given the logic we have set out. However, our logic suggests important changes in the framework shaping deliberation at other stages. First, committee deliberations at the macro-allocation stage culminating in a concurrent resolution should be opaque, contrary to current practice. Second, currently opaque budget summits, where the ultimate deals are struck in case ordinary processes break down, should take place in the public eye. Budget summits are entirely matters of logrolling and pragmatic compromise as the two branches, and sometimes the two parties, hammer out a bargain to keep the government running and avert a fiscal disaster. Quite obviously, political constraints may rule out either or both of these proposals, as we discuss below.

Although we tentatively conclude that disclosure of certain stages of the budget process remains an important aspect of the budget framework and should be extended into realms currently closed, such as budget summits, we have not yet said anything about the timing of disclosure, where disclosure is to occur at all. We turn next to that important aspect of transparency.

Delayed disclosure – in general. The tradeoff between good and bad accountability arises from the existence of two audiences with frequently diverging objectives and with asymmetrical abilities to monitor lawmakers. Legislators know that the two audiences have vastly different capabilities to monitor and punish, so transparency operates to reduce principal-agent slack between organized interests and lawmakers more than it reduces slack between voters and their elected representatives. In principle, the solution would be to keep organized interests in the dark about legislative behavior while fully revealing it to voters. Although that solution is impossible – once information is provided to voters, it is provided to everyone – it may be possible, in some cases, to deprive transfer-seeking organized interests of the information while the deals are being struck and interest group influence is most problematic, while at the same time ensuring that voters have access to information before they cast their ballots. Delayed

⁴² See Garrett, *supra* note 41, at 415-16 (discussing difference in intensity of interest group activity at concurrent resolution stage and later stages of budgeting).

disclosure is a tactic that may provide many, if not all, of the accountability benefits of transparency while mitigating its accountability costs.⁴³ A similar technique is used in some countries' open records laws, which preserve confidentiality of some documents during official decision making processes but allow broad dissemination at a later time to enable voters to learn about the inputs relevant to a decision once it has been announced.⁴⁴

The basic rationale for delayed disclosure here is to maximize the benefits of information to voters generally while minimizing the benefits of information to interest groups. This general aim in turn has two components. First, delayed disclosure prevents interest groups from bringing immediate pressure to bear on legislators and other policymakers while deliberations proceed. To be sure, legislators may anticipate punishment from interest groups who later learn that their demands have not been met. Under delayed disclosure, however, it is hard for interest groups to make effective real-time interventions, to the extent that they are acting in the dark. Delayed disclosure gives decision makers breathing space and room to maneuver.

Second, delayed disclosure can be structured to mitigate the ex ante threat of interest-group retaliation at election time. How can electorally-relevant information be channeled to voters but not to interest groups? It is unclear whether this trick can in fact be accomplished, as we emphasize below; but it is possible that it can, because of the structure and timing of the modern political campaign. The key point is that interest groups seeking to maximize their influence must act earlier in the election cycle than voters, who can wait until Election Day to pass judgment on their agents. Interest groups must target campaign funds, advertising and other resources at earlier stages of the electoral cycle; indeed, such resources are often most influential at the earliest stage, as parties are assessing the pool of potential candidates to decide which will become actual candidates, and as incumbents seek to discourage serious challengers. If interest groups must act before voters, then delayed disclosure can force interest groups to act in the dark while voters act with sufficient information.

To be sure, interest groups will be able to use the information disclosed before Election Day in one political cycle to allocate resources and enforce threats or promises in a later cycle. But the political discount rate – the rate at which politicians discount the

⁴³ The idea of delayed disclosure – or to put it differently, temporary secrecy – is not new. Others who write about fiscal transparency identify the timing of disclosure as a key variable in the success of open meetings in increasing accountability without disrupting deliberation that occurs best out of the public eye. See, e.g., Stiglitz, *supra* note 35, at 22; Heald, *supra* note 4, at 746. However, none has proposed a formal system of delayed transparency as a solution for the problem of dual audiences with divergent interests and different monitoring capabilities. In a related context, Coglianese, Zeckhauser & Parson suggest keeping parts of agency rulemaking processes confidential for several years after the regulation is promulgated to encourage regulated entities to share information with government regulators. Coglianese, Zeckhauser & Parson, *supra* note 1, at 339. This proposal responds to different concerns than those we identify here; the regulatory problem these authors identify is information asymmetry between the regulated and the regulators.

⁴⁴ See Andrea Prat, *The Wrong Kind of Transparency*, 95 *Am. Econ. Rev.* 862, 869-70 (2005) (discussing Sweden's open records law and noting that more than 30 countries allow temporary secrecy for deliberations relevant to some decisions); Maurice Frankel, *Freedom of Information: Some International Characteristics* 9 (2001) (discussing laws in Sweden, Portugal, and Finland) (Paper from the Campaign for Freedom of Information, on file with authors)

future – will assure that an interest groups' threat to punish the politician two elections hence will be less impressive than a threat tied to the next election. Delayed disclosure effectively lengthens the legislators' term of office, but only for groups enforcing bad accountability; such groups would plausibly prefer more frequent elections to maintain a tighter hold on legislators. For purposes of good accountability to voters, however, delayed disclosure does not effectively change the frequency of election; voters would still receive information in time to vote competently in the next succeeding election.

