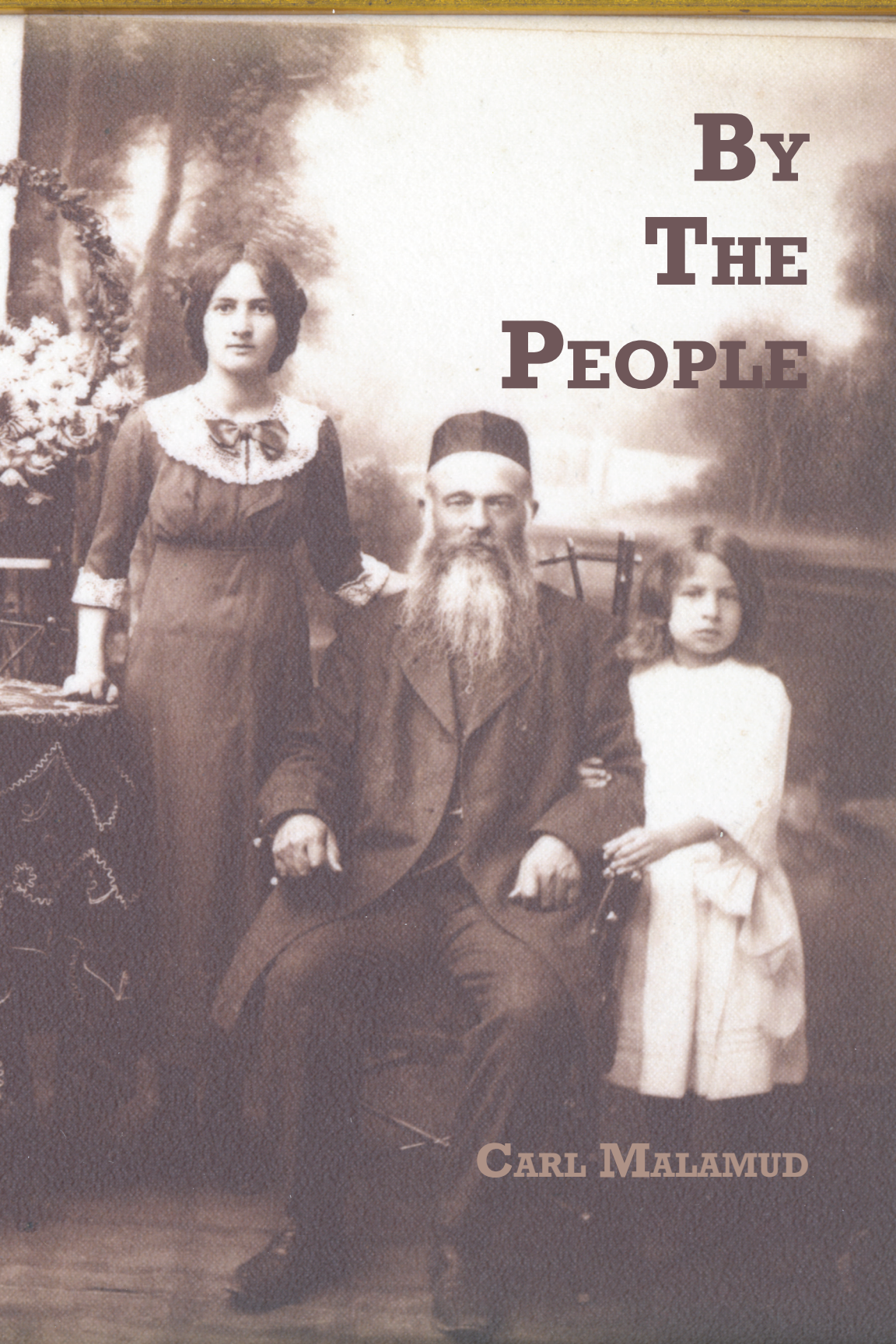

By The People

Carl Malamud

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An address to the Government 2.0 Summit
Washington, D.C., September 10, 2009
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By The People

