
Jillian Raines '12
New York Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

Part of the First Amendment Commons, and the Internet Law Commons

Recommended Citation

This Note is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.
JILLIAN RAINES


57 N.Y.L. Sch. L. Rev. 313 (2012–2013)

ABOUT THE AUTHOR: Jillian Raines received her J.D. from New York Law School in May of 2012.
I. INTRODUCTION

In April of 2012, the U.S. General Services Administration (GSA) came under fire for spending more than $800,000 on a 2010 conference held in Las Vegas. A GSA report disclosing this excessive spending prompted GSA Acting Administrator Martha Johnson to resign and admit “taxpayer dollars were squandered.” The scandal caused lawmakers to prod the U.S. Department of Justice (DOJ) to inquire into and investigate more closely the spending practices of federal agencies. As a result, an October 2011 report, which concluded a five-year investigation conducted by GSA Inspector General Brian Miller and the DOJ, “found seven GSA employees had conspired to award government contracts in return for kickbacks.” In fact, sixty-four prosecutions from October 2010 to September 2011 involved individuals “who bilked the GSA by inflating costs, or just flat out stole from it.”

These disconcerting statistics came to light despite the existence of USASpending.gov—the U.S. government website purporting to allow the public to see how and on what the U.S. government spends money—suggesting that the site may not be fostering transparency as effectively as desired. Perhaps a reason that these recent and rampant abuses went undetected on USASpending.gov is the fact that, according to Hudson Hollister, former counsel for the U.S. House Committee on Oversight and Government Reform, only thirty-four percent of all the data on USASpending.gov is accurate. This troubling fact helps explain why, despite the U.S. government’s $80 billion annual budget for information technology, spending abuses like those discovered within the GSA can go undetected for some time. Mr. Hollister has stated that “[i]t should be possible for citizens, watchdog groups, media, and even the appropriators in Congress to use all of this spending data to judge whether government is working for them or not.” However, as Mr. Hollister and others have noted, neither the current government IT infrastructure nor related legislative mandates effectively


2. See Cohen & Bash, supra note 1 (reporting that, at the hearing of Jeff Neely, the GSA official responsible for planning the $800,000-plus GSA conference, Rep. Darrel E. Issa (R-CA), the Representative who introduced the Digital Accountability & Transparency Act, stated that “the controversy raised ‘serious questions in the minds of the American people about how government is using their tax dollars’”).

3. Coscarelli, supra note 1.


5. Id.


7. See id.

8. Id.
enable such transparency. These recent government spending abuses and failed IT solutions contribute to the murky backdrop that surrounds current government spending transparency at the federal level in the United States.

In an effort to combat waste, fraud, and abuse in government spending, in June 2011 Representative Darrell E. Issa (R-CA) sponsored a congressional bill purporting to revamp this landscape by revolutionizing how government spending data is reported and disseminated to the public. The Digital Accountability and Transparency Act of 2011 (DATA) aims to “transform how we track federal spending” by creating an independent commission to oversee reporting of spending data by federal agencies, recipients of federal awards, and the U.S. Department of the Treasury, and to ensure publication of federal spending data online for the public’s use. The version of DATA that passed in the House of Representatives on April 25, 2012 requires the creation of an online repository (dubbed the “federal accountability portal”) to host all federal government spending data (i.e., for all government grants and contracts) to be used by the government. DATA additionally mandates constructive changes to the legislation that spawned USASpending.gov, so that data collected can be accurately translated to the public. This transparency bill builds on the successes of previous federal spending

---

9. See id.

10. This note explores the House version of DATA and its recommendations for improvements proposed by the author. See The Digital Accountability and Transparency Act, H.R. 2146, 112th Cong. (as passed by House, Apr. 25, 2012), available at http://www.gpo.gov/fdsys/pkg/BILLS-112hr2146er/pdf/BILLS-112hr2146er.pdf. Accordingly, all citations to DATA reference the text of the House bill unless otherwise indicated. This note does not directly address the substantive provisions of the Senate companion bill introduced on September 21, 2012, except in that these recommendations can generally be applied to the overall legislation as it proceeds. However, in various places throughout this note, particular provisions of the Senate bill are referenced—generally where the Senate version anticipates things lacking in the House version or where the Senate version removes an important element included in the House bill. The position advocated for in this note is that the ultimate form of DATA, when enacted, should more closely resemble the House bill in scope and substance.


12. See id.

13. The House version of DATA has been revised since its introduction in the House of Representatives in June 2011. Also, the recently introduced Senate version of the bill differs in scope from the bill that passed through the House, as it scales back many provisions of DATA in an effort to minimize the implementation burden on federal fund recipients. See Hudson Hollister, Digging into the Senate’s New DATA Act: Same Name, Different Content, Same Goals, DATA TRANSPARENCY COALITION (Sept. 24, 2012), http://datacoalition.blogspot.com/2012/09/digging-into-senates-new-data-act-same.html; see also Ryan Holeywell, States Fear DATA Act’s Costs, Gov’t Tech. (May 4, 2012), http://www.govtech.com/budget-finance/States-Fear-DATA-Acts-Costs.html.


15. Id. § 3613(b).

16. See id. § 3612 (“The Commission shall publish online all information submitted by recipients and agencies.”).
transparency legislation\textsuperscript{17} aiming to improve how the government collects and disseminates spending data\textsuperscript{18} and to help “identify waste, fraud, and abuse.”\textsuperscript{19}

More broadly, the bill represents an effort to enable better decisionmaking through integrating open\textsuperscript{20} information technology policies into the federal government.\textsuperscript{21} Such transparency legislation has the potential to provide federal agencies and the American public with access to accurate and complete data regarding how the government spends money, on what, for whom, and for what purpose,\textsuperscript{22} thus providing a toolkit for Americans to hold their federal agencies accountable.

Spending transparency legislation like DATA is needed for a number of reasons. Increasing the amount of reliable and accessible data on government spending has tremendous potential to make positive and sustainable impacts inside and outside of government. Within government, greater access to increasingly accurate and timely information would allow federal agencies to more easily spot meaningful trends in spending, as well as identify inefficient expenditures, cost overruns, discrepancies in reported data, and areas of need.\textsuperscript{23} American citizens have a right to scrutinize how their government spends their tax dollars, especially given today’s increasingly precarious economic climate.\textsuperscript{24} Legislation like DATA could give them the information

\textsuperscript{18} This bill really purports to serve as an open data initiative. The ways in which it builds on previous legislation and can use technology to increase the accuracy, completeness, and understanding of spending-related data will be discussed throughout this note.
\textsuperscript{19} Schuman, supra note 11.
\textsuperscript{20} “Open” here refers to those technologies and IT policies that enable information to be easily and freely accessed, used and reused, and redistributed. See Open Knowledge Found., Defining the Open in Open Data, Open Content and Open Services, Open Definition, http://opendefinition.org/okd/ (last visited Aug. 29, 2012).
\textsuperscript{21} The Sunlight Foundation reports that the legislation aims to “establish an independent body to track all federal spending on a single website and require the use of consistent government-wide data standards.” Schuman, supra note 11.
\textsuperscript{22} Under the proposed language of DATA, recipients who are individuals and who receive an award that does not exceed $100,000 in the current calendar or fiscal year, and who have not received a single transaction exceeding $24,999 during the current calendar or fiscal year, are exempt from reporting. See The Digital Accountability and Transparency Act, H.R. 2146 § 3604(a), 112th Cong. (as passed by House, Apr. 25, 2012), available at http://www.gpo.gov/fdsys/pkg/BILLS-112hr2146fs/pdf/BILLS-112hr2146fs.pdf.
\textsuperscript{23} See, e.g., Transparency through Technology: Evaluating Federal Open Government Efforts: Hearing on H.R. 2146 Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Governmental Reform (2011) (statement of Ellen Miller, Co-Founder and Executive Director, the Sunlight Foundation) [hereinafter Transparency through Technology] (“The USDA website lists the cost of their school breakfast and lunch programs at $12.7 billion, but only $250,000 of these costs are reported on USA Spending.gov. The Maritime Administration has never reported the spending associated with any of its loan or insurance programs, and reports only a fraction of its grant activity.”) (footnotes omitted).
\textsuperscript{24} The recent “debt crisis” is one example of how the country’s precarious economy has become politically charged. See, e.g., Elspeth Reeve, What Is the Debt Ceiling Crisis All About, The Atlantic Wire (Jan. 6, 2011),
they need to do so. The reporting and disclosure required byDATA would allow government watch-dog organizations to accurately monitor government operations and compare agency spending data to other government data; it would provide journalists access to accurate data to inform reports on government spending affairs; and it would allow technologists access to spending data in its raw form to be used for innovation. Enabling a more informed citizenry helps inform voting decisions and inspire citizens to engage with government—signs of a well-functioning democracy.

An increase in the availability of technology that can be used to improve government transparency also suggests that the mandate inDATA calling for government to open up spending data to its people is as achievable as it is vital. By applying evolving technology to a complex problem like government spending transparency, DATA, which calls for technological modernization of government, carries with it the possibility of laying a framework for a continually evolving embrace of open data practices within the U.S. government. Releasing more meaningful, reliable, and timely data to the public vests in citizens the power to engage with government in a way previously unattainable. No longer will citizens be forced to wait for delayed or redacted internal reports detailing instances of wasteful spending in government agencies. Rather, they can monitor spending themselves; they can use the data to inform friends and communities; they can innovate with the data by creating websites or mobile apps that help people easily detect anything from how much the U.S. Department of Defense spends on projects in their town to whether the bulk of the recipients of U.S. Department of Education awards are educational facilities. And DATA’s open data principles can empower government, too, by helping to create a sustainable infrastructure for capturing and sharing this spending information at limited cost. DATA truly envisions a cohabitated democracy, where government agencies and citizens work in tandem to advance collaborative democratic principles. As presently drafted, however, DATA does not go far enough in paving the way for a more transparent and open government.

This note contends that in order to efficiently and effectively collect and disseminate accurate spending data, modern spending transparency legislation likeDATA must successfully incorporate specific principles of open data to better enable the creation

25. A significant example of the public deriving value from open data is the government-coordinated open data project known as the Human Genome Project (HGP). Sponsored by the U.S. Department of Energy and the National Institutes of Health, HGP stands as one of the first open innovation projects where the public benefits from open data proved apparent. See ORG. FOR ECON. COOPERATION & DEV., FOREWORD TO OECD PRINCIPLES AND GUIDELINES FOR ACCESS TO RESEARCH DATA FROM PUBLIC FUNDING 3, 3 (2007) (“The international Human Genome Project is but one good example of a large-scale endeavor in which openly accessible information is being used successfully by many different users, all over the world, for a great variety of purposes.”); see also HUMAN GENOME PROJECT INFORMATION, OAK RIDGE NAT’L. LABORATORY, http://www.ornl.gov/sci/techresources/Human_Genome/home.shtml (last visited Oct. 16, 2012) (official webpage of HGP).
and maintenance of an impactful reporting and dissemination system, which is accessible to government personnel, entities receiving federal awards, and average citizens. The version of DATA passed by the House fails to accomplish this in three ways. First, while DATA addresses the need for easy comparison among data collected from across government and from various recipients, its call for the adoption of common data elements and standards in reporting spending data can be strengthened to make certain that the data collected and published can be efficiently cross-referenced and checked for accuracy. Second, DATA’s language does not provide for continued research into the operability of the technical collection and dissemination infrastructure that the bill mandates, which limits the legislation’s chances of ensuring accurate data gets continually reported and shared. In other words, it lacks a check on making certain that evolving open data principles are applied to government. And, finally, DATA fails to capitalize on the potential of individuals who have technical open data and web expertise. By analyzing DATA and arguing for the inclusion of these additional provisions, this note can serve as a guide to Congress as it decides the ultimate form DATA will take when it is enacted into law.26 This note can also assist legislators and innovators everywhere who want to support open data transparency efforts at various levels of government, both domestically and abroad.

Part II of this note will discuss the roots of open government principles and their history in the United States as well as modern developments in transparency initiatives and the open data movement.27 This section will set the stage for understanding how DATA has the potential to embrace core open principles necessary to foster true transparency in the realm of government spending. Part III will provide the legislative history behind important government spending transparency initiatives in order to explain the framework that led to the introduction of the DATA bill. And finally, Part IV will analyze DATA, and discuss the House draft’s strengths and weaknesses in ensuring its language will produce a truly open collection and dissemination system for government spending data. It will argue that for any government spending transparency legislation to fulfill the goal of openness and to enable the prevention and detection of waste, fraud, and abuse, the proposed law must harness open data principles by including three elements: common data elements28 and standards;29 a mandate for continued analysis of efficacy and efficiency; and specific inclusion of technical, open data experts in an advisory role.

26. For a more thorough look into the differences between the House version discussed in this note and the more modest Senate version, see Hollister, supra note 13.

27. See infra Part II.

28. *PC Magazine* defines “data element” as “[t]he fundamental data structure in a data processing system. Any unit of data defined for processing is a data element; for example, ACCOUNT NUMBER, NAME, ADDRESS and CITY.” *Definition of: Data Element*, PC Mag. Encyclopedia, http://www.pcmag.com/encyclopedia_term/0,2542,t=data+element&ci=40771,00.asp#fbid=gH_8vKgy-au (last visited Sept. 28, 2012).

to assist those tasked with carrying out the legislation’s requirements. Part IV will identify how the House version of DATA specifically falls short in these three areas. It will also propose ways to strengthen these elements within DATA to maximize its effectiveness and help guarantee that DATA can serve as a model for future transparency legislation consistent with open data and open government principles.\(^{30}\)

Part V will conclude.