The devil is in the details, of course. The hard part is determining the right time to release the details of the budget negotiations. The delay should be long enough to reduce interest groups' ability to pressure lawmakers as they make decisions, but the information must be publicized early enough to influence electoral outcomes. This latter requirement means that the information must be available well before the actual elections because it will influence the decisions of other viable candidates, who must decide whether to challenge incumbents who participated in unsavory or questionable deals. The information, then, must be made public not only before the primary election but also before the time candidates file to appear on the ballot. Disclosure must also occur early enough for challengers to begin to raise money necessary for a successful campaign. Such early disclosure also increases the power of interest groups because they can use the information to direct campaign resources to lawmakers who work energetically on their behalf or to the opponents of those who reneged on deals. Disclosure after the period when interest groups' campaign contributions can make the most difference is the optimal time for publicity, but revealing information that late in the campaign might also reduce the ability of voters – and intermediaries like the press and challengers – to use the information appropriately. This is an optimization problem – the problem is to find the disclosure point that maximizes the difference between the benefits of information to voters and the benefits of information to efficiency-reducing interest groups.

The available information about costs and benefits is too crude to be sure where the exact optimum is located, but we suggest, as a reasonable guess, that disclosure should be delayed until a few weeks before first the primary elections for congressional seats. For many House seats, the primary is the only possible venue for competition, so continuing secrecy past this stage of the electoral cycle will deny voters a meaningful chance to act on the information. We emphasize that this date is only a guess – it may be too late in the electoral process to allow serious challengers to emerge, and it may also be too early, in that it would allow interest groups substantial influence in the campaign for the general election, although at least such groups will have reduced sway in the selection of the two major candidates.

Our proposal of delayed disclosure is speculative, and offered to provoke ideas. We emphasize that the proposal might fail, for strictly factual reasons. It might turn out, in fact, that there just is no disclosure point that is both (1) sufficiently late so as to hamper the ability of interest groups to retaliate against legislators in the relevant election cycle and also (2) sufficiently early as to give would-be challengers and informational intermediaries the material they need to inform voters. We emphasize, however, that the current system, in which transfer-seeking interest groups get immediate information from budgeting committees, is an extreme or corner solution, one that is most unlikely to be the best possible arrangement, in light of all relevant costs and benefits. Quite plausibly

some delay in disclosure would improve matters, both to give legislators breathing room and to hamper interest-group retaliation, although it is difficult to say in the abstract and with any precision how much delay would be best.

Finally, a clarifying point is in order. When we suggest that some deliberations be kept opaque and some be subject to delayed disclosure, we do not mean that the former will be kept secret permanently. In a long enough time frame everything is disclosed, even presidential papers and highly classified documents. For our purposes, following the logic suggested above, “delayed disclosure” just means disclosure that occurs after the deliberations, but sometime before the next election after the relevant budget is adopted; “opacity” means that the relevant deliberations are not disclosed in time for the next following election.

Delayed disclosure – committees. We now turn to problems of delayed disclosure in particular institutional arenas, within the larger budget process. A system of delayed disclosure might allow legislative bargaining in appropriations and tax-writing committees, within the framework of a concurrent budget resolution, to occur behind closed doors. Transcripts of deliberation would be kept, and any documents generated during the process would be retained for later release. If ongoing committee deliberations could be kept secret, then interest groups’ ability to affect the details of spending and revenue decisions and to monitor lawmakers would be reduced. Permanent secrecy is not desirable, however, because it would insulate corrupt deals from publicity and eliminate the deterrent effect of disclosure. Thus transcripts and other documents of committee deliberations must be fully disclosed after the budget has passed but before Election Day. Knowing that their discussions and deals will not be kept secret forever, lawmakers would have strong incentives to refrain from entering into bargains that could not withstand the sunlight of public disclosure. Moreover, because the output of the committee deliberations – the final mix of appropriations, entitlement spending and taxes – would be public and floor deliberations would be open, obviously corrupt and questionable deals would likely be discovered and scrutinized as the budget was being developed.