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Carl Malamud

1. *Gettsyburg Address* in Abraham Lincoln, *Speeches and Writings 1859–1865,* Library of America (1989). For an analysis of the address, see Gary Wills, *Lincoln at Gettysburg: The Words That Re-Made America,* Simon & Schuster (1992). The definitive Lincoln is Michael Burlingame, *Abraham Lincoln: A Life (2 Vols.),* John Hopkins University Press (2008).
2. A good introduction to Franklin is Walter Isaacson, *Benjamin Franklin: An American Life,* Simon & Schuster (2003), though one should not neglect Carl Van Dorn, *Benjamin Franklin,* Viking Press (1938) nor Benjamin Franklin, *The Private Life of the Late Benjamin Franklin, LL.D. Originally Written By Himself, And Now Translated From The French,* reprinted in Benjamin Franklin, *Collected Writings,* Library of America (1793, reprinted 1987). For Thomas Paine, see David Freeman Hawke, *Paine,* Harper & Row (1974). For Paine's ideas reflected in the tenor of the times, see Eric Foner, *Tom Paine and Revolutionary America,* Oxford University Press (1976).
3. A good account of the differing perspectives of the Democratic Republican populists and the more-establishment oriented Federalists, led by Alexander Hamilton, can be found in Jeffrey L. Pasley, *The Tyranny of Printers: Newspaper Politics in the Early American Republic,* University Press of Virgina (2001). The role of printers and the press in fermenting political change is further set out in Marcus Daniel, *Scandal & Civility: Journalism and the Birth of American Democracy,* Oxford University Press (2009).
4. Adams has perhaps received a bum rap from history, though some of that reputation is self-inflicted, starting when Adams joined Benjamin Franklin in France to represent the Continental Congress. Franklin promptly wrote back that "Mr. Adams has given Offence to the Court here." Benjamin Franklin, *Letter to Samuel Huntington,* (1780). For a more sympathetic portrait, see John Patrick Diggins, *John Adams,* Times Books (2003).

By The People

1 When Abraham Lincoln spoke of "a government of the people, by the people, for the people," he was speaking of more than the consecration of a battlefield, he was speaking of a wave of transformation that was changing the way government related to the citizens it served.

2 This transformation was the second of three waves of change. The first—the Founder's wave—began when printers such as Ben Franklin and pamphleteers such as Thomas Paine dared to involve themselves in civic affairs, publishing their opinions about how government should function, the policies it should follow, daring even to say that the people should go so far as to select their own leaders.

3 This first wave of transformation culminated when Thomas Jefferson took the White House, riding in on a crest of populist sentiment, a reaction against his more button-down predecessors, George Washington and John Adams. While both Washington and Adams were revolutionaries, they were aristocratic revolutionaries, governing from the top down, an elite who favored the populace with public service by governing them.

4 John Adams took great pains to instill a sense of dignity (some said majesty) in the new offices of government. He designed an official vice presidential uniform and suggested that Washington be addressed as "Your Excellency." Adams' sense of pomp was such that the Jeffersonians took to referring to him as "His Rotundity"

5. Jefferson's dining table and informal dress habits are cited in Joyce Appleby, *Thomas Jefferson,* Times Books (2003), p. 41. While there is no direct evidence of passers-by being invited in for breakfast, Jefferson was known to be a friendly fellow and enjoyed his breakfast. See Henry Stephens Randall, *The Life of Thomas Jefferson, Volume 3,* Derby & Jackson (1858), p. 505, quoting Daniel Webster's visit to Monticello: "His breakfast is tea and coffee, bread always fresh from the oven, of which he does not seem afraid, with sometimes a slight accompaniment of cold meat."
6. Though some would argue that Lincoln's sole aims were the preservation of the Union and the abolition, or resolution through other means, of the question of slavery, an argument can be made that Lincoln was one of a series of leaders who also concerned themselves with the role of government in creating a platform for the country. See Lincoln's advocacy in the middle of the war for *The Homestead Act, The Land Grant College Act,* and *The Pacific Railway Acts of 1862 and 1864.* George McGovern, *Abraham Lincoln,* Times Books (2009), pp. 210–211.
7. A good description of the sorry state of "publik printing" in America in the years leading up to 1861 can be found in Robert E. Kling, Jr., *Government Printing Office,* Praeger Library of U.S. Government Departments (1970), pp. 13–18. See also Robert Washington Kerr, *History of the Government Printing Office,* Government Printing Office (1881).
8. Lincoln's use of Defrees as editor is detailed in Douglas L. Wilson, *Lincoln's Sword: The Presidency and the Power of Words,* Alfred A. Knopf, (2006), pp. 86–90. Lincoln and Defrees bickered over the use of everything from excessive commas to "undignified expressions" such as "sugar-coated," for which Lincoln stuck to his guns in his *Message of July 4,* saying "Defrees, that word expresses precisely my idea, and I am not going to change it." The two worked out a detente. Defrees said "he would tell me he would furnish the words—and I might put the periods to suit."