II. THE HISTORY OF OPEN GOVERNMENT AND MODERN DEVELOPMENTS IN OPEN DATA

A. The Roots of Open Government

While the “open government” movement (or at least the term “open government”) was not popularized within the United States before President Obama signed his Executive Memorandum on Transparency and Open Government on January 29, 2009,\(^{31}\) principles of participation in government and freedom of discourse find their roots in the U.S. Constitution’s First Amendment guarantees of free speech and free press.\(^{32}\) The constitutional right to question, discuss, petition, and protest government is a bedrock value for public participation in the decisionmaking and policy-building of American government. Such participation can consist of anything from drawing attention to abuses and petitioning lawmakers to initiate changes in the law, to providing expertise that may be lacking within the four corners of government,\(^{33}\) to generating sound ideas for promoting civic activity through collaboration.\(^{34}\)

\(^{30}\) The recommendations advanced in this note elaborate on the redrafting undertaken by a team of experts and New York Law School students that set out to maximize the bill’s effectiveness. This team of individuals is made up of former Deputy Chief Technology Officer for the Executive Office of Science & Technology Policy, Professor of Law at New York Law School, and Visiting Professor at the New York University Robert F. Wagner Graduate School of Public Service Beth Noveck; Rensselaer Polytechnic Institute of New York Professor James Hendler; former New York Law School Law Review Notes and Comments Editor Jeffrey Lawhorn ‘12; and the author.


\(^{34}\) For example, at the Club de Madrid conference held November 8–9, 2011, then-U.S. Department of Health and Human Services (HHS) Chief Technology Officer (CTO) Todd Parks presented on the open government initiative within HHS. Mr. Parks discussed an HHS-sponsored project “Health Datapalooza,” which was an open call for the best products and services people had created using HHS-released health data. The project allowed eighteen months for submissions that offered a sustainable
DATA: USING OPEN DATA PRINCIPLES TO REVAMP SPENDING TRANSPARENCY LEGISLATION

Participation is a two-way street to greater democracy: the more the government advises and informs its people, the better the lives of the citizenry.35 Yet, history has demonstrated that meaningful citizen participation in government requires equal access to the information that government officials collect and use to inform policy decisions. U.S. Supreme Court Justice Louis Brandeis wrote in a Harper’s Weekly article in 1913 that “[s]unlight is said to be the best of disinfectants”36—a phrase often quoted as an expression of support for transparency and openness of government.37 Transparency and openness are two concepts of open government that the federal government has supported over the years, particularly to help inform the electorate in ways that enable individuals to hold the government accountable.

B. The Freedom of Information Act and Its Aftermath

In 1966, Congress passed the Freedom of Information Act (FOIA or the “Act”),38 which the First Amendment Center has said “is arguably the most important tool Americans have to oversee the workings of their government.”39 FOIA established that all government agency records should be open to the public. The Act requires that each agency publish in the Federal Register important information regarding the agency’s functions and policies;40 FOIA also requires that agencies allow public access to certain records of agency actions and events.41 Lastly, FOIA provides the public with the ability to request these agency records, so long as requests are reasonably described.42 As then-President Lyndon B. Johnson said when he signed FOIA into law,

---

35. See The White House, supra note 33, at 5 (“Information provided by government can help inform the electorate. Information from federal agencies can help the public make more informed choices about daily decisions, from the choice of consumer products to decisions affecting their health, housing, and transportation concerns.”).
40. See 5 U.S.C. § 552(a)(1); see also Vladeck, supra note 39.
41. See 5 U.S.C. § 552(a)(2); see also Vladeck, supra note 39. FOIA requires the public have access to actions including: “final opinions in agency adjudications, statements of policy not published in the Federal Register, administrative and staff manuals that affect the public; and, most importantly, records processed and disclosed under FOIA that are likely to become the subject of subsequent requests for the same records.” Id.
42. 5 U.S.C. § 552(a)(2); see also § 552(a)(3).
[t]his legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.43

FOIA’s enactment laid the foundation for the principle of freedom of information44 and initiated the beginnings of open government principles through efforts to provide citizens with access to government operations. While society has grasped tightly to this core notion of a right to government information, following FOIA’s enactment, the jurisprudence that followed largely served to narrow rather than expand FOIA’s reach through clarifying and expanding the nine exemptions to the right of public access to government information laid out under FOIA.45

C. Open Government and Open Data in the Internet Age

The notions of greater participation and increased access to government information that began with FOIA have never been as mature and attainable as they are presently in today’s Internet-driven, networked society. Scholars writing about government openness have noted “[t]he Internet’s transformative political potential has been clear to astute nontechnical observers since at least the mid-1990s.”46 And, in fact, all branches of government have taken measures in the online arena as part of their


44. See, e.g., Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) (stating that “[d]emocracies die behind closed doors” and stressing the right of the public to access government information provided under FOIA).

45. See Vladeck, supra note 39, for a discussion of the jurisprudence that followed FOIA’s enactment and clarified the nine exemptions found in § 55(b) of FOIA. These exemptions are:

1. Classified information.
2. Internal agency personnel rules and practices.
3. Information specifically exempted from disclosure by statute.
4. Private commercial or trade secret information.
5. Interagency or intra-agency privileged communications.
6. Personnel, medical or similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
7. Information compiled for law enforcement purposes.
8. Information related to reports for or by an agency involved in regulating financial institutions.

Id.; see also Amy E. Rees, Recent Developments Regarding the Freedom of Information Act: A “Prologue to a Farce or a Tragedy; Or, Perhaps, Both,” 44 DUKE L.J. 1183 (1995) (illustrating further discussion of the jurisprudence and the shaping of FOIA).

attempts to achieve government data transparency and promote democracy, albeit to different degrees and at varying speeds.

In what could be considered the first wave of data openness in the United States, Congress and the federal agencies provided the public with a look inside their operations by sharing their data and the products of their work more directly with citizens. Congress launched Thomas.gov in January 1995 to make every bill introduced in Congress available to the public.47 In accordance with the E-Government Act of 2002, all federal agencies now have their own websites,48 where information about agency proceedings and requests for public comment or participation can be found.59 The federal judiciary established the Public Access to Court Electronic Records system (PACER)50 in 1988 and opened it to the public (through a subscription-based model) in 2001 to provide access to federal case materials.51 And in the realm of open spending data specifically, Congress has passed transparency legislation such as the Federal Funding Accountability and Transparency Act (FFATA) and the American Recovery and Reinvestment Act of 2009 (the “Recovery Act”)52 to open up spending data in an effort to better monitor for waste, fraud, and abuse in government. Following the passage of FFATA and the Recovery Act came USASpending.gov and Recovery.gov,53 websites where the public can access and search government spending information that federal agencies have collected.

A second wave of data openness has more recently swept through the government, demonstrating great potential for how the public sector can use digital technologies and the Internet in a more mutually participatory way.54 On May 21, 2009, the federal government launched DATA.gov, a repository of data generated by the federal government.55 As Vivek Kundra, who served as the first U.S. Chief Information

---

47. Id.
49. Examples include: (1) the Federal Communications Commission website (located at http://www.fcc.gov/); (2) the Securities and Exchange Commission website (located at http://www.sec.gov/), where the public can search things like company filings; and (3) the U.S. Department of Education’s website (located at http://www.ed.gov/).
52. See infra Part III.B–C.
54. See supra Part II.A–C for a discussion on government use of digital technologies and the Internet to promote transparency in relation to government spending.
55. Transparency and Federal Management IT Systems: Hearing on H.R. 2146 Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and
Officer (CIO), noted in testimony before the Committee on Oversight and Government Reform in July 2011, DATA.gov started with only forty-seven datasets and now has more than 390,000 available.\footnote{56} DATA.gov’s growth has largely been due to participation from the public—as Mr. Kundra put it, “scores of citizen-created applications that turn raw data into services to help the American people.”\footnote{57}

In addition to increased public participation with government and its data through government websites, great strides in the mission of creating government data that is “open” have been made in the United States, largely because of private sector contributions to the cause. For example, the Center for Information Technology Policy at Princeton University launched RECAP, “an extension (or ‘add on’) for the Firefox web browser that improves the PACER experience while helping PACER users build a completely free and open repository of public court records.”\footnote{58} Through such private sector initiatives, much headway has been made in publishing government data online, in educating the public on how to use the data, and in creating, from the data, beneficial products and services for public use.

Additionally, the United Kingdom has garnered substantial recognition in the open government and open data discussions, often serving as an example to U.S. initiatives.\footnote{59} The United Kingdom’s data.gov.uk, for example, has “5,400 datasets available, from all central government departments and a number of other public sector bodies and local authorities” on “one searchable website.”\footnote{60} Not only does this website offer data for the public to look at and scrutinize, it also offers this data in its raw form with an invitation to developers to freely use the data to make mobile


\footnote{57. \textit{Id.}}

\footnote{58. \textit{About: RECAP Firefox Extension, Recap}, https://www.recapthelaw.org/about/ (last visited Sept. 28, 2012). An “add-on” is a “software extension that adds extra features to a program. It may extend certain functions within the program, add new items to the program's interface, or give the program additional capabilities.” \textit{Add-on}, \textit{TechTerms.com}, http://www.techterms.com/definition/addon (last updated Dec. 22, 2008). Further examples of contributions to government transparency from outside government include Govtrack.us, which was created by a linguistics graduate student “by painstakingly reprocessing tens of thousands of Web pages” to combine “bill text, floor speeches and votes for houses of Congress” on one site. Robinson et al., supra note 46, at 166. Additionally, activist Carl Malamud “took the SEC’s data online and is now attempting to open up judicial records, which are currently housed behind subscription sites.” \textit{Id.}}


\footnote{60. \textit{About Us}, \textit{Data.gov.uk}, http://data.gov.uk/about-us (last visited Sept. 28, 2012).}
applications and platforms that will service British citizens. Data.gov.uk is in line with U.K. Prime Minister David Cameron’s May 2010 vow to “set [a] new standard for transparency” in the United Kingdom by increasing the amount and types of government spending data available online for British citizens. He also pledged that the collected and published spending data would be “in an open standardised format [sic]” and licensed for free use by anyone. Based on the Prime Minister’s webpage as well as data.gov.uk and spending accountability projects such as the U.K. Open Spending project, making data open, particularly government spending data, is a main priority within the United Kingdom that can serve (and has served) as a guide for efforts within the United States.

D. Modern Open Data Principles

Today’s efforts in the United States, the United Kingdom, and globally to make governments more open and democratic have been largely influenced by efforts of the open data movement, which promotes the release of various different data in machine-readable, downloadable, usable, and distributable formats. This modern

———

61. For example, data.gov.uk currently features the “UK Pharmacy” application, a mobile app that uses the GPS within a smart phone and data collected from the Health and Social Care Information Centre on the locations of pharmacies around the United Kingdom to help users locate their nearest pharmacy. See UK Pharmacy, Data.Gov.uk, http://data.gov.uk/apps/uk-pharmacy (last visited Sept. 28, 2012).


63. See id.

64. Id.


69. See Alissa Black, Open Data Movement, New Am. Found. (July 2, 2012), http://oti.newamerica.net/publications/articles/2012/open_data_movement_69253 (“Open data policies typically define open data as structured standardized data in machine readable formats published for the public. This means that government data can be downloaded in such formats as CSV, KML, XML, and even XLS.”).
open data movement\textsuperscript{69} has been spearheaded by organizations like the Open Knowledge Foundation (OKFN), a non-profit entity made up of academics, public servants, entrepreneurs, data experts, archivists, and web developers who share a common goal: “open knowledge.”\textsuperscript{70} OKFN promotes open access to a variety of types of information, from science and research data to economic and bibliographical data.\textsuperscript{71} The open data movement has also gained steam as a result of the prominence of “Big Data” (which refers to the increase in volume, velocity, and variety of data that exists today)\textsuperscript{72} and advances in technology that enable real-time processing, analyzing, sharing, and visualizing of information.\textsuperscript{73}

The current “open initiatives” coming out of the open data movement focus on the basic principles of making information downloadable, useable, meaningful, and accessible to all, absent exorbitant costs and legal or subscription barriers.\textsuperscript{74} These defining principles of the open data community can be achieved in a number of ways.\textsuperscript{75} For example, making sure data is standardized is necessary for data to make sense to all relevant, interested parties once released, be it a web expert, a grandmother, or a government employee.\textsuperscript{76} Standardizing data also helps pinpoint discrepancies and remedy the presence of duplicative and opaque information, thus making it more meaningful.\textsuperscript{77} Additionally, collaboration with individuals who understand the technical


\textsuperscript{70}. About, Open Knowledge Found., http://okfn.org/about/ (last visited Sept. 28, 2012).


\textsuperscript{72}. See Edd Dumbill, Volume, Velocity, Variety: What You Need to Know About Big Data, Forbes (Jan. 19, 2012, 9:46 AM), http://www.forbes.com/sites/oreillymedia/2012/01/19/volume-velocity-variety-what-you-need-to-know-about-big-data/ (describing the meaning of Big Data as an increase in the amount of data present today, the type—structured or unstructured data—and the real-time nature of producing, processing, analyzing and sharing of this new information).