If delayed disclosure were adopted in a budget framework law shaping committee deliberations, it should be accompanied by modifications in the Lobbying Disclosure Act (LDA)⁴⁵ to provide substantially better information about which representatives and senators are meeting with which lobbyists and on what topics. The concern is that temporary secrecy not only protects lawmakers from interest group pressure that undermines the public interest, but also protects corruption. Efficiency-reducing bargains can be combated not only by the threat of ultimate disclosure of the details of deliberations but also by immediate disclosure of meetings that members of Congress hold with lobbyists. The public can reason from the fact of those meetings, and the amount of money spent to support them, about the likely influence exerted by an organized group on a key lawmaker at a pivotal time in the budget cycle. Currently, the LDA does not provide very specific information about which lawmaker a lobbyist meets with or about the precise subject matter of their discussions.⁴⁶ If the committee

⁴⁵ Pub. L. No. 104-65, 109 Stat. 691 (1995) (codified as amended in scattered sections of 2 U.S.C. (2000)).

⁴⁶ 2 U.S.C. § 1604(b)(2)(B).

deliberations about budgeting that occur after in the appropriations, tax-writing and other substantive committees are kept temporarily secret, as we suggest, then more aggressive disclosure of lobbying contacts would be required.⁴⁷

Delayed disclosure – budget summits. When they occur, budget summits typically involve a small group of people from the executive and legislative branches.⁴⁸ Deliberations that occur in summits are not open to the public, or even to other members of the legislature, although the ultimate deal is presented to Congress, typically in a conference report of an omnibus budget reconciliation act or an omnibus appropriations law, for an up or down vote. Thus, the output of this process is public, even if the inputs – from interest group influence to political deals reached to provide a consensus document – are not. Often the product of a budget summit is not fully understood at the time it is presented to Congress because there is often little time between the summit's proposal and the final vote, but the terms can be scrutinized by the press and opponents later to ensure accountability. Thus, delayed disclosure of deliberations of summit meetings promises to increase accountability relative to the status quo. Notes and drafts of documents could be disclosed in the weeks following the summit to provide better insight into the deals reached while not unduly inhibiting the give-and-take required to form a compromise.⁴⁹ Even disclosing only the drafts of documents, with records of which political player made which changes, without disclosure of transcripts or similar records of discussions at the meetings would provide a sufficient record to ensure accountability at some point.⁵⁰

Furthermore, a system of delayed disclosure with respect to budget summits would prove superior to the more typical open meeting rules that require immediate publicity of deliberations. One of the advantages of the current structure of budget summits is that political actors, working in private, can avoid fiscal train wrecks by reaching politically sensitive deals that may anger interest groups. When the deals are revealed, politicians can claim that they worked as hard as possible to further the objectives of groups affiliated with them, but they were forced to take the bitter with the sweet to craft a deal that is, all things considered, the best outcome. Because the product of summits is presented to Congress as a take-it-or-leave-it proposal, groups know that they have little ability to unravel the compromise once it emerges from the summit. In reality, participants in the summit often pragmatically retreat from extreme positions and work to craft a compromise that averts political and fiscal disaster. Although delayed disclosure may inhibit that dynamic somewhat – because politicians know they cannot escape accountability for their decisions after the transcripts and drafts are made public

⁴⁷ See Elizabeth Garrett, Ronald M. Levin & Theodore Ruger, *Constitutional Issues Raised by the 1995 Lobbying Disclosure Act*, in *The Lobbying Manual* 143, 147 (W.V. Luneberg & T.M. Susman eds., 2005). Indeed, more targeted disclosure through the LDA is warranted even if delayed disclosure of committee deliberations is not adopted.

⁴⁸ See Garrett, *supra* note 22, at 725.

⁴⁹ See Gilmour, *supra* note 22, at 140-43, 163-64.

⁵⁰ Similar rules of delayed disclosure should be considered for congressional task forces, particularly those that bring forward legislative proposals. These entities are different from budget summits, which are interbranch and often bipartisan, because they are often arms of the majority party and thus may also discuss party strategy which is appropriately kept confidential. But, to the extent that a task force is acting in the place of a congressional committee, then it should be subject to parallel rules of disclosure.

and their claims of working to protect certain interest groups' benefits may be undermined by the record of the discussions – temporary secrecy will still protect the interactions from immediate pressure and interference. Disclosure, whether simultaneous or delayed, inevitably affects the dynamics of negotiations. That is its purpose; the hard question is to get the balance of transparency and opacity right to allow compromise in an environment of accountability.

Delayed disclosure – advisory committees. Another arena where rules of delayed disclosure should be adopted is decision making by federal advisory committees. These committees often consider matters relevant to budgeting, from Social Security and entitlement reform to tax reform.⁵¹ Federal advisory committees currently use techniques to allow them some opacity during decision making notwithstanding provisions in the Federal Advisory Committee Act (FACA)⁵² that require relatively immediate disclosure of drafts and other documents to the public.⁵³ For example, President Bush's Advisory Panel on Federal Tax Reform that met during 2005⁵⁴ did not make public any drafts or other documents that were seen by four or fewer of the nine panel members, allowing five working groups of four members each to deliberate entirely behind closed doors. As long as these groups did not formally provide advice to the President or a federal officer or agency, they were not subject to FACA's transparency requirements. In reality, however, the real work of the Panel occurred in private; the public meetings were used for taking testimony of witnesses selected by the Panel and discussing reform themes that had been more fully debated and largely but not formally decided in the working groups.⁵⁵ It was not a coincidence that the Tax Panel's two reform options had virtually identical provisions affecting individual tax code⁵⁶ even though the two working groups responsible for the options had entirely different membership. By the time public

⁵¹ Although our focus here is on advisory committees working in the budgeting arena, our recommendations apply to all federal advisory committees.