and a strong sentiment for a more representative and responsive government started to take shape.

5 When Jefferson moved into the White House after his raucous political campaign, he felt so deeply that his duty was to form a government for all the people of the United States that he abolished the formal dining table in the White House, replacing it with a round one so nobody could sit at the head. Indeed, if you happened to be walking by the White House early in the morning and knocked on the door, you might be greeted by Jefferson dressed in his bath robe, who would likely invite you in for a spot of breakfast.

6 The first great wave of transformation was a government that spoke, for the first time in modern history, directly to and with its citizens. The second wave—the Lincoln Wave—was just as fundamental.

7 The same day Lincoln was inaugurated in 1861, a new agency opened its doors, a Government Printing Office with a mission of "Keeping America Informed." Prior to Lincoln, the proceedings of government were reported by the press in a summary and sporadic fashion. The proceedings of Congress were reported by the Congressional Globe, a private enterprise, and the executive and legislative branches were reported only if it struck the fancy of a newspaperman.

8 The Government Printing Office created the first Official Journal of Government, the *Congressional Record*,

9. The growth of government from Lincoln through the New Deal was driven by countervailing forces to support yet also control the growth and consequent abuses as both government and industry scaled to ever larger sizes. These contradictory impulses led to conservative patricians such as Theodore Roosevelt taking on the mantle of trustbuster and free-enterprise businessmen such as Herbert Hoover taking on the mantle of safety regulator. Two good accounts of these times are John Milton Cooper Jr., *The Warrior and the Priest: Woodrow Wilson and Theodore Roosevelt,* Harvard University Press (1985) and Wiliam E. Leuchtenburg, *The Perils of Prosperity (2nd Ed.),* University of Chicago Press (1958).
10. The toll of the industrial revolution on workers and families is told in many forums, but much can be learned from the stories of two of the hardest hit, the bakers and the dock workers. See Maria Balinska, *The Bagel: The Surprising History of a Modest Bread,* Yale University Press (2008) and Marc Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger,* Princeton University Press (2006).
11. *141 Men and Girls Die in Waist Factory Fire; Trapped High Up in Washington Place Building; Street Strewn With Bodies; Piles of Dead Inside,* New York Times, Mar. 26, 1911, p. 1. See also Frances Perkins, *Lecture,* Cornell University (Sept. 30 1964). The number of dead varies from 141 to 148.
12. Quote is from Dorthy Sue Cobble and Michael Merrill, *Working Heroes: Frances Perkins,* AFL-CIO (2009). See also Oral History Research Office, *Interview with Frances Perkins,* Columbia University Libraries (1951–1955) and Frances Perkins, *The Roots of Social Security,* Social Security Administration Headquarters (Oct. 23, 1962), in which Miss Perkins explains how they bootstrapped the Social Security Program by misappropriating $125,000 from Henry Hopkins. Perkins was also one of the first beta users of "the new IBM machines." See Frances Perkins, *Speech on the 25th Anniversary of the Social Security Act,* Department of Health, Education, and Welfare (Aug. 15, 1960).

which recorded the floors in a full and mostly true fashion. The Printing Office also began publishing the *Foreign Relations of the United States*, the official record of the State Department, and Superintendent of Documents John Defrees even served as Lincoln's personal editor for messages of state such as the Emancipation Proclamation.