\textsuperscript{76}. See, e.g., Open Data Found., http://www.opendatafoundation.org/ (last visited Sept. 23, 2012) (“The Open Data Foundation provides a place where the members of different communities can come together and work on the alignment of technology standards and software tools which will facilitate visibility and re-use of data at all levels of the statistical information chain.”).

\textsuperscript{77}. Rather than making the public do additional homework to understand government operations, we should focus on preventing the creation of a website where out-of-date and unreliable information cannot be compared because the information exists in different formats or refers to the same entity or type of government expenditure in numerous agency-specific ways. See, e.g., Nathan Yau, Data.gov in Crisis: The Open Data Movement is Bigger than Just One Site, The Guardian Data Blog (Apr. 5, 2011, 8:54 AM),

325
and web-design component of collecting and releasing data freely to the public in non-proprietary ways is key. It ensures that an organization (or a government) does not inefficiently create a platform that, for example, inadvertently restricts access or only captures certain, less valuable pieces of data. Lastly, guaranteeing the complete, timely, and accurate release of data to the public (i.e., making certain the system for opening data has some sort of accountability mechanism) means testing and evolving the ways of capturing, describing, and disseminating that information. Thus, researching the openness of transparency and open data initiatives fundamentally underlies many of open data’s core principles.

These open data principles are inextricably linked to the goals of open government and provide means for achieving a truly collaborative democracy. As advances in technology make it possible to share data in more meaningful ways that allow for that information to be downloaded and used, more citizens are able to see through bureaucratic blockades and participate in government. Sharing information in a way that gives developers, journalists, regular citizens, and other government agencies more and better information about how government works strengthens our ability to ensure that the government is working for its people.

Applying these themes from the open data movement to an open government transparency initiative like DATA may seem obvious given today’s information-driven, online society; however, a closer look at government spending data reveals that historical efforts to advance transparency in this area have suffered from shortcomings that modern legislative efforts are striving to reconcile.

III. PREDECESSOR U.S. SPENDING TRANSPARENCY EFFORTS

The following discussion will examine the advances and shortcomings of three U.S. transparency initiatives that created website platforms to increase the openness of government spending data: the E-Grants Initiative (Grants.gov), FFATA (USASpending.gov), and the Recovery Act (Recovery.gov). These initiatives help lay the framework for understanding the ways DATA can be improved.

http://www.guardian.co.uk/news/datablog/2011/apr/05/data-gov-crisis-obama (observing that Data.gov is slow, hard to use, and infrequently updated and arguing that applying open data principles to open government initiatives makes it possible for citizens to meaningfully participate in government).

78. For an example of how the government has restricted such access in the past, see David S. Levine, The People’s Trade Secrets, 18 Mich. Telecom. & Tech. L. Rev. 61 (2011), available at http://www.mttlr.org/voleighteen/levine.pdf (discussing government use of trade secret law to restrict public access to information).

79. See Jim Hendler & Beth Noveck, Improving Government Data Collection, Cairns Blog (July 5, 2011), http://cairns.typepad.com/blog/2011/07/improving-government-data-collection.html (“We don’t understand the problem of inconsistent spending reporting well enough to design—whether by the legislative or executive branch—the system. Instead, we ought to be allowing small-scale pilots . . . seeing what works, and trying again.”).

80. See infra Part IV.
A. The E-Grants Initiative

Grants.gov was “established as a governmental resource named the E-Grants Initiative, part of . . . President[George W. Bush’s] 2002 Fiscal Year Management Agenda to improve government services to the public.”81 The website offers “information on over 1,000 grant programs and access to approximately $500 billion in annual awards.”82 Effectively, Grants.gov provides the public with a centralized bank of information on grant and contract opportunities from all federal agencies. The Grants.gov webpage explains that the project “has its origins in the Federal Financial Assistance Management Improvement Act of 1999,”83 which required all federal agencies to develop and implement a plan to

(1) improve the effectiveness and performance of Federal financial assistance programs; (2) simplify Federal financial assistance application and reporting requirements; (3) improve the delivery of services to the public; and (4) facilitate greater coordination among those responsible for delivering such services.84

The Office of Management and Budget (OMB) created and manages Grants.gov, with support from U.S. Department of Health and Human Services (HHS).85 This initiative is illustrative of some core spending transparency principles. For example, it provides wide dissemination of grant-related opportunities to the public by putting the information online. Additionally, it provides open access to the repository of grant opportunities. However, it also has important flaws. In a July 2011 report, the General Accountability Office (GAO) highlighted some of the problems with Grants.gov. The report focused heavily on the limited and poor quality of system performance measurements,86 which led to system unavailability, diminished usability, and loss of data integrity within the Grants.gov system.87 Additionally, OMB relies on customer surveys to gauge performance, yet the survey is offered only to grantees, and not to those who sign on to Grants.gov to submit a

82. Id.
86. Id. at 19 (“Grants.gov lacks performance measures to track important aspects of its performance. OMB described Grants.gov as a ‘cannot fail’ system . . . . Grants.gov’s only performance measures that address system performance are tied to customer satisfaction.”).
87. Id. at 18 (“Identifying problems has been challenging for the PMO until very recently because system performance has been monitored anecdotally; that is, through manual checks and customer complaints.”).
grant application. Even so, the report notes that in "May 2009, the customer satisfaction score for the 3,690 respondents surveyed was 53 out of 100." The GAO’s report recommends four ways of improving Grants.gov: “system performance measures, guidance clarifying the governance structure, a structured means for applicant input, and uniform policies for processing grant applications.” This indicates that the Grants.gov website, while successful in organizing grant opportunities for possible recipients, lacks an effective accountability mechanism.

B. The Federal Funding Accountability and Transparency Act of 2006

In 2006, Congress enacted FFATA into law. The act’s goal was to promote transparency in government spending by requiring recipients of federal awards to disclose the pertinent information surrounding those awards to the OMB. Out of FFATA came USAspending.gov, the website where the public was (and still is) able to search, aggregate, and evaluate the information provided by the recipients of federal monies and contracts. The system is intended to allow the public to vet the grants for waste and inefficient spending by the federal government. However, the website lacks in usability and the reliability of its data.

Reporting under FFATA is dictated by the OMB and recipient information is primarily collected from the FFATA Sub-award Reporting System (FSRS). The information required to be reported under FFATA, both for recipients of federal awards and of sub-awards, includes the name of the individual or entity receiving the award; the amount of the award; the agency providing the funds; the appropriate code to determine whether the award exists as a contract or a grant; the program source of the award; the title of the award and a descriptive purpose for the disbursement of funds; the location of the recipient; the place of performance; a unique identifier for the recipient and any parent entity; and the total compensation and the names of the top five executives of the recipient entity if “more than 80% of annual gross revenues [are] from the Federal government, and those revenues are

88. Id. at 19.
89. Id.
90. Id.
91. According to FFATA.org, the stated intent of the act is “to empower every American with the ability to hold the government accountable for each spending decision. The end result is to reduce wasteful spending in the government.” Details About FFATA Act, FFATA Info. Center, http://www.ffata.org/ffata/ffataact.html (last visited Sept. 28, 2012).
93. Alex Howard additionally notes that “the flagship database of federal government spending at USAspending.gov simply isn’t anywhere near as accurate as it needs to be to source stories [for journalistic purposes].” Alex Howard, Uncertain Prospects for the DATA Act in the Senate, O’Reilly Radar (July 25, 2012), http://radar.oreilly.com/2012/07/will-the-data-act-founder-in-the-senate.html.
95. “Sub-awards” refers to those federal awards issued to sub-recipients.
greater than $25M annually[,] and [if] compensation information is not already available through reporting to the SEC."96 Despite this established reporting process, its result—USASpending.gov—presents nearly $1.3 trillion worth of inaccurate or redundant federal spending data on a site that already has navigational challenges.97

Vivek Kundra noted in his testimony before the House Committee on Oversight and Government Reform in July 2011 that, “as of May 2011, USASpending.gov displays—for awards made beginning in 2000—over $25.4 trillion in prime awards, based on over 47,000 individual prime awards, and more than $3.9 trillion in sub-awards.”98 For example, the below figure (fig. 1), a screenshot of USASpending.gov’s website, shows the data available for federal awards issued to recipient Boeing. The graph indicates that $203.9 million have been awarded by a number of federal agencies in 655 contracts, 244 grants, and 9 “other” expenditures.

![Figure 1](image-url)

**FIGURE 1.** This screenshot taken from USASpending.gov’s website details the total value of contracts, grants, and “other” prime awards issued to recipient Boeing. This amount totals $203.9 million coming from 665 contracts, 224 grants and 9 other awards.

The next screenshot (fig. 2) taken from USASpending.gov provides a preview of what appears when you search by the recipient, Boeing. The search provides a breakdown of each of Boeing’s awards, organized by transaction.

---

96. *FAQ, supra note 94* (answering “What is Required to be Reported as Part of the Transparency Act?”); *see also Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 1186, § 2(b).*


99. *USASpending.gov, supra note 92.*
When one clicks into the “Definitive Contract information for Transaction Number 1,” USASpending.gov provides users with further information, including, for example, the agency funding the contract and the specific code for the office that handled the contract.

![USASpending.gov screenshot](image)

**FIGURE 2.** This screenshot shows an example of the breakdown of each “transaction” with Boeing on USASpending.gov. The shot details the first Boeing transaction, a “Definitive Contract” and includes its amount, the date, program source, issuing agency, and a numerical and lettered code for the contract description.

**FIGURE 3.** This USASpending.gov screenshot provides further information regarding the “Definitive Contract” in Transaction 1, including the Major Funding Agency, the Contracting Agency and the specific codes for these agency offices.

100. *Id.*

101. *Id.*
As indicated by these graphs, USASpending.gov’s interface presents information that, to an average user, is most likely difficult to understand. This includes undefined acronyms, entity codes that carry no meaning to the lay person, and numerous blank fields. Additionally, information that might be important to the user is absent from the site. For example, many questions go unanswered, such as: What is the “Research and Development Test” Program (the “Program Source” listed for the first contract with Boeing) about? What does Boeing do? For how long has the government awarded Boeing contracts? Does the government contract with other entities owned by Boeing or that own Boeing? These open questions compound what many experts have already noted are problems that currently plague USASpending.gov.

For example, in March of 2011, Ellen Miller, the Co-Founder and Executive Director of the Sunlight Foundation, spoke before the House Committee on Oversight and Government Reform in the U.S. House of Representatives about FFATA and USASpending.gov. Ms. Miller noted that “because citizens are learning how to engage with the government online, our collective goal should be a truly open and accountable system for tracking every dollar the government spends.” She went on to highlight, however, that this goal has not yet been achieved.

Referring back to the example of federal awards allocated to Boeing, and demonstrating Ms. Miller’s concerns, the below screenshot shows the website’s breakdown when you review the data included for the first contract transaction. The information disclosed includes fields such as “date signed,” “ultimate completion date,” the “type of Contract Pricing,” and most importantly “contract description,” which for this particular transaction is filled with an ID code consisting of a string of letters that do not disclose any meaningful information about the contract. Other fields are left blank.

102. The Sunlight Foundation “is a non-profit, nonpartisan organization that uses the power of the Internet to catalyze greater government openness and transparency, and provides new tools and resources for media and citizens, alike.” About Us, Sunlight Found., http://sunlightfoundation.com/about/ (last visited Sept. 28, 2012).

This display (fig. 4) means little to most viewers, especially the unfilled fields and the incoherent contract description. It also helps demonstrate what Ms. Miller referred to in her testimony as “poorly published data” and “proprietary identifiers that hinder effective tracking of corporate entities.”

Additional critiques of the federal budget and federal spending transparency initiatives have come from Mr. Kundra, who noted in his congressional testimony that much work is still needed to better leverage technical transparency initiatives within government, and specifically on websites like USASpending.gov. Mr. Kundra’s testimony focused on the “more than 12,000 systems, composed of hundreds of thousands of subsystems and countless databases” within the federal government that make up a technical hurdle to true spending transparency. Additionally, Mr. Kundra stressed that funding IT projects in government “agency-by-agency, bureau-by-bureau, creates additional obstacles, leads to duplication, and hinders our ability to share services government-wide.” These issues exist despite the presence of USASpending.gov.

104. USASpending.gov, supra note 92.

105. Ms. Miller discussed the Sunlight Foundation’s previous findings that “almost $1.3 trillion in spending . . . failed to meet one of the following three metrics: timeliness, completeness, and consistency.” She highlighted the fact that, while improvements have been made, “discrepancies in the grants data from USASpending.gov remain.” Transparency through Technology, supra note 23, at 3.


107. Id.
Daniel Schuman of the Sunlight Foundation has also written about the ineptitudes of government spending transparency initiatives and specifically about FFATA, drawing attention to the Sunlight Foundation’s Clearspending project, which has identified the “nearly $1.3 trillion in spending discrepancies” in the federal spending data reported on USASpending.gov. A press release issued by the House Oversight and Government Reform Committee notes:

in fiscal year 2009, USASpending.gov was accurate for only 35% of federal programs, according to the Sunlight Foundation. USASpending.gov does not cover internal expenses, so there is no way to use its data to evaluate federal programs’ return on taxpayers’ investment. And the information on USASpending.gov is in a different format from other federal databases—making comparisons difficult.