⁵² 5 U.S.C. App. 2.

⁵³ It seems clear that FACA was intended to subject all of an advisory committee's deliberations to public scrutiny as they occur. See, e.g., H.R. Rep. No. 92-1017 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3500 (stating that § 10(b) of the Act, which requires that all records and files "which were made available to or prepared for or by each advisory committee" be made available to the public, "has the effect of assuring openness in the operations of advisory committees. This provision coupled with the requirement that complete and accurate minutes of committee meetings be kept serves to prevent the surreptitious use of advisory committees to further the interests of any special interest group. Along with the provisions for balanced representation ... this requirement of openness is a strong safeguard of the public interest."). But the regulations interpreting the Act have provided guidance to committees that seek to insulate some of their deliberations from public scrutiny. See 41 C.F.R. § 102-3.35(a); 41 C.F.R. § 102-3.160; 41 C.F.R. pt. 102-3, subpt. D, app. A, 66 Fed. Reg. 37728, 37729 (July 19, 2001).

⁵⁴ Ex. Order No. 13,369, 70 Fed. Reg. 2323 (Jan. 7, 2005).

⁵⁵ Similar nonpublic negotiations between only a subset of a committee occurred in 1981 as the National Commission of Social Security Reform (the "Greenspan Commission") deliberated on reform of the Social Security system. See Gilmour, *supra* note 22, at 156-58. As with the President's Tax Reform Panel, the Social Security Commission was governed by FACA. See Charter of the National Commission on Social Security Reform (1983) (noting that the Commission was governed by FACA and that all meetings would be open unless otherwise determined by the Secretary of Health and Human Services), *available at* <http://www.ssa.gov/history/reports/gspan10.html>.

⁵⁶ President's Advisory Panel on Federal Tax Reform, *Simple, Fair, and Pro-Growth: Proposals to Fix America's Tax System* 63-95 (2005).

deliberations occurred, key decisions had been at least informally reached and some of the most revealing disagreements had occurred in private.⁵⁷

This structure of private deliberations by subgroups and public deliberation by a full advisory committee is in some ways consistent with our recommendations for a mix of transparency and opacity. Confidential deliberations dampen posturing and partisanship and improve the quality of deliberations, because privacy allows advisory committees to consider reform alternatives and guidance that would elicit strongly negative interest group reaction without interference from those groups. The problem with the current structure is that only subgroups of fewer than a majority of the full committee can discuss and deliberate in private, denying that environment to meetings of the full committee. This is an issue whether the advisory committee is made up of members working in their individual capacities to provide advice based on their independent judgment or whether they are appointed as representatives of a particular interest.⁵⁸ In the latter case, immediate transparency of deliberations may make compromise even more difficult as representatives are unwilling to back away from their groups' positions in an environment that allows pressure to be applied as deliberations unfold. Again, we note that allowing some privacy for deliberations does not mean that disclosure never occurs; the option of delayed disclosure for advisory committees is one that could strike the right balance to elicit better advice and reduce the influence of organized special interests.

We therefore suggest several amendments to FACA to construct a formal system of delayed disclosure. First, the full panel should be allowed to deliberate in private, with the requirement that all these deliberations, as well as any by subgroups of the committee, be disclosed after the panel's report has been. Votes and final decisions would have to occur in public or be revealed clearly in any report providing advice to the executive branch; the ultimate advice itself must be made public at the same time it is transmitted to the federal official or agency. Documents and working drafts generated by the full panel or subgroups should be automatically disclosed within some, relatively short time period after the release of the final report or, for committees that exist for several years, after they file their charters, a biennial requirement for longstanding advisory committees.⁵⁹ Such a mandate for disclosure of documents generated by subgroups would actually improve transparency because, as long as the subgroup does not directly advise the executive branch, those documents now never have to be made public.⁶⁰

⁵⁷ It is the case, however, that the working groups made no formal decisions about recommendations; rather, all such decisions were made by the full panel in open meetings or a public vote. See Letter from Jeffrey Kupfer to Rob Wells, Deputy Bureau Chief of Dow Jones Newswires, June 8, 2005 (noting that subgroups' work could be done in private because the Panel would make all decisions about recommendations in open meetings) (on file with authors).

⁵⁸ See Office of Government Ethics, Memorandum to Designated Agency Ethics Officials on Federal Advisory Committee Appointments (Aug. 18, 2005) (describing difference between the two kinds of appointments).