9 The Lincoln wave of transformation was one of fully documenting government, publishing the rule book that governs our society. But, it was more, it was also the beginning of a formal process of involving citizens in the workings of government, a process which culminated during FDR's New Deal.

10 This transformation in the nature of government was spurred by broader changes in society, changes that were breathtaking in scope, but often wreaked a terrible toll on workers and families.

11 In 1911, in a sweatshop on the 9th and 10th stories of a New York tenement, the nation reached a watershed. The Triangle Shirtwaist factory was a sweatshop crowded with unsafe machinery and combustible materials, with no fire escapes and the exit doors chained shut to keep workers from taking breaks. It was a powder keg that would inevitably explode in a firestorm, and it did. The Triangle Shirtwaist Fire claimed the lives of 146 garment workers.

12 Standing across the street that terrible day in 1911 was a young woman named Frances Perkins, a social worker and the executive secretary of the New York Consumers

13. Kirstin Downey, *The Woman Behind the New Deal: The Life of Frances Perkins,* Nan A. Talese (2009), p. 48. See also David Von Drehle, *Triangle: The Fire That Changed America,* Grove/Atlantic (2003).
14. Robert F. Wagner (Chairman), *Second Report of the Factory Investigating Commission,* State of New York (1913). One can argue that fire safety dates back to Benjamin Franklin. (Writing as Anonymous to himself as Editor), *On Protection of Towns from Fire,* Pennsylvania Gazette (Feb. 4, 1734). Likewise, the lore of building codes is that they reach back not only to Washington and Jefferson, but as far back as the *Code of Hammurabi,* Rule 229, "If a builder builds a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death," 1790 BC. The systematic promulgation of codes of general applicability flourished in the period after 1915 with the founding of the Building Officials and Code Administrators International (BOCA). This trend towards formal standardization reflected the broader trend in the engineering community towards the creation of private codes and laws. See Edwin T. Layton, *Revolt of the Engineers,* Press of Case Western Reserve University (1971).
15. Perkins and Smith had previously become acquainted when she lobbied the state legislature for a bill to limit the work week for women and children to 54 hours. Her first reaction upon seeing Smith in action on the floor of the Assembly was "it's a pity he's a Tammany man." Robert A. Slayton, *Empire Statesman: The Rise and Redemption of Al Smith,* Free Press (2001), pp. 83–84.

League, one of a new kind of civic organization advocating better conditions for factory workers. Perkins watched helplessly as young women, hands clasped in prayer, leapt to their deaths. Later, she recalled "the experience was seared on my mind as well as my heart—a never-to-be-forgotten reminder of why I had to spend my life fighting conditions that could permit such a tragedy."

13 Equally touched by the tragedy was a hard-boiled politician, Al Smith of Tammany Hall. Smith was horrified and formed a citizen's commission to investigate. When Theodore Roosevelt was asked who should serve as the chief investigator, Teddy thought of the young social worker he had heard so many good things about, saying "with Frances, you can't fail."

14 Perkins worked alongside a retired fire engineer—who sought her out and insisted on taking part as a volunteer—and with their commission of citizens they created the first fire code, spelling out the minimum standards of safety to be used in factories, offices, and homes. The fire code was adopted by New York City, then spread throughout the nation, joined over time by other fundamental public safety codes governing building, electricity, plumbing, elevators, boilers, and the other technical aspects of our modern society.