This specifies that both policy problems (deciding what disclosures to mandate) and technical problems (disparities in the various formats of federal databases) are preventing USASpending.gov from being a truly accurate and transparent tool for government and the public.


DATA can also be seen as stemming in part from or expanding upon the Recovery Act, which President Obama signed into law to inject $787 billion dollars into the U.S. economy during the recession that followed the 2008 financial crisis. The Recovery Act created the Recovery Accountability and Transparency Board (RATB) to oversee the spending of recovery-related funds. Originally headed by Chairman Earl E. Devaney, and made up of twelve inspectors general from federal

108. Schuman, supra note 11.


111. The Statement of Purposes of The American Recovery and Reinvestment Act reads as follows:

The purposes of this Act include the following:

(1) To preserve and create jobs and promote economic recovery;

(2) To assist those most impacted by the recession;

(3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health;

(4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits;

(5) To stabilize state and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

Id.; see also The Recovery Act, Recovery.gov, http://www.recovery.gov/About/Pages/The_Act.aspx (last visited Sept. 28, 2012). The initial $787 billion expenditure amount was corrected in 2011 to the increased amount of $840 billion. Id.


113. Chairwoman Kathleen S. Tighe took over the RATB in 2011 when Chairman Devaney retired.
agencies, the RATB was created with two stated goals: (1) “[t]o provide transparency of Recovery-related funds” and (2) “[t]o detect and prevent fraud, waste, and mismanagement.”

According to Recovery.gov, the website that makes public the information collected by the RATB, the Recovery Act in part made available approximately $243.3 billion for federal contracts, grants, and loans. Additionally, in dispensing these monies, the Recovery Act requires recipients of Recovery funds to report quarterly on how they are using the money. The information reported is published on Recovery.gov so that the public knows how Recovery Act funds have been spent and by whom. Below (fig. 5) is an example of what Recovery.gov looks like for Recovery funds sent to the state of New York. The screenshot displays an interactive map and graphs indicating the amount of contracts, grants, and loans awarded to New York. It also provides information on the funding by quarter to New York, the number of jobs created by quarter, the funding categories, the amount awarded versus the amount received, and an award-by-award breakdown of the overall funding.

The display certainly provides more and clearer information to an average user than USASpending.gov, and also shows more comparative data. For example, the funding categories chart for New York indicates the different areas where stimulus funds have been spent, such as education or health, with the size of each category within the chart correlating to the amount of funds having been spent in that category. The chart allows users to scroll over each category for more information. This dynamic interface presents the information in a way that does not distract the user with meaningless indicators, but instead provides an interactive experience to visually attract and engage, rather than confuse users.

114. § 1521, 123 Stat. at 289; see also The Board, supra note 112.


116. See § 1512(c), 123 Stat. 115, 287 (“Not later than 10 days after the end of each calendar quarter, each recipient that received recovery funds from a Federal agency shall submit a report to that agency . . . ”).

In his July 2011 testimony, Mr. Kundra noted that because of the speed with which recovery funds were disbursed, the concern for monitoring waste and abuse was high. However, according to Mr. Kundra, “the Recovery Act has had an unprecedented low level of fraud, with less than 0.6% of all awards experiencing any waste, fraud, or abuse.” This success can be attributed in part to the fact that Recovery.gov—with user-friendly visualizations and increased visibility into how funds were being spent—“deterred much fraud before it ever occurred.”


120. Id. at 4.

121. Id. at 4.
DATA: USING OPEN DATA PRINCIPLES TO REVAMP SPENDING TRANSPARENCY LEGISLATION

However, despite being an improvement over USASpending.gov, OMB Watch\textsuperscript{122} perhaps said it best in a September 2009 report, when the organization wrote that “the concept of transparency in Recovery Act spending is rather simple to articulate but quite difficult to implement.”\textsuperscript{123} Part of the Recovery Act’s mandate was to create and maintain Recovery.gov for the public. Despite this mandate, however, the 2009 report indicated that there was at least a two-year lag period for updating data. This lag has only recently been addressed.\textsuperscript{124}

According to Mr. Kundra and as evidenced by changes in Recovery.gov since 2009, the government has begun to tackle many of the issues originally posed by implementing Recovery.gov, partially through “adopt[ing] uniform identifiers and data standards wherever feasible to ease the flow of data and reduce system complexity.”\textsuperscript{125} And today, the site enables searching by state, zip code, funding agency, fund amount, name of recipient, type of award, category of award, and status of project or contract.\textsuperscript{126} It also provides more plain-English descriptions for the types of projects and jobs created through the Recovery Act funds allotted to a given project. However, a major drawback of the system is that the Recovery Act covers only Recovery Act funds—not the entire federal budget.

IV. REALIZING OPEN DATA PRINCIPLES IN THE DATA BILL AND SPENDING TRANSPARENCY LEGISLATION

A. How Congress Can Use Open Data Principles to Improve DATA

1. DATA’s Structure & Policy

DATA arose out of these government initiatives aimed at promoting transparency and openness in government spending data. Representative Issa\textsuperscript{127} co-sponsored the DATA bill in the House of Representatives at a time when American skepticism regarding the strength of the U.S. economy was high.\textsuperscript{128} This, coupled with the


\textsuperscript{124.} See id. at 6 (“Currently, the greatest disappointment stems from the Recovery Board’s lack of progress in updating and improving Recovery.gov, notwithstanding a July 8 contract with Smartronix to rebuild the website.”). The site was updated and improved as of September 2012 to address many of these shortfalls.

\textsuperscript{125.} Transparency and Federal Management IT Systems, supra note 55. See also infra Part IV.B.1.

\textsuperscript{126.} This allows each individual user to have a personally curated experience, ensuring he or she can find the exact information sought from Recovery.gov.


public\textsuperscript{129} and presidential\textsuperscript{130} commitment to opening up government, as well as Americans’ acceptance of the Internet as something to be harnessed by the federal government, and not feared, makes DATA’s goal of fostering greater transparency in federal government spending seem like an obvious addition to the legislative agenda. The bill unanimously passed the House of Representatives on April 25, 2012, and on September 21, 2012 Senator Mark A. Warner (D-VA) introduced the companion version of the bill in the Senate.\textsuperscript{131} The Senate version of the bill is a more modest approach, but shares the same goals of greater transparency and heightened accountability in reporting and sharing government spending data. For example, under the Senate version, recipients of funds need not report directly to the Federal Accountability and Spending Transparency Commission (the “FAST Commission”) and the bulk of the legislation attempts to improve upon existing reporting requirements to USASpending.gov, rather than create an entirely new website.\textsuperscript{132}

Both versions of the bill represent what the Sunlight Foundation’s Daniel Schuman has called “the growing understanding on Capitol Hill that technology-mediated government transparency is an area of bipartisan agreement where real progress can be made.”\textsuperscript{133} Specifically, the House bill purports to build on the successes of USASpending.gov and Recovery.gov and creates an independent commission\textsuperscript{134} tasked with overseeing data reporting and monitoring the data for waste, fraud, and abuse.\textsuperscript{135} Additionally, a principal aim of the legislation is to enable the public to use the spending data collected and published under the provisions of the statute for the purpose of monitoring waste, fraud, and abuse as well.\textsuperscript{136}

\textsuperscript{129.} A recent study conducted by David Cuillier and Bruce E. Pinkleton explains that “people indicated strong support for open government. The mean of the support for transparency scale was 5.72 (SD = 1.31) out of a scale from 1 to 7, with 7 indicating the most support.” David Cuillier & Bruce E. Pinkleton, \textit{Suspicion and Secrecy: Political Attitudes and Their Relationship to Support for Freedom of Information}, 16 Comm. L. & Pol'y 227, 246 (2011).

\textsuperscript{130.} See supra Part II.A.

\textsuperscript{131.} See The Digital Accountability and Transparency Act, H.R. 2146, 112th Cong. (as passed by House, Apr. 25, 2012), \textit{available at} http://www.gpo.gov/fdsys/pkg/BILLS-112hr2146rs/pdf/BILLS-112hr2146rs.pdf.

\textsuperscript{132.} For a more comprehensive understanding of the current Senate version of DATA, see Hollister, supra note 13; see also Daniel Schuman, Sens. Warner, Portman Reintroduce DATA Act, SUNLIGHT FOUND. (Sept. 24, 2012, 6:01 PM), http://sunlightfoundation.com/blog/2012/09/24/sens-warner-portman-reintroduce-data-act/.


\textsuperscript{134.} The Senate version of DATA designates the creation of a new Federal Accountability and Spending Transparency Board rather than the commission established under the House bill. See The Digital Accountability and Transparency Act, S. 3600, 112th Cong. § 3(g)(1), \textit{available at} http://www.gpo.gov/fdsys/pkg/BILLS-112s3600is/pdf/BILLS-112s3600is.pdf.

\textsuperscript{135.} H.R. 2146 §§ 3621(a), 3623(a)(3); see also infra note 160 and accompanying text. All references to §§ 3601–42 are contained within §§ 101(a) and 102 of the House bill, which will be inserted as a new chapter, “Chapter 36,” immediately following 31 U.S.C. § 35.

\textsuperscript{136.} See H.R. 2146 § 3612, 3613(b). The Senate version of DATA notes that a goal of the legislation is to “provide consistent, reliable, and searchable Government-wide spending data that is displayed accurately for taxpayers and policy makers on USASpending.gov.” S. 3600 § 2(2).
DATA’s structure, as drafted by the House, includes three main sections. Title I lays out the main requirements for reporting by recipients of federal grants and contracts, federal agencies, and the U.S. Department of the Treasury.137 This provision mandates that all of these entities report specified information to the newly created FAST Commission, which is established in Title II of the bill.138 The reporting requirements include disclosing the name of the recipient and its parent entity, if applicable, the purpose of the award or sub-award and how it will be used,139 and any additional information that the FAST Commission requires via regulation.140 To aid in reporting (and in publishing) this spending data, the legislation, as proposed, includes in Subchapter II to Title I a requirement for data standardization, which calls for the independent commission to designate common data elements and standards for the required reporting and disseminating of spending data under the Act.141

Subchapter II of Title I also requires that the FAST Commission take over management of USASpending.gov from OMB142 for purposes of publishing online all information submitted by recipients and agencies under the Act.143 This section amends the FFATA144 to require that all spending data collected under DATA be published via USASpending.gov, essentially revamping FFATA so it applies to all government spending.145 Amendments to DATA since its introduction include a requirement that the spending information be nonproprietary146 to enable public searches, aggregation, and downloading.147

Also in the “Data Standardization” Subchapter II to Title I of DATA,148 the Act’s language requires the creation of a “government-wide, Internet-based data access system, to be known as the Federal Accountability Portal,” to host all of the information collected under the Act.149 The reported information is to be combined with other compilations of government data to help federal agencies verify the “eligibility and responsibility of recipients and potential recipients with respect to the

137. H.R. 2146 §§ 3602, 3603, 3604.
138. Id. § 3621(a).
139. Id. §§ 3602(b), 3603(b).
140. Id. § 3602(b)(2)(J).
141. Id. § 3611.
142. Id. § 3618(b).
143. Id. § 3618(b).
144. Id. § 3618.
145. Id. § 3618(a)(5).
146. Id. § 3618(a)(4).
147. Id. § 3618(a)(6)(D)-(G).
148. See id. § 3611–18 (“Subchapter II—DATA STANDARDIZATION”).
149. Id. § 3613(a), (b)(2)(A)–(D). Notably, the Senate version, while amending FFATA to revamp USASpending.gov, does not include this mandate for the creation of a new Federal Accountability Portal. Rather, it seeks to achieve its goals by improving upon existing government websites. See generally S. 3600.
receipt and use of Federal funds,”150 and to permit agencies, inspectors general, and law enforcement to actually “track Federal awards and recipients to detect and prevent waste, fraud, and abuse.”151

Title II of the proposed bill officially establishes the new FAST Commission. It is made up of five commissioners who will be appointed by the President.152 The FAST Commission is tasked with monitoring the collection, tracking, and dissemination of the data collected about federal awards.153 The Commission’s functions include, in pertinent part, maintaining and monitoring the Federal Accountability Portal154 and USASpending.gov, as well as designating the data elements and standards to use for reporting and sharing information under the Act.155

DATA additionally calls for the creation of an Advisory Committee to the FAST Commission, which is tasked with providing the Commission with “findings and recommendations related to the Commission’s implementation” of the Act.156

Finally, Title III places limits and heightened reporting requirements on government travel and conference spending (in light of the recent GSA scandals) and calls for Congress to reestablish the Act in seven years. In total, the bill allocates $51 million each fiscal year for the enactment of its provisions.157

150. H.R. 2146 § 3613(b)(2)(B).
151. Id. § 3613(b)(2)(C).
152. Id. § 3622(a)(1). The Senate’s version of the FAST Commission is made up of five members appointed by the President and includes an Inspector General, a Chief Financial Officer, a Deputy Secretary of a federal agency, and not less than one senior official from OMB. See S. 3600 § 3(g)(2)(B)–(C).
153. See H.R. 2146 § 3623.
154. Id. § 3613(a).
155. Id. § 3623(b)(2) (“Reviewing whether reporting under a section of this title meets applicable standards and specifies the purpose of the Federal award and measures of performance.”); id. § 3623(b)(7) (“Standardizing common data elements and data reporting standards to foster transparency and accountability for Federal spending, as required by section 3611 of this title.”). The Commission’s role also includes taking over the functions of the Recovery Board established under the Recovery Act. The Senate version of the bill proposes slightly different functions for its FAST Commission, which include: providing “strategic direction” for enhancing spending transparency; monitoring the creation of standards; monitoring the collection, storage, and disclosure of data reported under DATA; advancing efforts to minimize fraud; using lessons learned from the Recovery Board; and “solicit[ing] input from State and local governments, institutes of higher education, and other Federal award recipients on ways to improve Federal financial reporting.” S. 3600 § 3(g)(3).
156. H.R. 2146 § 3627(2). One major flaw of the Senate version of DATA is that it does not establish an advisory committee to the FAST Commission. While the Senate’s modest approach attempts to make the oversight of the legislation’s implementation more efficient, the Advisory Committee envisioned in the House version could play a meaningful role in achieving the spending transparency goals of the bill; see infra Part IV.B.3.
157. Id. § 3629 (“Title III—Additional Provisions”), see also id. § 3628(a); Commentary: Issa Releases New Spending Transparency Bill, OMB Watch (June 14, 2011), http://www.ombwatch.org/node/11716.
2. Strengths of DATA

Unlike Grants.gov, DATA seems to envision a far more dynamic platform than simply a tool to search government grant options. For example, the Federal Accountability Portal mandated under DATA would be a site where agencies can evaluate potential recipients for federal awards, but also where all of government can have spending data plus “other information maintained by Federal, State, local, and foreign government agencies”158 and “other commercially and publicly available information”159 at their disposal.