⁵⁹ Federal advisory committees terminate after two years unless their duration is explicitly extended. In all cases, the committees must report publicly on their work every two years. See 41 C.F.R. § 102, subpt. B, app. A; 66 Fed. Reg. 37740 (July 19, 2001).

⁶⁰ For example, none of the dozens of revenue estimates provided by Treasury to the subgroups of the Tax Reform Panel have been released to the public, not even in the final report. This information is crucial to

Second, records of any private deliberations of working groups or the full panel should be maintained and disclosed after the advisory committee has been disbanded or regularly throughout the life of the committee. There is a cost to such delayed disclosure of the content of deliberations; although disclosure would provide better insight into the thought processes of panel members and the compromises reached, disclosure, albeit delayed, could inhibit robust discussion. We believe keeping a record of the discussion is warranted and would not chill deliberation severely; after all, off-the-record discussions are still possible in even less formal settings between individual members or with staff. Moreover, if panel members knew that disclosure would occur sometime in the future, they would be deterred from making arguments solely based on self-interest in the working group deliberations, and thus the overall discussions might be better suited to reach public-regarding outcomes. We left open the possibility of keeping the details of deliberations by budget summits private, and mandating only release of drafts of documents; however, because advisory committees members have less direct accountability than budget summitters who are elected officials and high-level presidential appointees, we believe more aggressive delayed disclosure is warranted in this context.

Third, all committee members, as well as staff, should disclose any contacts with lobbyists or interest groups so that the public has a sense of who has input into the process even if the substance of that input is not known during the advisory committee's deliberations. This disclosure should be relatively immediate, not delayed as would be the case for disclosure of deliberations and working drafts. The LDA can serve as a model for this new requirement, but the recommendations discussed above to provide more specific information about lobbying contacts should be incorporated here as well.

Fourth, we recommend that, with advisory committees, as well as with all the other budget institutions we have discussed, the rules concerning what must occur immediately in public and what can occur initially in private settings, with later disclosure, be clearly stated in a framework law. Each federal advisory committee no doubt reaches different kinds of accommodations concerning disclosure in relatively ad hoc ways, although specialized staff advise committees about the rules and precedents and federal regulations adopted in 2001 set out some rules and examples concerning transparency. In our view, delayed disclosure is the optimal structure for decision

judging the recommendations and the assertions in the report that the proposals are revenue neutral and adhere to the current tax burden. In the long run, the drafts of the some of the Treasury documents used by working groups may become public through Freedom of Information Act requests, so the secrecy surrounding this aspect of the deliberations may not permanent. In addition, the Panel's staff archived all the documents so they may be made public at some later time. See Email from Jeffrey F. Kupfer, Executive Director, President's Advisory Panel on Federal Tax Reform, to Elizabeth Garrett (Dec. 1, 2005) (on file with authors). No transcripts were kept of the working groups' deliberations; therefore, those discussions cannot be disclosed. In contrast, transcripts of all open hearings and meetings are available on the Panel's webpage. See www.taxreformpanel.gov (transcripts of each public meeting provided on Panel website). Press covered all the open hearings; media efforts to learn about the deliberations of the working groups were unavailing. See Letter from William A. Dobrovir, Attorney, *Tax Analysts*, to Jeffrey F. Kupfer, Executive Director, President's Advisory Panel on Federal Tax Reform (July 20, 2005) (on file with authors) (requesting documents relating to subgroups); Memorandum from Kenneth R. Schmalzbach to Jeffrey F. Kupfer, "Subject: Document Search" (Aug. 8, 2005) (providing response) (on file with authors).

making in some kinds of entities, but the decision to use temporary secrecy itself should be made openly⁶¹ and the rules should clearly provide the limits of secrecy and ensure that virtually all private deliberations by advisory committees be made public at some point.

Adopting an explicit framework of delayed disclosure for much of the work of advisory committees, with final deliberations in public, is also justified because it will reduce the costs incurred currently as committees work to evade the current suboptimal rules. For example, the arrangements used by the Tax Reform Panel to circumvent FACA's open meeting requirements hampered the Panel's deliberations in tangible ways. Most significantly, private deliberation never occurred in a group of more than four of the nine members. Even with relatively balanced subgroups, that configuration denied the panel the input of all members on key issues until very late in the process, just weeks before release of the final report.⁶² It also enhances the power of staff relative to panel members because staff talk frequently with all members and attend all subgroup meetings. One Panel member, who has been critical of FACA's disclosure provisions, suggests that the final report could have been more detailed had the full panel been able to deliberate privately;⁶³ certainly, more specific agreements on certain issues might have emerged had larger groups been able to interact. Let us underscore again that we are not recommending that advisory committees be allowed to keep their deliberations secret forever; only that more of their work should be closed to the public while it is occurring, with disclosure delayed only until after the release of the final report or other regular reporting.

