

Esteemed members of the Legislature, members of the public, and fellow speakers.

INTRODUCTION

My name is Tom Kamenick. I am Deputy Counsel at the Wisconsin Institute for Law & Liberty, commonly known by its acronym, “WILL”. WILL is a nonprofit public interest law firm and think tank. Through education, litigation, and participation in public discourse, we seek to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society.

We have long been advocates of open government. We have filed numerous open records and open meetings lawsuits, the latest being on behalf of the Isthmus, right here in town, against the Madison Police Department. We have provided free legal advice to countless individuals and organizations on open records and open meetings issues. I am a member of the Wisconsin Freedom of Information Council. Our mission statement includes “seeking to safeguard access to information that citizens must have to act responsibly in a free and democratic society.”

Three years ago I was a panelist on the Council’s Open Government Road Show, a whirlwind tour with eight stops all around the state in three days to highlight the importance and practical use of open record and open meetings laws. The tour included representatives from across the political spectrum, including the Center for Media and Democracy, the MacIver Institute for Public Policy, and the Wisconsin Democracy Campaign.

With that background in mind, I come here today to talk to you about the importance of open government. Specifically, why transparency and access to government information is essential to liberty.

PART I – WHAT DO PEOPLE SAY ABOUT OPEN GOVERNMENT?

“Democracy dies in darkness.” “Sunlight is the best of disinfectants.” “The price of liberty is eternal vigilance.” We’ve all heard sayings like these and similar variations, but where do they come from? What do they really mean?

“Democracy dies in darkness” – you might know it as the new motto of the Washington Post. The story the Post tells is that Jeff Bezos, who owns the Post, heard it from Bob Woodward of Watergate fame, who said he had read it in a judicial decision. The Post article attributes it to a “pre-Watergate” case striking down warrantless wiretaps, and even offers a quote from the case.ⁱ

Funny thing is, that’s not right. That case doesn’t contain anything like “democracy dies in darkness” and as far as my research can tell me, no court has ever written a phrase like that. It turns out that something a bit different appeared in another case, one declaring secret deportation hearings unconstitutional. There, the court said that “democracies die behind closed doors.”

Think about what happened there for a minute. An erroneous claim about government transparency was corrected specifically because of government transparency – because court opinions are public records. And appropriately, that case extolled the virtues of open government – “When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment “did not trust any government to separate the true from the false for us.” They protected the people against secret government.”ⁱⁱ

Let's take the next quote – “Sunlight is the best disinfectant.” Now that one DOES appear in court cases, but that's not where it originated. It was coined by Supreme Court Justice Louis Brandeis, but not in a court case. Rather it appears in his book *Other People's Money and How the Bankers Use It*, which was critical of the self-interested dealings of bank executives at the expense of their investors.

The original quote goes like this – ““Publicity is justly commended as a remedy for social and industrial diseases. **Sunlight is said to be the best of disinfectants**; electric light the most efficient policeman.”ⁱⁱⁱ Variations of that phrase have appeared in literally hundreds of cases as the shibboleth of government transparency.

Finally, what about “The price of liberty is eternal vigilance”? That phrase is much older. It's been attributed to Thomas Jefferson, Thomas Paine, even Abraham Lincoln. And who knows, they might have said it, or something similar. But the earliest version we can find is attributable to Irish orator John Philpot Curran, who said this:

"It is the common fate of the indolent to see their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime."^{iv}

So what are we supposed to keep vigilant for? I disagree with Curran that a failure of vigilance will lead to an immediate consequence of servitude. Rather, the failure of vigilance leads to the slow degradation of liberty - the creeping but inexorable trend of government gathering more power to itself at the expense of individual freedoms, the topic of Hayek's *The Road to Serfdom*, which chronicled how the Nazis rose to power.

As importantly, how are we to keep vigilant? We must watch government, but please note that such an endeavor is only possible if the government is transparent so that we can watch. We have to see what government is doing. It's hard enough to discern a slowly shifting tide without the government obstructing our view. Regression cannot be resisted if it cannot be seen.

PART II – THE BENEFITS OF TRANSPARENCY

So more specifically now, what are the benefits of government transparency? Why do we want it?