Additionally, DATA's amendments to FFATA mean that all of the information previously reported via USASpending.gov, Recovery.gov, and in the Consolidated Federal Funds Report (which is maintained by the U.S. Census Bureau) will be available to the public via the newly revised USASpending.gov.160 DATA also vests power in management of both the intake of spending reports as well as of the public dissemination of this information in an independent body, the FAST Commission, rather than in OMB.161

Another important and improved aspect of DATA is its requirement for reporting. Unlike FFATA, DATA's reporting requirement extends to both recipients of federal awards and to agencies that disburse grants and contracts.162 DATA specifies that this requirement is for "continuous or automatic reporting"163 and exists "so that information reported by recipients and information reported by the agency can be directly compared."164 This provision will ideally help combat the prevalence of unreliable agency award reports since recipients' reports will provide an accuracy check on that information, as will the Treasury reports.165

158. H.R. 2146 § 3613(b)(1)(B)
159. Id. § 3613(b)(1)(C).
160. Id. § 103 (“AMENDMENTS TO THE FEDERAL FUNDING ACCOUNTABILITY AND TRANSPARENCY ACT of 2006.”); see also Press Release, Comm. on Oversight & Gov't Reform, Federal Spending Transparency Legis. (June 2011) (suggesting that the goal would be to eventually have the accountability portal subsume all of these other systems).
161. This note will not address the separation of powers arguments for or against vesting the power to track government spending in the legislative versus the executive branch of government. For a discussion on vesting the obligations of executing DATA in an executive body such as OMB, see Joseph Marks, DATA Act Scene Two: Drop the Independent Board, Nextgov (July 18, 2012), http://www.nextgov.com/cio-briefing/2012/07/data-act-scene-two-drop-independent-board/56859/ (“As an agency charged with implementing the Obama administration's programs, OMB has a vested interest in making those programs appear successful, which will sometimes conflict with transparency.”) (quoting Daniel Schuman of the Sunlight Foundation).
162. H.R. 2146 § 3603. The requirement that recipients of government funds report directly to the FAST Board is significantly absent from the Senate version of DATA. See S. 3600 § 3(f) (seeking to streamline reporting requirements by vesting the responsibility in the OMB).
163. H.R. 2146 § 3603(b)(1)(C).
164. Id. § 3603(b)(4).
165. Press Release, Comm. on Oversight & Gov't Reform, Federal Spending Transparency Legis. (June 2011) (“USASpending relies on data reported by federal agencies. These reports from the agencies are
Consistent with its underlying goal of making government spending data more open, DATA also includes encouraging language in its amendments to FFATA. Specifically, DATA requires that the information be made available in a “reasonably timely manner” and “without charge, license, or registration.” These amendments also require that the public spending data can be “searched and aggregated” and “downloaded, including downloaded in bulk.” These are all explicit commitments to making sure that DATA is implemented consistent with the principles of open data discussed in Part II.D. of this note—a positive indication of DATA’s potential.

Lastly, DATA calls for both the standardization of this spending data and the creation of an advisory group to the FAST Commission to assist in implementing the legislation. Standardization is key to ensuring that information collected from various recipients and agencies is done consistently to allow for comparison. Additionally, DATA’s requirement that the Commission instate “common data elements” makes certain that each entity reporting spending figures discloses the same information.

3. Weaknesses of DATA and the Need for the Implementation of Three Core Open Data Principles

While it is an impressively forward-thinking bill, DATA has some flaws. Specifically, the House version of the bill lacks three things that must be addressed:

unreliable: in fiscal year 2009, USAspending.gov was accurate for only 35% of federal programs, according to the Sunlight Foundation.; see also Schuman, supra note 133.

With 3 independent data streams on how money is spent, it will become much easier to automatically detect discrepancies in spending reporting. Putting all agency data side-by-side will facilitate comparison of how well agencies are performing. This should create a virtuous cycle by which agencies compete to keep costs in line with their peers and to fully report on their spending.

Id.

166. H.R. 2146 § 103 (amending 31 U.S.C. § 6101, by inserting into Section 2, Paragraph 6(A)).
167. Id. (amending 31 U.S.C. § 6101, by inserting into Section 2, Paragraph 6(C)). Notably, the Senate version of DATA has a specific provision entitled “Improvements to Access to Data.” See S. 3600 § 3(6)(4).
168. Id. (amending 31 U.S.C. § 6101, by inserting into Section 2, Paragraph 6(D)).
169. Id. (amending 31 U.S.C. § 6101, by inserting into Section 2, Paragraph 6(E)).
170. See supra Part II.D.
171. H.R. 2146 § 3611 (“Data standardization for reporting information”); § 3627 (“Advisory committee to [the] Commission”).
172. In fact, the House Oversight Committee on Government and Reform has articulated support for these provisions by indicating that

[t]he legislation will empower the new [Commission] to set consistent data elements and standards [to eliminate current inconsistencies in federal spending data]. These elements and standards will permit the data to be automatically checked for errors and allow easy analysis to find waste, fraud, and abuse. Over time, their use will become an accepted best practice for the whole government.

Press Release, Comm. on Oversight & Gov’t Reform, Federal Spending Transparency Legis. (June 2011).
the need for developing and evolving core data elements and standards; the importance of continued analysis into DATA’s efficacy and efficiency; and the vital role technical, open data experts can play in an advisory role to the FAST Commission.

First, for transparency legislation to truly bring about open government data, its language should ensure that the data is collected and distributed in a way that allows it to be freely accessed, easily compared, and cross-referenced by anyone. The House version of DATA currently does include a “Data Standardization for Reporting Information” section173 that directs the FAST Commission to develop, “to the extent practicable,” non-proprietary common data elements “such as codes, identifiers, and fields, for information required to be reported by recipients or agencies under this chapter, including identifiers, awards, and agencies.”174 In creating these common data elements, the language of the proposed legislation directs the FAST Commission to “ensure interoperability”175 and directs the Commission to incorporate those already in existence in the arena of government spending data.176 As for data standards, DATA similarly directs the FAST Commission to designate them, incorporating where possible “existing nonproprietary standards, such as the eXtensible Business Reporting Language (XBRL)” already in use by the government.177 While these provisions envision that the information released to the public on USASpending.gov be freely accessible and usable by people, making sure DATA achieves this requires strengthening DATA’s current mandate for the creation and use of common data elements and standards—especially if DATA is to live up to its potential as a template for future government open data legislation.

173. H.R. 2146 § 3611.
174. Id. § 3611(a)(1)–(3). This mandate in the House bill anticipates public consultation by requiring that the FAST Commission initiate a full rule-making process in accordance with the Administrative Procedure Act. See Hollister, supra note 13 (“[T]he House version directs the FAST Commission to designate the standards ‘by rule’—which means public notice and comment under the Administrative Procedure Act.”). The Senate version of DATA, however, does not account for any public consultation in designating common data elements or standards. Rather, the Senate bill simply notes that the Secretary of the Treasury, in consultation with the Directors of OMB and the GSA and the heads of Federal agencies should “establish government-wide financial data standards for Federal funds,” including common data elements “such as codes, unique award identifiers, and fields, for financial and payment information required to be reported by Federal agencies.” S. 3600 § 3(e)(2)(A)(i). The attention to financial-specific information is valuable, though as government transparency initiatives grow, the government should encourage developing data elements and standards that can be used for information spanning numerous disciplines. Developing a specific financial vocabulary for agencies and fund recipients that cannot be used effectively by the intellectual property community, for example, minimizes the opportunity for meaningful comparison of data.
175. H.R. 2146 § 3611(a)(3).
176. Id. § 3611(a)(3)(A)–(D).
177. Id. § 3611(b)(3). The Senate version of DATA directs that the “Secretary of the Treasury, in consultation with the Director of the Office of Management and Budget, the General Services Administration, and the heads of Federal agencies, shall establish Government-wide financial data standards for Federal funds.” S. 3600 § 3(e)(2)(A).
Common data elements are universal codes, identifiers, input fields, and legal names of entities that are used to ascribe a value to different units of data.\textsuperscript{178} Put more simply, imagine filling out an online form that requests your “Name,” “Affiliation,” and the “Industry” in which you work. Those input fields are data elements—they give an agreed-to meaning to the information you input for each of them. As for common data elements, compare data elements such as “address” or “location”; both help indicate information pertaining to geographical location and may contain the same information, but the titles are different. Only when either “address” or “location” is universally adopted would there be a common data element.\textsuperscript{179} As for common data standards, these refer to the shared, standardized technical vocabulary in which to put common data elements; common data standards indicate agreed-to formats, representations, and definitions of common data elements so that different individuals, entities, or agencies collecting, merging, sharing, or analyzing the data can make certain the information is coded uniformly and thus makes sense when compared or combined with data from other individuals, entities, or agencies.\textsuperscript{180}

As the Sunlight Foundation’s Ellen Miller said, common data elements and standards are important in open data transparency initiatives because “[i]dentifiers are the social security numbers of data, and their unreliability creates confusion.”\textsuperscript{181} Without common data elements and standards in place, comparing data among government agencies proves difficult.\textsuperscript{182} Different data elements used in agency and recipient reporting make for inconsistent and difficult-to-compare data.\textsuperscript{183} Further,

\begin{itemize}
  \item \textsuperscript{178} See H.R. 2146 § 3611(a)(1).
  \item \textsuperscript{179} Other examples of data elements are the names of different entities, such as ABC Corp. See Hendler & Noveck, \textit{supra} note 79 (discussing the need for common data elements so reporting information relevant to ABC does not get classified as pertaining to ABC Corp. and ABC Inc.); see also \textit{supra} Part III.B. and accompanying text (demonstrating how the term Boeing may also be a common data element).
  \item \textsuperscript{180} \textit{Data Standards Briefing Paper}, \textit{supra} note 29.
  \item \textsuperscript{181} See \textit{Transparency through Technology}, \textit{supra} note 23.
  \item \textsuperscript{182} The educational sphere provides a good example of how government standardization of data has been effective. Stemming from the Education Science Reform Act of 2002, the National Center for Education Statistics (NCES) began the Common Education Data Standards (CEDS) project, which has a stated goal of collaboratively developing a common vocabulary for a core subset of data elements that exist in multiple data systems. See Jarret Cummings, \textit{Developments to Watch: Common Education Data Standards (CEDS)}, EDUCAUSE (May 19, 2011), http://www.educause.edu/blog/jcummings/ DevelopmentstoWatchCommonEdusca/229110 (citing examples including student demographics, program participation, enrollment, and course-level information). The ultimate adoption of CEDS by any agency or institution is intended to be voluntary and consistent with the goal of effectively sharing high-quality data in a useful form across relevant organizations as needed. The project continues to evolve and enhance the educational sector’s ability to “build new tools to assist with data reporting[,] and help ease reporting burden,” as well as enable institutions to “share data, when appropriate, using a common language.” Jack Buckley, \textit{NCES Update: Summer Forum Meeting 2011}, NAT’L CENTER FOR EDUC. STATISTICS, http://nces.ed.gov/forum/ppt/NCES_Update_Forum_S2011.ppt (last visited Sept. 25, 2012).
  \item \textsuperscript{183} For instance, currently in government, the “Treasury uses a two-digit code to identify agencies, while OMB uses a three-digit code.” Comm. on Oversight & Gov’t Reform, \textit{Federal Spending Transparency Legis.} (June 2011).
\end{itemize}
the data standards used to communicate data from and to various stakeholders in government can also differ depending on which agency you are talking about or what outside entity you are referring to. According to OMB Watch, implementing a mandate for these common data elements and standards in transparency legislation “significantly enhance[s] the ability of various federal data systems to communicate with each other, furthering data accessibility to the public and federal agency workers.” In light of these problems, open data and transparency initiatives must explicitly emphasize adopting those common data elements and standards that account for the best practices of standardization in the open data community.