III. Second-Best Problems: Motivations and Constraints

So far we have discussed the optimal framework for transparency in the budget process, on the deliberately counterfactual assumption that such a framework could be imposed and enforced by an impartial institutional designer. We now turn to a range of second-best problems. Such problems arise from two sources: institutional and political constraints on implementation, and the motivation of participants. In general, although such problems are real, it is unclear that the constraints are so tight as to rule out adoption of the optimal transparency framework.

The supply of optimal rules

⁶¹ See Dennis F. Thompson, *Democratic Secrecy*, 114 Pol. Sci. Q. 181, 184-85 (1999) (arguing that any rules providing for temporary secrecy must be justified and the decision to allow such secrecy made through open and public decision making).

⁶² Interested members can be kept informed about the work of working groups on which they do not serve through conversations with staff or with other members; indeed, some advisory committees appoint the chair of the committee as a member of all working groups so that at least one member has a comprehensive view of all the deliberation.

⁶³ See Heidi Glenn, *Frenzel Criticizes Sunshine Law Governing Tax Panel*, Tax Notes, Nov. 28, 2005, at 1126. Frenzel's remarks are not particularly consistent on this point: in this speech, he argued that more detail would have been possible with more secrecy but also contended that too much detail was included on the recommendations to revise the tax subsidy for interest on home mortgages. We do not agree with Frenzel's conclusion that the solution is to repeal the disclosure provisions. Chairman Connie Mack has also criticized FACA's open meeting requirements. See Heidi Glenn, *Perspectives on Tax Reform From Connie Mack*, Tax Notes, Jan. 9, 2006, at 26.

The first problem arises on what might be called the supply side. Even if the framework we have sketched is desirable, which actors, if any, will be motivated to adopt it? Our analysis presupposes that legislators are either self-interested or act, at least sometimes, as tightly constrained agents for interest groups and other self-interested actors. This is an instance of a general problem, called the “determinacy paradox” or “Bhagwati paradox.”⁶⁴ Where the motives of relevant actors are endogenized as self-interested, and not assumed to be benevolent or public-spirited, there is little point in recommending reforms on public-regarding grounds. By hypothesis, public-spirited recommendations will fall on deaf ears.

Here two points are worth highlighting. First, it is valuable to identify (even approximately) the optimal structure of transparency rules. Absent that knowledge, reformers do not even know in which direction to push; in that case the question whether it is possible to attain ideal reforms does not even arise. Our principal aim here is to sketch desirable reforms, at the level of first-best. Furthermore, our analysis should draw into serious question reformers’ typical reaction to problems of accountability: increasingly aggressive disclosure rules aimed at immediate publicity. We suggest that a more nuanced approach is likely to yield better results, and that the option of delayed disclosure should at least be subject to serious discussion.

Second, the supply-side problem is frequently overcome within Congress. Consider the range of framework statutes by which legislators act to dampen interest-group influence and to check their own (future) self-interested motivations. The Electoral Count Act of 1887⁶⁵ was intended to dampen partisanship and self-interest in the context of disputed presidential elections; the Base Realignment and Closure Acts,⁶⁶ first passed in 1988, reduce lawmakers’ ability to protect military bases important to the economy of their district but not vital to the nation’s defense; aspects of the federal budget process make it more difficult for members of Congress to freely engage in distributive politics.⁶⁷ One mechanism at work here is the veil of uncertainty. Legislators’ uncertainty about how decisions will affect their interests not only helps to determine optimal transparency rules, as discussed in Section II, but also helps to ensure that the optimal transparency rules will be enacted. At any particular time, legislators can and do agree on framework statutes that improve future decision making for all concerned. In such cases agreement is possible because it is not clear, at the time of adoption, exactly whose interests will be benefited and whose hurt by the application of the framework rules in future periods.⁶⁸ It is an open question whether such a mechanism might allow enactment of a framework statute implementing the transparency structure we propose.

⁶⁴ See Brendan O’Flaherty & Jagdish Bhagwati, *Will Free Trade with Political Science Put Normative Economics Out of Work?*, 9 *Econ. & Pol.* 207 (1996).

⁶⁵ 24 Stat. 373 (1887).

⁶⁶ For the first such act, see Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623 (1988).

⁶⁷ See Garrett, *supra* note 25, at 722-30 (providing examples of framework laws).

⁶⁸ See *id.* at 736-41; Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 *Yale L.J.* 399, 428-29 (2001).

This proposal – with opacity at some stages and delayed disclosure in others – might garner more sincere support from lawmakers than the current tendency toward immediate disclosure of all deliberation. It seems likely that at least some legislators have supported full disclosure only in response to constituent demands following scandals like Watergate, and would be interested in our more nuanced proposal. Legislators might prefer to conduct some of their budget deliberations out of the public eye – or at least away from the immediate pressure of organized groups and their lobbyists.⁶⁹ Whether such a proposal could be sufficiently explained to constituents, given high current levels of distrust for elected representatives, is an open question.