15 When Al Smith took the governor's seat in New York, he brought Frances Perkins with him, installing her on the new Industrial Commission, one of the first state bodies to

16. Wilson is particularly known for his reliance on the conference in international affairs, but even as governor he embraced the commission form of government for towns and cities and often broke precedent by personally attending events such as Democratic party caucuses to press his point. Robert Alexander Kraig, *Woodrow Wilson and the Lost World of the Oratorical Statesman,* Texas A&M University Press (2004). Hoover's embrace of the conference and the public/private partnership are told in F. Robert van der Linden, *Airlines & Air Mail: The Post Office and the Birth of the Commercial Aviation Industry,* University Press of Kentucky (2002), p. 9. Compelling portraits of Harding and Hoover as bureaucrats beloved by all Americans before their respective falls can be found in John W. Dean, *Warren G. Harding,* Times Books (2004) and William E. Leuchtenburg, *Herbert Hoover,* Times Books (2009).
17. Perhaps the best view of the chaos of the New Deal is through those caught in the eye of the hurricane. See in particular Frances Perkins, *The Roosevelt That I Knew,* Viking Adult (1946) and Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas,* Random House (2003).
18. *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). See also Office of the Federal Register, *The Federal Register: March 14, 1936—March 14, 2006,* National Archives and Records Administration (2006). The Brandeis warning was delivered by proxy by Ervin Grisworld, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation,* 48 Harvard L. Rev. 198 (1934).

begin regulating safety in the workplace. Perkins excelled in the post, and when Franklin Roosevelt took the governor's seat from Smith, not only did he ask Perkins to stay on, he promoted her to become one of his senior administrators.

16 This was an era where commissions and conferences became an important part of government, where citizens were consulted and their opinions heard in order to form a consensus on how government should act. Woodrow Wilson, Warren Harding, and Herbert Hoover used these boards and commissions to decide how to regulate the safety of aeroplanes, finance the creation of roads, and establish new-fangled efficiency mechanisms such as Daylight Savings Time.

17 This wave of transformation culminated when FDR moved to Washington. By then, these ideas of consultation and documentation had firmly taken root. But in the New Deal, there was chaos.

18 In 1934, the Assistant Attorney General went to the Supreme Court to argue why two oil companies should be required to obey regulations, only to find out that the government had never published those regulations. Justice Louis Brandeis sternly warned that without systematic publication of the rules, ignorance of the law would become a defense, and a new Official Journal of Government, the *Federal Register*, was created to serve as

19. While 250 years of history has been arbitrarily segregated into 3 waves, we note that the principle of broad access to the workings of government to the extent technically possible for the times would have found favor. When Thomas Jefferson was asked his view about publishing written records regarding the postal service, he replied that distribution of these documents should be "not by vaults and locks which fence them from the public eye and use in consigning them to the waste of time, but by such a multiplication of copies, as shall place them beyond the reach of accident." Thomas Jefferson, *Letter to Ebenezer Hazard,* Philadelphia (Feb. 18, 1791).
20. Pace et. al., *The Global Positioning System: Assessing National Policies,* RAND Corporation (1995). Mary C. Rabbitt, *The United States Geological Survey: 1879–1989,* Government Printing Office (1989). The emphasis on cartography as a national resource dates back to the Founders and in particular the work of the Lewis and Clark Expedition. See Thomas Pynchon, *Mason & Dixon,* Henry Holt (1997) and John Noble Wilford, *The Mapmakers,* Knopf (1981). Similar open systems were created to disseminate weather information. See Hughes Patrick, *A Century of Weather Service,* Gordon & Breach (1970).
21. The classic statement of Internet as platform is Yochai Benkler, *The Wealth of Networks: How Social production Transforms Markets and Freedom,* Yale University Press (2006). The TCP/IP protocol suite was based on the end-to-end principle and was characterized by open standards. See Saltzer, J., Reed, D., and Clark, D.D., *End-to-End Arguments in System Design,* ACM Transactions on Computer Systems, 1984, Vol. 2, No. 4 and, for the open standards argument, Malamud, *Exploring the Internet,* Prentice Hall (1993). The open protocol suite was not pre-ordained. OSI, an alternative network architecture with very different characteristics, was a strong contender to beat out TCP/IP to become the Internet. Marshall T. Rose, *The Open Book: A Practical Perspective on OSI,* Prentice Hall (*1990).*

the vehicle for systematic publication across all agencies of the regulations and notifications of the executive branch.