Second, DATA does not make certain that the reporting and dissemination system it calls for will efficiently and accurately withstand and evolve with the technological and bureaucratic changes of the future. Any inkling of such a provision in the House text of DATA is either overtly vague or absent.

In today’s information-driven society, it is easy to act in the “spirit” of transparency by mere reference to buzzwords and the platitudes of openness or transparency generally. Passing legislation requiring government agencies to merely post data on a website is one thing; demanding that the types of data and the standards used to collect that data are continually checked for completeness, accuracy, and meaningful use by the public is another entirely. The latter requires both research into evolving technology for collecting and openly sharing that information as well as exploration into what types of information continue to have meaning to different stakeholders. If a democracy wishes to use technology to connect with and engage its citizenry, continued study and analysis into whether the system enables non-proprietary access to complete, accurate governmental data that can be used, reused and redistributed, is key.

184. Commentary: Issa Releases New Spending Transparency Bill, supra note 157. Additionally, implementing new common data elements and data standards for each new technology project within government increases the difficulty of standardizing and comparing data rather than helping to open up data across government. By adding to the already existing common data elements and standards within government, the data government collects cannot be used effectively by other branches or agencies within the government as well as by the public for comparison, critique, and innovation.


186. New and important relationships between data may emerge in five or ten years time, demanding collection of information that the FAST Commission decides whether or not to report now. Additionally, continued technological innovation may provide new insights to previously worthless data. Therefore, the system DATA establishes should be continually monitored and researched to ensure the government and the public will always be able to use USASpending.gov (or its successor platform) as a tool to hold the government accountable. Notably, the Senate version of DATA does require that the Secretary of the Treasury report to Congress on the metrics used to determine if fraud detection under DATA “has reduced, or contributed to the reduction of, improper payments or improper awards.” S. 3600 § 3(a)(3) (B)(ii). However, nothing mandates that these metrics be evolved as the reporting, storing, sharing, and analyzing technologies evolve. In addition, the legislation’s text makes no effort to provide for the development of crowd-sourced metrics for evaluating the openness of the system.
A constantly evolving, learned, and researched system promotes transparency; a system put into place in 2012 or 2013 without a mandate to probe for new ways its transparency and public value can be improved and enhanced may not.187 Without continued research and analysis into the technical components required, current government transparency legislation efforts may become mere flawed reiterations of past efforts. As such, DATA should include a provision that mandates review of the data elements, standards, and platforms for efficacy and efficiency.188

The House version of DATA includes within the FAST Commission’s functions a specific requirement that the Commission review “whether reporting under section 3602 of this title meets applicable standards and specifies the purpose of the Federal award and measures of performance,”189 as well as a provision directing the Commission to identify “possible criminal activity”190 (i.e., fraud). The bill also notes that the “data reporting standards” adopted by the Commission to govern all reporters of federal awards shall “be capable of being continually upgraded as necessary.”191 Lastly, the House version of the bill also includes a provision requiring the FAST Commission to report to Congress on the “timeliness, completeness, accuracy, and interoperability of the data submitted by each Executive agency,” and then publish these reports online.192 This last provision, however, while hinting at metrics, does not account for data submitted by recipients, nor does it address how these important elements will be measured and researched. Particularly lacking is the importance of conducting this research in consultation with those having the requisite technical background to assist in determining how to best monitor compliance and gauge efficacy of the reporting system created by the FAST Commission.

Additionally, nowhere does the House bill clearly define what it means to “meet applicable standards;” nowhere does the language articulate how the FAST Commission will ensure that data standards can continually be upgraded. DATA

187. Hendler & Noveck, supra note 79 (noting DATA’s need for research). “We don’t understand the problem of inconsistent spending reporting well enough to design—whether by the legislative or executive branch—the system. Instead, we ought to be allowing small-scale pilots (potentially funded by prize-backed challenges) seeing what works, and trying again.” Id.

188. As the newness of using digital technologies in government has exposed the underdeveloped identifiers, standards, and norms used in collecting and sharing data, research is vital to continuing their development and ensuring government is truly functioning in an open way.

189. H.R. 2146 § 3623(b)(2).

190. Id. § 3623(b)(3).

191. Id. § 3611(b)(2)(C).

192. Id. § 3603(d). This particular provision was absent from the initial language of the House bill. See The Digital Accountability and Transparency Act, H.R. 2146, 112th Cong. (2011) (as introduced June 13, 2011), available at http://www.gpo.gov/fdsys/pkg/BILLS-112hr2146ih/pdf/BILLS-112hr2146ih.pdf. DATA has thus been positively revised to include such a provision hinting at the development of metrics. The Senate version’s language requires that each Inspector General submit to congress and “make publically available a report on the completeness, timeliness, quality, and accuracy of the data submitted under this Act.” S. 3600 § 3(b)(1) (emphasis added). This is an improvement even over the House version. This note advocates for DATA’s language to go even further to ensure maximum openness, without additional bureaucratic burdens.
creates a multitude of functions that the Commission must carry out, yet nowhere does DATA establish an affirmative function to conduct ongoing analysis of the openness of the data elements and standards, the reporting system, or the platforms where this spending information is to be collected or disclosed. Nor does DATA provide resources to those outside government to conduct research into the efficacy of the system created under DATA. The bill is lacking in its language directing the Commission or the Advisory Committee to track specific performance metrics on the continued openness of the FAST Commission’s data collection and dissemination efforts. And in the federal government, where agency leaders are already overworked and under-resourced, agencies’ ability to devote substantial effort to evaluating the efficacy and openness of government transparency initiatives can be challenging, especially when the decision to do so is left to the discretion of the agency.

When the government undertakes an open data initiative such as DATA, it is imperative that it implement and sustain that initiative in the most efficient and effective way in order to limit wasteful expenditures and energy. Continually looking for ways to use technology to do tasks more cheaply and more effectively provides greater assurance that tax dollars will not be wasted. By including in the law a provision directing such research, the government has no choice but to track its progress in opening government spending data and in using technology to enable data-driven tracking of waste, fraud, and abuse. In the private sector, for example, research projects aimed at evaluating such government transparency efforts have met success, though increased access to data and government resources are needed to enhance these projects’ beneficial impacts.

For example, the Sunlight Foundation’s Clearspending project exists to supplement the data of USASpending.gov by conducting and sharing with the public research on the website’s effectiveness and accuracy at disclosing the operations of government. Clearspending measures the consistency, completeness, and timeliness of information released on USASpending.gov. And while Clearspending serves as a valuable check on how well USASpending.gov is serving as a transparency tool, it has limitations. Clearspending uses the “Catalog of Federal Domestic Assistance (CFDA) as a

193. Again, the Senate version notes that the Secretary of the Treasury must report on the metrics used to determine whether fraud detection and prevention has been successful. However, the text does not include reporting on metrics for evaluating whether the system used to detect fraud is open, sustainable, and how the system can be improved. See S. 3600 § 3(e)(3).

194. See About Us, Sunlight Found., supra note 102.

195. According to Clearspending, USASpending.gov contains information about two main types of spending: contracts and direct assistance, which consists of grants, direct payments, loans and loan guarantees. These two types of spending are tracked using two very different reporting systems. One of them is the Federal Awards and Assistance Data System PLUS (FAADS-PLUS) and the other is the Federal Procurement Data System—Next Generation (FPDS-NG). For the purposes of this analysis, Clearspending has focused exclusively on FAADS PLUS, the dataset that contains information about direct assistance.

comparison point for the obligations in USASpending.gov.”196 The CFDA, however, only features “direct assistance such as grants and loans,” and does not include contracts. Thus Clearspending is forced to rely on the limited data procured from the CFDA, that is published on USASpending.gov, and that it can get from often burdensome FOIA requests.197 This means the project’s research can lag behind real-time spending and suffer in accuracy and completeness due to limited data.

A legal mandate ensuring continued research into USASpending.gov’s openness and transparency, however, would encourage the development of more complete and meaningful checks on government spending—increasing the chances of identifying areas the government can save money, limit waste, and prevent spending abuses.198 The same rationale applies to DATA; including a research mandate up front would foster an environment where gaps in data access no longer hinder research into the transparency initiatives of government.

Directly mandating these checks in the legislation also ensures that research done with sufficient time, money, and access to data is conducted in a continuous and consistent manner, and by those who have valuable insight—both the open data community and the public. This increases the chances that government can spot and implement new ways to make data more open as the technology enabling such improvements emerge. This increases the chance that government transparency initiatives will evolve closer to the real-time developments of open data technologies. Explicitly mandating how research into the efficacy of the system should be conducted within DATA’s language could also improve the quality of the data collected, ensuring that it is the right data to help prevent and detect waste, fraud, and abuse, and that it is accessible, complete, and useful to the public and to other government agencies. Ensuring this could be done if DATA’s language established defined metrics to evaluate both collection and dissemination of the data. Additionally, this could be accomplished if DATA’s language anticipated providing the needed resources and data to those individuals or entities who can adequately track the progress of the government’s transparency effort.199 More or less, without such foresight in DATA, the legislation lacks a true accountability mechanism.200

196. About Us, Sunlight Found., supra note 102.
197. Id.
198. While FFATA (which directed the creation of USASpending.gov) includes a provision that requires USASpending.gov to “provide an opportunity for the public to provide input about the utility of the site and recommendations for improvements,” the law contains no affirmative obligation mandating research into the site’s utility. See Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109–282, 120 Stat. 1186, § 2(c)(3).
200. For example, without such an express provision demanding research, the reports the FAST Commission must give to Congress on timeliness, completeness, accuracy, and interoperability of the data reported by the agencies could end up the product of rushed research or hopeful bureaucratic projections at best. Nothing under DATA as currently drafted, ensures these reports will be informed through credible, well-sourced, and evolving research. See generally H.R. 2146.
DATA: USING OPEN DATA PRINCIPLES TO REVAMP SPENDING TRANSPARENCY LEGISLATION

Third, DATA does not mandate that open data and web experts be included in the process of opening up this spending data. Given the enormous amount of money spent on federal government IT programs—“much of [which] goes for upkeep on legacy systems that are no longer commercially available or are one-off, custom environments, making operation and repairs extremely costly”—it is important to note that required consultation with private sector experts can increase efficiency and lower costs of implementation and maintenance. As Darrell M. West, the Vice President and Director of Governance Studies at The Brookings Institution, noted, “[f]actors such as institutional arrangements, budget scarcity, group conflict, cultural norms and prevailing patterns of social and political behavior have restricted government actions” in this area. Bringing in someone removed from government, with expertise in open data web systems, however, would surely prove fruitful.

As presently drafted, DATA provides the FAST Commission the option of contracting out its functions, but it does not include any explicit reference to technical experts who would best aid in the how of implementing the legal mandates of the Act. The House bill requires the development of a reporting system that can be monitored on a newly created, Internet-based Federal Accountability Portal, as well as revamping of FFATA’s USASpending.gov platform, to enable more open dissemination of spending data. These are technical, data-intensive, and complex tasks that scholars from Albany’s Center for Technology in Government have noted pose challenges to most government agencies.

For most government agencies, providing information for public use is an extra responsibility that may compete for resources with the demands of mission-focused operations. While vast amounts of useful information are contained in government data systems, the systems themselves were seldom designed for use beyond the agency’s own needs.

Making sure DATA’s system is designed for truly capturing and sharing openly complete and accurate spending data demands that the bill better account for collaboration among technical experts and the FAST Commission.

Collaboration between private sector technical experts and governments engaged in open data transparency initiatives has proved successful, for example, in both New York City and Santa Cruz. In New York City in July 2011, the City hosted a “civic


203. H.R. 2146 §3624(d)(1) (“IN GENERAL.—The Commission may enter into contracts to enable the Commission to discharge its duties under this chapter, including contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and make such payments as may be necessary to carry out the duties of the Commission.”).

204. Dawes & Helbig, supra note 32.
hackathon to get developers contributing ideas to make NYC.gov better.”205 By offering government resources to the public, New York City enabled the private sector to contribute its expertise in “a combination of digital and analog tools, including blackboards, projection screens, laptops and Post-Its” to generate ideas to advance and improve NYC.gov.206 In Santa Cruz, California, in October 2011, the Santa Cruz City Council approved proposals “introduced by an external technology committee” and aimed at “expand[ing] the city’s digital efforts.”207 The proposals included the creation of a “15-member task force . . . consist[ing] of people employed in the technology industry,” as well as public officials.208 The City’s initiatives included improving “bureaucratic efficiency” through the task force’s “interoperability recommendation aim[ed] [at] find[ing] ways for the ‘city’s software systems to speak a common language’” and “an open data recommendation” to open up city data such as “surf reports, transit applications and crime updates . . . under a creative commons license.”209

Both of these examples demonstrate how tapping into the technical expertise in the private sector to help in government transparency initiatives has proved useful to government. In New York City, civic developers introduced new designs for NYC.gov that the city is considering in its redesign of the NYC.gov website to improve the user interface, improve social networking functionalities, and better the NYC-specific features on the site.210 In Santa Cruz, City Councilman David Terrazas stated that the benefit of passing the external technology committee’s data recommendations will help “encourag[e] third-party developers to take data and create new city services at no cost to taxpayers.”211

DATA, too, has the potential to foster government collaboration with the private sector. Yet, as currently drafted, DATA does not capitalize on this potential. To remedy this, DATA’s language should require that individuals with technical


208. Id.

209. Id. For more information about creative commons licenses, see About the Licenses, Creative Commons, http://creativecommons.org/licenses/ (last visited Oct. 1, 2012).