Circumvention

Another problem is circumvention of transparency through informal arrangements. Sometimes transparency requirements seem futile, because all relevant actors desire to preserve opacity and can collude to keep real decision making out of the public eye, in a way that is difficult for external enforcers to monitor and prevent. Some even go so far as to claim that transparency rules are a sham, because they are systematically or at least frequently evaded.⁷⁰ The evasion phenomenon is real, but any conclusion that transparency requirements are ineffectual would be far too cavalier. Almost any institutional rules can be circumvented, but circumvention is costly; the higher the costs, the more effective the rule. Where transparency is imposed in order to chill self-interested bargains, the fact that self-interested bargains must be attempted through furtive whispers behind closed doors may be a sign that the transparency rules are working just as intended, rather than a symptom of failure. Where self-interested actors must act by indirection, the costs of striking bargains will rise, and fewer of them will be struck.

Leaks

The circumvention problem is that actors can opt for secrecy in violation of rules prescribing transparency. The reverse problem is that of leaks, where actors can opt for transparency in violation of rules prescribing secrecy. Perhaps uncoordinated leaks, difficult to deter (especially where the leaker is a legislator or staff member protected by the Speech and Debate Clause⁷¹), will undermine opacity, whatever the formal rules say. Recall in this connection Ferejohn's claim that legislators and other agents have individual-level incentives to supply transparency to constituents, even if doing so would be undesirable from the social point of view.⁷² Reporters and lobbyists will expend significant resources to ferret out the information before it is released, which could result

⁶⁹ However, to the extent that our proposal will reduce the amount of campaign and other support provided to lawmakers from interest groups, they will prefer the status quo.

⁷⁰ See, e.g., S. Rep. No. 105-167 (1998) ("Thompson Committee Report") (studying the federal elections of 1996 and concluding that campaign finance laws, including disclosure provisions, are frequently evaded or ignored); Brian Fletcher, Case Comment, *Cheney v. United States District Court for the District of Columbia*, 28 Harv. Envtl. L. Rev. 605, 613 (2004) (arguing that one criticism of FACA is that "its requirements of balance and transparency are routinely ignored with impunity because the Act is largely unenforceable").

⁷¹ U.S. Const. Art. 1, §6. See also *Gravel v. United States*, 408 U.S. 606 (1972) (applying Speech or Debate Clause to Senate staffer who leaked Pentagon Papers to media).

⁷² See Ferejohn, *supra* note 2.

in unproductive rent seeking as officials leak valuable information to favored members of the press or lobbyists with connections and clout.⁷³

It is much too casual, however, to assume that leaks will inevitably undermine any regime of opacity. In both the executive branch and Congress, most secrets are kept, most of the time. Leaks make news because they occur against a less salient backdrop, that of a system in which national security intelligence, privileged and confidential documents and deliberations, and other information are routinely kept secret. The problem of leaks is real, but one must give specific and concrete reasons to think that opacity in one domain will be unsustainable, when opacity in other domains is in fact consistently sustained. Recall, as an important mechanism that reduces incentives to leak, that noncredible leaks bring no benefit to the leaker. Any legislator can come out of a closed session and report to interest groups that he advocated their pet projects, but the interest groups know that the legislator knows that the interest groups have no way to verify the claim; that common knowledge makes the claim noncredible.⁷⁴

These remarks are general; let us focus concretely on the problem of leaks in various contexts where we have recommended delayed disclosure. The main challenge for delayed disclosure, and the main variable that differs across these contexts, is the size of the group that would have access to the confidential information at the time transparency could adversely affect deliberations. The fewer people involved in decision making, the easier it is to detect and prevent leaks. We will begin with those in which leaks are hardest to prevent and move to those where prevention is less costly.⁷⁵

Congressional committees. Committees often have large memberships and substantial staffs, making it unclear whether delayed disclosure is a workable solution when applied to committee deliberations. Even if only the members of the committee and their staffs were privy to the details of deliberations, then several dozen, perhaps even more, people would have to maintain confidentiality in the face of temptations to disclose the information to interested parties. These parties can entice disclosure through implicit promises of campaign contributions and other help to lawmakers and through hints of future employment to staff. Because records of the deliberations would be maintained for future release, people involved in the negotiations might be able to credibly provide confidential information to interested parties.

These considerations are hardly decisive, however. For one thing, there are legal penalties for showing nonpublic records to outside parties, such as interest groups or journalists, so the would-be leaker faces a dilemma between issuing a credible leak at the

⁷³ See Stiglitz, *supra* note 35, at 11-12.