We are governed by a representative democracy; the role of public officials is ostensibly to carry out the public's wishes, subject to the structural limitations on government power. A government “of the people, by the people, and for the people” operates by consent of the governed. But it is a basic principle of moral and legal thinking that to even be able to consent to something, you must know what it is you are consenting to.

It therefore follows that for consent to be meaningful, the government must be as open and honest as possible about what it is doing. At the most basic level, the electorate has a significant interest in its government's actions and, thus, should be able to ascertain what those actions are. As the Wisconsin Supreme Court has said, “Open records and open meetings laws, that is, “Sunshine Laws,” “are first and foremost a powerful tool for everyday people to keep track of what their government is up to.... The right of the people to monitor the people's business is one of the core principles of democracy.”^v

The “representative” nature of our government needs transparency, too. An informed electorate is necessary for democracy to work. The people must choose their representatives. At times they must

choose whether to exercise governmental power directly, such as by referendum or approving changes to our state Constitution. Those choices must be informed by thorough knowledge. People must know what their elected officials do, how they behave, and what their ideologies, positions, and preferences are in order to decide whether to retain them.

Another use of government transparency is looking for incentives – particularly rooting out perverse and misaligned ones. Public Choice Theory is a whole field of study seeking to explain how self-interest (of politicians, of bureaucrats, of lobbyists, even of voters) can lead to results NOT favored by the whole polity. I'm sure you've heard the phrase "follow the money" (just one aspect of public choice theory). Well that money can't be followed without government transparency. Open records and open meetings laws make the whole process more transparent, bringing that self-interest into the light. That makes it harder for decision-makers to act as captured agents of special interests.

I mentioned earlier that public officials carry out the public's wishes, but only subject to the structural limitations on government power. In America, that begins at the top with our federal and state Constitutions, but also consists of federal limitations placed on states and state limitations placed on municipalities. But those limitations must be more than just paper barriers. The USSR, for example, had a bill of rights giving people even more freedom than we have in America. But there was no enforcement of those rights, so they were worthless.

One of the most precarious problems facing our founders was how to actually ensure that the limitations they created were enforced. Their solution was the compartmentalization of government powers, "setting power against power" – division of responsibility not only between the three branches of government, but between the state and federal governments. So unlike Soviet Russia, we have methods of enforcement. But how can people know if those limits are being evaded without access to information about the government? It requires constant vigilance and access to the inner workings of government to ensure that each portion of government stays in its proper sphere of authority.

All of these benefits of transparency help keep the source of government power where it belongs – with the sovereign people. More information leads to more informed voters. More information of abuses leads to people pushing back. My job at WILL is largely to challenge government officials when they are violating people's rights at any level. Government transparency is absolutely vital to that pursuit. It often takes government records to identify and prove government misdeeds.

PART III – THE ILLS OF SECRECTIVE GOVERNMENT

I want to transition now to what happens when we don't have transparent government. And I want to begin by quoting a passage from a law review article written about Wisconsin's open records law, which puts it quite well.

"If doubts linger as to the necessity of open government, one need only consider the consequences of a government that operates behind closed doors. If the government does not remain open, it will have carte blanche to conduct its affairs. The opportunity for abuse in such a regime is manifest. In fact, many of this country's most notorious controversies have arisen in such situations. The Iran-Contra scandal, Watergate, the savings and loan scandal, and, possibly, the Clinton/Whitewater debacle all illustrate the need for open government. These political blunders may have been prevented if those involved had not believed that they could take action without informing their constituents."^{vi}

I want to begin my examples by actually turning to a fictional world – that of Harry Potter. Key to the plotline of more than one book was the Ministry of Magic’s campaign of misinformation to the public. Lying about the titular hero, Harry Potter. Lying about the return of the murderous dark wizard Lord Voldemort. Lying about the Ministry’s criminal prosecutions and security at the wizards’ prison, Azkaban. Government officials lied through their teeth in order to preserve their own skins.

Now, the series’ author, J.K. Rowling, doesn’t say anything about access to Ministry records in her books. But it’s hard to imagine the wizarding world had any open government laws at all if they could get away with their lies for so long. Open access to Ministry records could have easily dispelled the tales they were spinning.

Prosecutorial abuses occurred in the Harry Potter universe as well. People were “disappeared” by the Ministry or sent to Azkaban without basic protections of due process. Those fictional abuses are not so far-fetched. They would not be surprising at all in any society that allowed its government to operate in secret. That part of the story is not so different from China during the Cultural Revolution or of the Soviet Union getting rid of troublesome elements by sending them to the gulags.