211. Sanzgiri, supra note 207.
expertise from within and outside of government are given a role on the Advisory Committee to the FAST Commission. 212

B. Proposed Open Data Provisions for Addition to DATA

1. Common Data Elements and Standards in DATA

To further DATA’s chances of producing a system where data can be effectively compared and cross-referenced, DATA’s adherence to this core understanding of common data elements and standards can be improved in two ways. First, common data elements and standards should be more clearly defined in the language of the bill. Second, language hindering the development of truly open data elements and standards should be removed. This can be done through the addition of an express provision directing the FAST Commission to consult with the public and the technical data expert members of the Advisory Committee213 in designating common data elements and standards. DATA’s standardization provisions should also reference an open standards body highly regarded in the technical community.

a. Define Common Data Elements and Standards

First and foremost, a definition of a “common data element” and a “common data standard” should be included in the language of DATA. If Congress is to embrace the best practices of the technology industry to improve data collection and disclosure efforts through legislation, transparency in sharing those best practices with those implementing the Act is fundamental. The “Definitions” section214 could read as follows:

COMMON DATA ELEMENTS.—The term “common data element” means the uniform name describing the informational elements that must be reported.”

and

DATA REPORTING STANDARDS.—The term “data reporting standards” means the common technical reference standard in which the data elements are reported.

Incorporating succinct definitions into the language of the bill would serve the primary objective of helping to break down the barrier between the techies, the bureaucrats, and average citizens. Not everyone is conversant in open data; if our

212. For example, technical members from OKFN could be ideal additions to the Advisory Committee. OKFN creates and manages open knowledge projects aimed at developing and evolving the standards and tools for opening up data (i.e., making sure the data is freely accessible, reusable, and redistributable). See Open Knowledge Found., supra note 70. OKFN works to research and evolve the right solutions to problems raised when applying modern technologies to government. Particularly, OKFN develops platforms for the production of open data. In fact, the U.K. government’s Open Spending Project—which uses government-released data on spending to detail a breakdown of where the government is spending money—was created by OKFN. See generally Open Spending, http://openspending.org/ (last visited Oct. 1, 2012).

213. See infra Part IV.B.3.

214. H.R. 2146 § 3601.
legislation is meant to harness it, it should aid government and citizens in becoming conversant on the subject. Incorporating these definitions would provide a basic “key” to inform implementation of the bill’s mandate that the FAST Commission designate common data elements, such as “codes, identifiers, and fields . . . including identifiers for recipients, awards, and agencies” and reporting standards, incorporating “existing nonproprietary standards, such as . . . XBRL.”

b. Remove Language Hindering Effective and Open Standardization

Additionally, to maximize the possibility that data collected can be compared with other data throughout the government, this note adopts the position taken by Professors Beth Noveck and Jim Hendler in relation to DATA and spending transparency legislation:

We shouldn’t be designing and building a system for reporting spending in a vacuum . . . We want the spending data to be able to “talk” to other data collected about corporate compliance and innovation so we can “mash up” data across agency responsibilities . . . [A]ny new requirements should mandate the use of non-proprietary, interoperable data elements.

Accordingly, the common data elements and standards language within DATA should be modified and strengthened in a number of ways. First, Congress should remove “to the extent practicable” from the language referencing common data elements and standards. The FAST Commission already has a starting point for adopting common data elements and standards because of its work with USASpending.gov and Recovery.gov. Suggesting through the language of the bill a feigned sense of difficulty regarding the Act’s requirements provides only an unwarranted excuse for the Commission if it falls short in implementing truly open common data elements and standards.

DATA should also include a more direct requirement that in designating common data elements and standards the FAST Commission shall consult with technical data experts and the public. Additionally, the FAST Commission, when

215. Id. § 3611(a).
216. Id. § 2611(b)(3).
217. Hendler & Noveck, supra note 79.
218. See H.R. 2146 § 3611(a)(2) (“CHARACTERISTICS OF COMMON DATA ELEMENTS.—The common data elements designated under paragraph (1) shall, to the extent practicable, be nonproprietary.”). The Senate language differs only slightly, calling for data standards “to the extent reasonable and practicable.” S. 3600 § 3(e)(2)(A)(iii).
219. See infra Part IV.B.3 for a discussion on the proposal to include technical data experts into DATA’s Advisory Committee to the Commission. Considering that proposal, the actual language proposed here regarding consultation on data elements and standards could read:

EXISTING COMMON DATA ELEMENTS.—In designating common data elements under this subsection, the Committee shall, in consultation with its Advisory Committee and with the public, incorporate common data elements developed and maintained by international voluntary consensus standards bodies, inter-governmental partnerships, accounting standards organizations, and other bodies, such as the International
making its designations of common data standards, should use those advanced by the World Wide Web Consortium (W3C). W3C is “an international community where Member organizations, a full-time staff, and the public work together to develop Web standards.”\(^{220}\) W3C is recognized for its work in developing truly open standards for the web.\(^{221}\) In fact, one of W3C’s primary goals in developing standards is to make sure they benefit and are available “to all people, whatever their hardware, software, network infrastructure, native language, culture, geographical location, or physical or mental ability.”\(^{222}\) Incorporating into open data legislation a mandate to consult those regimes coming out of this international, open standards body will bolster DATA’s chances of serving as the example of an effective open government data initiative.\(^{223}\) Not only will reference to W3C in DATA prompt the designation of truly open standards, but it will also communicate to the technology community the U.S. government’s seriousness and commitment to applying the technical industry’s best practices into open government data initiatives.

Some may argue DATA already accounts for many standards bodies and references existing standards the FAST Commission shall consider in its designations. However, as Professor Noveck has stated publicly, these initiatives must not simply be about “transparency for its own sake.”\(^{224}\) Rather, they should work “toward the end of making better decisions, creating greater accountability and driving better performance” in government.\(^{225}\) The Senate should, therefore, include a reference to an open standards-creating entity, like W3C, in the provisions of DATA that deal with designating common data elements and standards. Doing so demonstrates a commitment to transparency and forges important relationships with technical experts outside of government.

\(^{221}\) See, e.g., Michael Vizard, Linked Data to Take Programmable Web to a Higher Level, Programmable Web (July 24, 2012), http://blog.programmableweb.com/2012/07/24/linked-data-to-take-programmable-web-to-a-higher-level/ (discussing W3C work backed by IBM and EMC to create an open standard for embedding URLs directly into application code). Additionally, the Obama Administration has looked to W3C for help in other more recent government-sponsored technological applications. See Jasmin Melvin, Do Not Track: Web Mandate Still Lacks Definition, NBCNews.com (July 23, 2012, 5:04PM), http://www.msnbc.msn.com/id/48291467/ns/technology_and_science-security/#.UC67ajFSQe0 (indicating that the Obama Administration is looking for W3C to design a “Do Not Track” web tool).
\(^{225}\) Id.
2. **Ongoing Evaluation of DATA’s Efficacy and Efficiency**

As the novelty of using digital technologies in government has exposed the underdeveloped identifiers, standards, and norms used in collecting and sharing data, research is vital to further developing these efforts. Accordingly, DATA must mandate that efforts to open up government spending data to the public are consistently reviewed for their efficacy and efficiency, subject to research using defined and flexible metrics. Providing experts in both the public and private sectors with the ability (and resources) to research, evaluate, experiment, develop, and enhance the ways the government uses technology to collect and share data can increase the chances that DATA will succeed in achieving its goals.226

To adequately address these issues, DATA should include provisions that (a) more clearly and explicitly mandate research into the continued openness and efficacy of the bill’s data reporting and dissemination systems; and (b) direct the FAST Commission to develop meaningful metrics to gauge the effectiveness and openness of the systems created under DATA.

### a. Proposed Language Mandating Ongoing Research and Analysis

To implement this accountability check into DATA, the language of the bill should include a provision within the specific functions of the Commission227 that reads as follows:

> The functions of the Commission shall include . . . (7) Awarding research grants to individuals or entities possessing like qualifications as the data expert Advisory Committee members under section 3627(b)(1)(E) for the purpose of evaluating the openness and effectiveness of the systems for gathering and reporting information under this Act and determining methods for improving such systems.

This provision would enable the FAST Commission to provide grants to organizations, like the Sunlight Foundation or OKFN, that can in turn investigate how effective the common data elements and standards chosen by the FAST Commission are and in what ways they can be improved. It could also enable such an organization to assist in developing and evolving complete and accurate metrics to evaluate DATA’s system.

Alternatively, a provision in DATA could delegate this research to the Advisory Committee to the FAST Commission with language detailing a second “Purpose” for the Committee:

> (2)(B) PURPOSE.—The substance of the findings and recommendations required under subsection (2)(A) of this section shall include the results of

226. Beth Simone Noveck, *Wiki Government: How Technology Can Make Government Better, Democracy Stronger, and Citizens More Powerful* 21 (2009) (“Decisionmaking is currently organized around the notion that the government official knows best. In reality, agencies make decisions every day without access to the best information or the time to make sense of the information they have.”); see also Robinson et al., *supra* note 46.

227. Currently drafted within the House version. *See* H.R. 2146 § 3623(b).
research conducted by the Advisory Committee for the purpose of evaluating the openness and effectiveness of the reporting systems for gathering and reporting information under this Act and determining methods for improving such systems.228

Regardless of whether this ongoing research is conducted by entities outside of government or by the Commission’s own Advisory Committee, the proposed statutory language would make sure that at least some of DATA’s $51 million annual implementation budget is devoted to evaluating the efficacy of its system. This research would contribute to finding cheaper, more efficient ways to evolve the reporting system, ensure accurate reports to Congress, and cut the costs of maintaining DATA over time.

While some may argue that the Commission and its Advisory Committee can and will conduct this efficacy research under the current language of the legislation, it is vital to note that the process of establishing data standards (which DATA requires) is one that experts suggest “should be subject to public consultation, letting developers and others help make sure the systems are open.”229 And while requiring continued analysis into DATA’s reporting and publication system230 may have the potential to slow down the FAST Commission’s implementation of DATA,231 there is significant value in figuring out how best to sustain transparency over time. The FAST Commission and its staff likely do not have the time, energy, or expertise to commit to such a task. Thus highlighting the need for outside experts or the Advisory Committee to handle this valuable analytical component is key.

b. Develop Metrics for Measuring Openness and Effectiveness Over Time

Additionally, under the “Specific Functions of the [FAST] Commission,” a provision should be added that requires the Commission to “designate metrics to measure, evaluate and improve the openness and effectiveness of the Common Data Elements, Data Reporting Standards, and the reporting and dissemination system.”232 DATA’s draft language currently notes that the FAST Commission shall “provide an opportunity for the public to provide input about the usefulness of the site and recommendations for improvement.”233 But this is arguably just an empty assurance that the FAST Commission will monitor the system for consistency with open data technology. In fact, under this draft language, something similar to the ineffective

228. The suggested text could be included within § 3627(a)(2)(B) of DATA. See id. § 3627(a)(2)(B).
229. Hendler & Noveck, supra note 79.
230. For example, DATA could require testing of the FAST Commission’s proposed designated common data elements and standards.
231. See Devaney, supra note 199 (“[W]ithout legislation, the government’s response will be a never-ending round of unobtainable consensus building and an onslaught of new pilot projects, all designed to show some action but really only masking their bureaucratic fears of losing control to a truly independent commission.”).
232. This proposed provision could also be placed under the “Specific Functions of the FAST Commission” in H.R. 2146 § 3623(b).
233. Id. § 3612(d)(3)(I).
Grants.gov customer surveys could potentially suffice. Rather, providing an express mandate to develop metrics to evaluate performance and gauge the openness of the system—as well as a means to identify ways it can be improved over time—would give teeth to DATA's current provisions. Adding such a mandate would also expand on DATA's requirement that the Commission report to Congress on the “timeliness, completeness, accuracy, and interoperability of the data submitted by each Executive agency” by ensuring that these important elements, as well as others the Commission (hopefully with consultation from the Advisory Committee and the public) deem important can be used to sustain meaningful evaluation of the openness and efficacy of the entire DATA reporting and dissemination system—not just in regard to the spending information reported by the funding agencies.

Simply saying that the public should have an opportunity to comment on the usefulness of the site is one thing; requiring that achievement of specific open data components, such as “completeness,” “openness,” “timeliness,” and “accuracy,” are measured in regard to all data reported and shared under DATA is another entirely. And mandating research using such metrics would better ensure that: (i) the public has constructive ways to provide feedback on the usefulness of USASpending.gov, (ii) the FAST Commission or its Advisory Committee has a guide for evaluating the implementation of DATA for consistency with its stated goals, and (iii) resources are not wasted updating or analyzing aspects of USASpending.gov or the Federal Accountability Portal that have no bearing on the transparency of the DATA initiative.