⁷⁴ For a different example of a proposal to reduce disclosure and eliminate the effects of leaks by rendering them non-credible, see Bruce Ackerman & Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (2002) (advocating secret donation booth in the campaign finance context to reduce the influence of special interests). Under their proposal, information could not be credibly provided about donations from interest groups because donors had the ability to withdraw their donation for a period of time after it was made, and even a canceled check is not credible evidence of a donation. See *id.* at 101-02.

⁷⁵ Because we do not advocate closing floor deliberations from the public at any time – even during deliberation on concurrent budget resolutions and macro-budgetary policies – we do not discuss the effect of leaks in this context. Certainly, combating leaks would be more difficult with respect to floor debate because of the number of people involved – not just lawmakers themselves, but their personal staffs and the staff of Congress.

risk of prosecution, and avoiding the risk of prosecution by limiting himself to cheap talk. For another, our suggestion is for complete opacity only at the stage of overall allocation by budget committees developing a budget resolution; at the stage of actual dickering, we merely propose that disclosure be delayed. At the former stage, the incentive to leak details to special interest groups is much reduced, because there are fewer details to leak and because it is less clear how particular interests will be affected by macro-level allocation. The very condition that makes opacity desirable – that actors work behind a partial veil of uncertainty – also reduces the benefits to be gained from leaks. At the latter stage, the incentive to leak is greater, but secrecy need only be temporarily enforced. Most generally, many congressional committees do manage to maintain secrecy or opacity for many issues. Absent some further account suggesting special reason to fear leaks in the budget setting, there is no obvious reason that a regime of committee-level opacity in budget matters would be systematically infeasible, although occasional leaks would surely occur.

Budget summits and advisory committees. Here leaks can rather easily be monitored and deterred; the small number of participants makes it difficult for the leaker to hide in the crowd. Historically, budget summit participants have usually managed to keep their deliberations confidential against the threat of internal leaks. Although some contemporaneous news stories surrounding budget summits include unnamed sources floating trial balloons or strategically leaking information that harms their opponents,⁷⁶ the political and fiscal conditions that lead to an interbranch summit are typically serious enough that participants understand secrecy is in their best interests. Details may become available some time after the summit as participants write memoirs⁷⁷ or participate in interviews for analysis in books, magazine articles, or scholarly research.⁷⁸ But leaks from these entities are unlikely to be prevalent because enforcement is much less challenging in the context of small groups.

Overall, the technique of delayed disclosure should be seriously considered as a way to achieve the goals of traditional disclosure while responding to the concern that interest groups and lobbyists are the true beneficiaries of open meetings. The strategy is least likely to work when the group that must keep the secret is so large that it is difficult

⁷⁶ See David Hoffman & John E. Yang, *Bush Repeats 'No Preconditions' for Deficit Talks*, Wash. Post, May 11, 1990, at A24 (reporting that White House Chief of Staff John Sununu “told reporters that Democrats could bring tax increases to the negotiating table but that Bush would not accept them.” According to the Post, “Sununu spoke on condition he not be identified by name, but yesterday others on the plane with him identified Sununu as the senior official who made the remarks.”); David S. Broder, *Optimistic Democrats Seek Issues*, Wash. Post, Sept. 16, 1990, at A8 (quoting comments made by Democratic Party Chairman Ronald H. Brown that “were based on leaked reports on administration proposals at the budget summit at Andrews Air Force Base”); Robert Pear, *G.O.P. Feud in House Stalls Budget Talks*, N.Y. Times, July 22, 1997, at A15 (quoting a Republican House member speaking on the condition of anonymity, who said that “[t]he Speaker’s negotiating position has been weakened. It will be more difficult to reach an accord. The Speaker will have a natural hesitancy to take risks with regard to the more conservative elements of our caucus.”); Gilmour, *supra* note 22, at 159 (quoting very vague statements made to the press by participants of the 1987 budget summit).

⁷⁷ See, e.g., Richard Darman, *Who’s In Control? Polar Politics and the Sensible Center* (1996).

⁷⁸ See, e.g., Bob Woodward, *The Agenda: Inside the Clinton White House* (1994) (providing details of budget negotiations in 1993); Wildavsky & Caiden, *supra* note 24, at 137-42 (providing details of dynamics of 1990 budget summit).

to detect who leaks the information, and when the leaks can be accompanied by credible proof of the information's accuracy. Small groups such as budget summits and federal advisory committees should pose little problem; congressional committees are a larger challenge, but probably not an insuperable one.

Conclusion

Our main emphasis, and the primary aim of the foregoing, has been to sketch an ideal or first-best framework for transparency in the federal budget process. The details of the framework are complex, but these are its outlines: less transparency should obtain at earlier stages of the budget process, when participants are deliberating over broad goals; more transparency should obtain at later stages, when actors are dickering over specific programs. In the latter domain, delayed disclosure should be used where feasible to maximize the benefits of transparency for voters while minimizing its benefits for interest groups. This framework faces a range of institutional and political constraints and motivational problems, but these problems are not clearly insurmountable.