One of the simplest ways government can abuse secrecy is to cover up its own crimes and misdeeds. Government employees already have a strong incentive to keep such things quiet – whether done by themselves, by an inferior they don’t want to take responsibility for, or a superior they don’t want to cross. The power to actually keep those actions hidden means that those abuses – which can frequently violate people’s rights – will continue unabated.

For example, look at the recent reporting of sexual harassment at UW-Madison and UW-Milwaukee, harassment that was hushed up until reporters started digging through old records.^{vii} Compare that to the state legislature, where leaders in both parties have refused to release even heavily redacted records about sexual harassment in their own chambers! What is the lesson there? What does the public learn? What do the perpetrators learn? How likely is the behavior to continue when the perpetrators know they won’t face the embarrassment of public scrutiny?

Oftentimes secrecy is justified by some greater good – or at least a claim of greater good. But good intentions often lead to unintended consequences.

For example, the Star Chamber. Who hasn’t heard of that odious secret court of the British Monarchy? Its very name has become synonymous with political oppression and abuse of power. But it was originally designed for good reasons – as a special way to prosecute prominent people that ordinary courts might hesitate to punish.

But over time its secrecy allowed it to be used in abusive ways. Defendants were forced to testify under oath, putting them under the “trilemma” of having to incriminate themselves, commit perjury, or be held in contempt for refusing to answer. Monarchs used it to persecute dissenters with no recourse. The Chamber even punished jurors from other courts who returned verdicts the government disliked. Its secrecy allowed it to use practices so violative of basic human rights that it became the justification for many of the express protections in the United States Constitution.

Let me turn from a historic abuse of secret courts to a more recent one – the John Doe process in Wisconsin. Like the Star Chamber, the John Doe process began from a worthy premise (allowing

prosecutors to undertake investigations without tipping off criminals who might flee or take measures to eliminate evidence – or witnesses), but its secrecy allowed it to be abused.

A John Doe proceeding allows for expansive and completely secret criminal investigations. Witnesses and targets alike are commanded to stay silent regarding the investigation. Unlike grand juries, however, which serve a similar purpose in other states and for the federal government, that secret process is not overseen by a lay jury, but rather by a judge.

While most John Does proceed without issue, “John Doe II”, used as a one-sided political campaign against Republicans and conservative individuals and organizations, was an unprecedented attack on individual liberty. Leave aside for a moment whether illegal behavior occurred and even whether the law should prohibit the kind of communication at issue. I’m focusing on the secret investigation process, which constantly leaked juicy details to the press while at the same time prohibiting its targets from publicly responding. Secrecy was not used as a shield in that case, but rather as a weapon.

John Doe II’s secrecy also was used to hide the individual violations of privacy, house, and home. To quote from the Wisconsin Supreme Court opinion declaring the process unconstitutional, “search warrants were executed at approximately 6:00 a.m. on October 3, 2013, in pre-dawn, armed, paramilitary-style raids in which bright floodlights were used to illuminate the targets’ homes.”^{viii}

People who had done nothing worse than engage in political speech were treated like dangerous gang leaders or drug dealers. Along with the home invasions and the appropriation of private property came ominous warnings. Don’t call your lawyer. Don’t tell anyone about this raid.

Again, government secrecy was used as a sword, not a shield – We’re going to violate your rights up and down, but you can’t tell anybody about it. And five years later **we are still learning** secrets about the investigation that the government has tried to keep hidden.

Abuse of secrecy like that is self-defeating. Excessive secrecy by the government undermines support for legitimate confidentiality. For example,

President Dwight D. Eisenhower’s administration ordered a study of government classification in an effort to prevent leaks. The report found that over-classification of innocuous information risked creating contempt for government secrecy that made leaks of genuinely sensitive documents more likely. “When much is classified that should not be classified at all,” the report concluded, “respect for the system is diminished and the extra effort required to adhere faithfully to the security procedures seems unreasonable.”^{ix}

The truth always comes out, and when people find out that government is hiding its own abuses – or even just keeping innocuous things secret that never needed to be hidden – they become less trustworthy of the government’s other claims of necessity. A limited subset of government information probably does need to be kept “top secret.” But the backlash engendered by excessive secrecy threatens to swing the pendulum too far in the other direction.