Critics may argue that a mandate to research is no more appropriate in transparency legislation than in any other piece of legislation. Some may say that under the current DATA bill nothing prevents the FAST Commission from ensuring that the proposed research is conducted. The argument that a research or metrics requirement is more or less superfluous, however, misses an important point. When the federal government explicitly directs, via law, the harnessing of open data technologies to make information more accessible to those inside of government and to the public, the only way to gauge whether the system is functional is to research and evaluate its effectiveness and enable a feedback loop that yields valid insight for continued improvement. Open data principles and enabling technologies are new, and their application in government even newer. Therefore, the FAST Commission and its staff do not have all of the

234. See supra Part III.A and accompanying text.
235. H.R. 2146 § 3603(d).
236. Id. § 3618(a)(4). Currently this section amends FFATA to add a requirement for the FAST Commission in relation to USASpending.gov: “[t]o the extent practicable, publish data under this section in a manner that complies with applicable principles and best practices in the private sector for the publication of open government data.” Id. Notably, the Senate version has a greater emphasis on how the prevention and detection of fraud will be conducted under DATA and includes obligations to investigate and report on the data collected. See S. 3600 § 3(e)(3). This note further advocates that a research requirement that promotes openness be made explicit in the final version of the bill because it will increase the probability that research will be done well and as a priority, thus enabling more effective fraud monitoring and prevention over time.
answers for how to make the system work. And without a specific mandate requiring them to evaluate and consistently work to improve the system, the system has the potential to become just another botched legacy.

3. Technical Data Experts

The last core element needed for DATA to be effective and consistent with open data principles is the inclusion of technical data experts from the private sector, beyond the bureaucratic walls of government, to share their successes at wielding and developing technology initiatives in the most cost-effective, user-friendly, and open ways. As discussed in Parts II and III of this note, with the development of the Internet and the prevalence of and dependency on technology within society and within the federal government, efforts to maximize government openness demand implementation of useful technology. Unfortunately, however, “public sector innovation” rarely embraces technology’s full potential, and seldom has it done so in a timely manner. In contrast, technical web and data experts in the private sector know which tools actually enable the free flow of data, and they know how to use those tools for the best results. Those possessing true “digital literacy”—those who understand the code, the web design, and the data processing and analysis—should be included in the discussion of how to design and implement a reporting and dissemination system that is as transparent as possible. These experts make their careers developing and researching the best ways to apply technology and data solutions to institutional problems, and thus could provide support to those government employees who are tasked with deciding which standards should be used in collecting data and with creating an open platform to host that data.

Those with technical expertise also know what incentivizes developers and technologists to innovate, and they can advise on ways to entice private innovators to create public-facing products and services using data released by the government.

In the 1990s, the Internet changed communication and commerce forever. A decade later, the Web 2.0 revolution created a new disruption, enabling hundreds of millions of citizens to publish, share, mix, comment and upload media to a more dynamic online environment . . . . [New technology] also provides new capabilities and opportunities to work with the public in collaboration, co-creation or oversight.

Id.

238. See supra Parts II and III.

239. “We're working to leverage the power and potential in what I call 21st century statecraft. Part of our approach is to embrace new tools . . . . But we're also reaching out to the people behind these tools, the innovators and entrepreneurs themselves.” 21st Century Statecraft, U.S. Dep’t. of St., http://www.state.gov/statecraft/overview/index.htm (last visited Sept. 25, 2012) (quoting U.S. Secretary of State Hillary Clinton’s address from Oct. 15, 2010).

240. See West, supra note 202.

241. See Dr. Alex Karp, CEO and Co-Founder, Palantir Technologies, Digital Technologies for 21st Century Democracy at the Club de Madrid Conference (Nov. 8, 2011) (discussing the need for technical advisors within government). Dr. Karp described those with digital literacy as the technicians who are capable of writing and understanding the computer code. Id.
Including technical experts in the process of implementing open data initiatives helps educate the government officials responsible for implementing open data laws and inform their efforts to shape open data policy and technology. Therefore, a relationship between the government and these private sector technical experts should be embraced in all government transparency legislation, and especially in DATA.

In order to help ensure its mandates are achieved in the most cost-efficient and transparent manner, DATA should explicitly provide a framework that fosters a relationship between the government and technical data experts in two ways: incorporate both individuals from the private sector as well as some agency CTOs and CIOs in the Advisory Committee to the FAST Commission and expand the functions of the FAST Commission to mandate consultation with both the Advisory Committee and the public in implementing DATA's requirements. Doing so will further strengthen the public-private partnership cocktail needed for DATA's success in serving as a model open data law.

a. Include Technical Experts in the Advisory Committee to the FAST Commission

DATA's current language provides that the composition of the Advisory Committee is to be made up of "no fewer than 10 and no more than 20 members" and that its members should be individuals who represent the interests of various stakeholders, from "recipients of Federal contracts, State, local, and tribal governments receiving Federal grants" to "nonprofit organizations that advocate transparency and accountability in government." However, this composition is devoid of individuals who have, or represent those with, the requisite technological open data and web expertise.

242. The House version of DATA tasks the FAST Commission with responsibilities for which technical experts would be well-suited. For example, DATA requires that the common data elements used to implement this Act "to the extent practicable, be nonproprietary." H.R. 2146 § 3611(a)(2). The current language also directs that the data reporting standards "incorporate a widely accepted, nonproprietary, searchable, platform-independent computer-readable format." Id. § 3611(b)(2)(A). DATA also advises that the adopted data reporting standards "incorporate existing nonproprietary standards, such as the extensible Business Reporting Language (XBRL)." Id. § 3611(b)(3). Lastly, in mandating online publication of the reported data, DATA directs that publication shall be "in a manner that complies with applicable principles and best practices in the private sector for the publication of open government data." Id. § 3618(a)(4). Notably, this last provision, which references best practices in the private sector, is absent from the Senate version of the bill.

243. In mandating consultation, DATA could be amended to make the Advisory Committee not subject to the Federal Advisory Committee Act, 5 U.S.C.A. app. 2 § 2, available at http://www.archives.gov/federal-register/laws/fed-advisory-committee/. Doing so may be justified given that the role of official committees' subject to the Federal Advisory Committee Act is meant to be merely advisory. In DATA and in open data legislation more generally, the government may benefit a great deal by allowing technical experts from the Advisory Committee to participate in the building or fixing of the technological system or platform being created.

244. H.R. 2146 § 3623(b)(1)(A)–(C).

245. Id. § 3623(b)(1)(D). Again, although the Senate version of DATA does not include an Advisory Committee, the ultimate version of DATA should certainly include this addition, as it can help minimize the costs of sustaining DATA over time.
Therefore, DATA should be amended to include in the Composition of the Advisory Committee a provision that reads: “Individuals who—(E) have expertise in fields such as open data, computer programming or technology, web sciences, web systems, technology policy, technology law, or related fields.” Individuals with expertise spanning these fields can bring insight that government personnel may lack.

Additionally, the Advisory Committee would benefit from the addition of CTOs and CIOs from within government to help advise the FAST Commission on applying technology to open up spending data. Agencies are already staffed, for example, with CIOs, whose functions are: “to provide policy direction, maintain the IT infrastructure of the organization, ensure proper security measures are followed, and to evaluate and control capital expenditures to facilitate the portfolio management of the organization.” CTOs, on the other hand, “provide overall awareness of technologies that can be used to advance the mission of the organization.” A bill purporting to implement technology to support the reporting and sharing of spending data should certainly draw on the expertise and experience of those individuals already in government who work in this arena.

The main objection of including technical experts from within and outside government within the Advisory Committee is that the staff members of the FAST Commission could satisfy this technical advisory role without an express provision. However, as detailed previously, government agency staff members are frequently tasked with a whole host of obligations and responsibilities. Extensively researching what the private sector believes to be best practices in publishing open government data, and then advising how, in technical terms, those principles should be framed, is a task that requires the attention and, more importantly, the expertise of more than just federal agency staff members and governmental representatives already envisioned on the Advisory Committee. Thus expressly bringing these technical experts into the DATA initiative increases the likelihood that the agency staffs will utilize these experts in carrying out the obligations under DATA. Additionally, it more readily suggests DATA will be enacted at the least cost and with the greatest efficiency.249

246. This proposed language could be included within § 3623(b)(1)(E) of DATA. See id. § 3623(b)(1)(E).


248. Id.

249. Much discussion at the Digital Technologies for 21st Century Democracy Club de Madrid conference held on November 8 and 9, 2011, focused on convincing government bodies to participate in open data initiatives when agency personnel have little time and budgets are frequently being slimmed. A solution proposed by Professor Noveck and experts presenting during the “Changing Nature of Statecraft: Impact of Big Data” breakout session was to solicit technical expertise from outside government to implement open data initiatives at little cost and with little strain on government resources. See Beth S. Noveck, Professor of Law, N.Y. Law Sch., Address at Opening Plenary Session to the Digital Technologies for 21st Century Democracy Conference (Nov. 8, 2011).
Additionally, DATA’s provision addressing the “Specific Functions of the [FAST] Commission”250 should be altered to include a provision mandating consultation with the Advisory Committee and the public. This provision could simply read as follows: “The functions of the Commission shall include each of the following, conducted in consultation with the Advisory Committee and the public—251 and be included as the introductory text to the entire section that details the functions of the FAST Commission. This would create a requirement for the Commission to consult with the members of the Advisory Committee who are outside technology experts regarding how to implement the requirements of the Act, which include designating common data elements and data standards, and collecting and publishing the information gathered online.

b. Mandatory Advisory Committee Consultation Regarding the Designation of Common Data Elements and Data Standards

Lastly, within the “Purpose” of the Advisory Committee, a provision should be added detailing the technical functions that open data web experts can serve. Specifically, these experts can provide a consulting role, gather an inventory of existing open data elements and standards to help inform the FAST Commissions, designations and help generate and mediate public input. This proposed addition would read as follows252:

(2) PURPOSE.—Those Advisory Committee members with the requisite technical expertise, as described in section 3627(b)(1)(E), shall:

(A) provide expertise to the Commission consistent with the provisions of this Act;

(2) create an inventory of examples of existing common data elements, standards, and reporting systems, whether from within the United States or in other nations; and

(3) assist the Commission in conducting public consultation consistent with the requirements of this Act.

By including these suggested changes to DATA, the legislation would have the best opportunity of ensuring that, when implemented, neither tax dollars nor government manpower is wasted determining how the information should be collected and made available. Also, relying on experts to help ensure that the DATA system is designed and implemented in the most open and transparent way helps ensure that the Federal Accountability Portal and USASpending.gov truly will be repositories of complete, accurate, and up-to-date information that agency personnel, inspectors general, and the public can use to hold the government accountable.253

250. H.R. 2146 § 3623(b).
251. Id. § 3623(b).
252. DATA could be revised to include this addition as § 3627(a)(2).
253. Anticipating the role that technical experts could play in relation to a separate government transparency project aimed at disseminating information on federal IT investments, the ITDashboard, Kundra noted
V. CONCLUSION

This note argues that for all government data transparency legislation (and particularly the DATA bill currently before Congress) to maximize government openness, such legislation should embody three core open data concepts in the language of the law: first, the language in open data legislation should account for government understanding of common data elements and standards in a way that maximizes the chances that standardization will lead to interoperability and easy comparison of data; next, open data legislation should mandate research into the efficacy and efficiency of the underlying data reporting system and public dissemination platforms; and lastly, open data legislation must foster a government relationship with technical, private sector open data and web experts to maximize the cost-efficiency and effectiveness of the technological system designed and implemented.

In conclusion, as open data initiatives within the federal government continue to grow, legislators should bear in mind the driving goals of openness, accessibility, and collaborative democracy that this note’s proposals encapsulate. These core concepts prove vital to any spending transparency legislation if it is to truly foster open, freely useable, and meaningful information in our evolving, information-driven society.

American citizens deserve to understand how our government spends collected tax dollars. And today’s technologies enable this with relative ease and at relatively low cost, especially if the government works with its citizens to improve transparency and better facilitate, reliable, data-driven decisions. Congress, in deciding whether to pass DATA, should consider this note’s suggestions on the exact language which is to be given the force of law.

And beyond spending transparency legislation at the federal level, democratic governments at various levels domestically and abroad should look to the suggestions in this note for guidance on implementing open government initiatives that embrace technology to truly maximize transparency. People in democratic societies should not be left in the dark about what their government does. Rather, they should be able to help inform their government’s actions through direct participation—be it innovation, more informed reporting, more informed voting, or idea generation. Open data initiatives make this bipartisan prospect of a collaborative democracy possible by ensuring the public has access to data that helps facilitate informed participation. And a bill like DATA, if drafted effectively, holds the potential to take these notions out of the abstract and create an atmosphere where freedom of information is more than just a constantly sought after constitutional principle—it is an easily excribable reality.

in his congressional testimony that, “[f]or the Dashboard to drive transparency effectively, it had to be easy to use . . . . We also wanted to make the Dashboard as easy as possible for agencies to update.” Transparency and Federal Management IT Systems, supra note 55. These suggestions are basic, almost common sense approaches to increasing the website’s transparency. However, in order to implement them into the ITDashboard or into an electronic repository of government spending data (like that envisioned under DATA), a relationship between government officials and the technical experts possessing the know-how to do so should be fostered.