The takeaway from all of this is that all government powers can be abused. Powers are given to the government from the people, and the government must remain accountable to the people, and must therefore demonstrate how it is using those powers TO the people, so the people can judge whether those powers are being abused.

American Transparency

So what has our country done to provide for government transparency? Thankfully, it's always been a goal we've valued, although like many protections of the people, it requires constant vigilance to preserve. Early in our history we moved quickly away from the secrecy of the Constitutional Convention in 1787 to a presumption of openness of government activity. James Madison himself said

A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.^x

How about Wisconsin? As early as 1856, the Wisconsin Supreme Court recognized that the people had the right to inspect government records and that public officials had a duty to provide access to those records. In 1917, individual statutes directing specific officers to maintain records and allow public access to them were combined into a single law, our first all-encompassing open records law commanding all government records to be preserved and kept available for public review.

I'd like to conclude by quoting the preamble to the current Open Records Law, which summarizes everything I've been talking about quite well.

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.^{xi}

I want to pause and emphasize there the strength of language used. Representative government is dependent on an informed electorate – not merely benefited by it, but reliant upon it. **ALL** persons are entitled, and to what? To some information? No, **the greatest possible information**. And not only information about high ranking people who could be deemed “officers” but mere “employees” of government as well.

Quoting again –

Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information.^{xii}

Let me stop one last time there. Too often we hear about how inconvenient it is to respond to record requests. How doing so takes up so much time that could be spent on other government functions. But providing access to records isn't some tangential obligation. It's essential – a core function of government and a part of the “routine” duties that must be performed diligently. The text of the Open Records Law says records must be provided “as soon as practicable and without delay” not “when it's most convenient and if other matters aren't more pressing.”

Back to the statute –

To that end, the Open Records Law shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of

public access generally is contrary to the public interest, and only in an exceptional case may access be denied.^{xiii}

As a populace, we must stay vigilant. And fight to ensure that government secrecy is always justified and is only used as a last resort when no other means will suffice. We need to keep government secrecy as the “exceptional case” and not as the normal course of business.

ⁱ Paul Fahri, *The Washington Post's New Slogan Turns out to Be an Old Saying*, WASHINGTON POST, Feb. 24, 2017, https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html?utm_term=.ff694da3584d.

ⁱⁱ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

ⁱⁱⁱ Louis Brandeis, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT*, 92 (1914).

^{iv} John Philpot Curran: Speech upon the Right of Election for Lord Mayor of Dublin, 1790. (Speeches. Dublin, 1808.) as quoted in Bartlett's Familiar Quotations.

^v *Schill v. Wisconsin Rapids School District*, 2010 WI 86, ¶12.

^{vi} Sverre David Roang, *Toward a More Open and Accountable Government: A Call for Optimal Disclosure under the Wisconsin Open Records Law*, 1994 Wis. L. Rev. 719.

^{vii} See Nico Savidge, 'Legacy of Sexism' and Allegations of Sexual Harassment Mar UW-Madison Department, WISCONSIN STATE JOURNAL, Nov. 19, 2017, http://host.madison.com/wsj/news/local/education/university/legacy-of-sexism-and-allegations-of-sexual-harassment-mar-uw/article_220cc4f3-3b0a-575a-898d-9c63711659c8.html; Talis Shelbourne, Jennifer Rick, & Miela Fetaw, *UWM Profs, Staff Accused of Sexual Assault & Harassment but Details Hidden*, MEDIA MILWAUKEE, Dec. 31, 2017, <http://mediamilwaukee.com/top-stories/uwm-sexual-harassment-assault-uw-milwaukee-numbers-claim>.

^{viii} *State ex rel. Two Unnamed Petitioners*, 2015 WI 85, ¶28.

^{ix} Radley Balko, *Government Secrecy Undermines Government's Ability to Keep Secrets*, THE HUFFINGTON POST, June 27, 2013, https://www.huffingtonpost.com/2013/06/27/government-secrecy-secrets_n_3512665.html

^x Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *The Writings of James Madison* (Gaillard Hunt, ed.).

^{xi} Wis. Stat. § 19.31.

^{xii} *Id.*

^{xiii} *Id.*