19 To recap this history: The first wave—the Founder's wave—established the principle that government must communicate with the people. Next, the Lincoln wave established the principles of documentation and consultation. We are now witnessing a third wave of change—an Internet wave—where the underpinnings and machinery of government are used not only by bureaucrats and civil servants, but by the people. This change has the potential to be equally fundamental.

20 This transformation has its roots in unlikely quarters. The military took one of the first definitive steps, when a series of satellite launches by the U.S. Air Force from 1978 to 1993 created a Global Positioning System to guide not only the aircraft and ships of the military services, but opened the system to make navigational information available for private cars, truck fleets, commercial aviation, and even unanticipated applications such as location-enabled telephones and digital cameras. At the same time, the U.S. Geological Survey began releasing high-quality digital maps into the public domain.

21 With the growth of the global Internet as a communications platform, opportunities arose to offer government information differently. It suddenly became possible, and then trivial, to copy entire databases and serve them in a totally different manner.

22. Tim O'Reilly, *Government as Platform,* Government 2.0 Summit (Sept.9, 2009). The Internet itself is, of course, partially a creation of government, a platform constructed in part as a vehicle for national laboratories, NASA, and other agencies to do their daily work. The interaction between early engineers and government officials is told in John Markoff, *What the Dormouse Said: How the Sixties Counterculture Shaped the Personal Computer Industry,* Viking (2005) and Katie Hafner, *Where Wizards Stay Up Late: The Origins of the Internet,* Simon & Schuster (1998).
23. John Markoff, *Plan Opens More Data to Public,* New York Times (Oct. 22, 1993), John Markoff, *Group to Widen Access to Federal Data Bases,* New York Times (Dec. 23, 1994), John Markoff, *.U.S. Is Urged to Offer More Data on Line,* New York Times (May 4, 1998), John Markoff, *U.S. to Release Patent Data On a World Wide Web Site,* New York Times (June 25, 1998). See also John Schwartz, *Idea Whose Time for Free Access Has Come,* Washington Post (June 29, 1998), James Gleick, *Washington Unplugged,* New York Times (Aug. 6, 1995), and David Bank, *Agent of Change,* San Jose Mercury News (Jan. 8, 1995).
24. The creation of the "one at a time" retail model of selling information is well-documented in Charles P. Bourne and Trudi Bellardo Hahn, *A History of Online Information Services: 1963–1976,* MIT Press (2003). Several commentators have recommended that government focus on bulk access to databases first and single-document delivery ("retail") access second. See David G. Robinson et. al., *Government Data and the Invisible Hand,* Yale Journal of Law & Technology, Vol. 11, p. 160 (2009) and Carl Malamud, *Federal Register 2.0,* Change.Gov (2009).
25. Carl Malamud, *EDGAR Access Statistics,* Internet Multicasting Service (July 31, 1995), Edward J. Markey, *Markey Applauds SEC Initiative to Put Corporate Fillings on Internet,* U.S. Congress (Aug. 16, 1995).

22 The operation of a Global Positioning System, coupled with the release by government of extensive digital maps, is an example of what Tim O'Reilly calls "government as platform," the creation of systems that are used not only by government to fulfill its own tasks, but form the basis for private activities, both for profit and not for profit.

23 An example of "government as platform" is a database I helped put on-line in the early 1990s, the Securities and Exchange Commission's EDGAR database of filings of public corporations and other financial institutions. For many years, in order to read SEC reports, one had to go to a special reading room in Washington, asking for specific documents as one would in a closed-stack library or in approaching the service window at the County Clerk's office.

24 Alternatively, one could subscribe to a few computerized retail information services, and pay the operators $30 to read just one document. In this system, the government produced products to sell, and information was viewed as a profit center for the government and for a few selected concessionaires.

25 What we found when we placed these so-called products on the Internet—for free—was that these reports were not just fodder for a few well-heeled financial professionals, a commodity used to make the Wall Street money machine function, but instead that these public reports of public corporations were of tremendous interest

26. Carl Shapiro and Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy,* Harvard Business Press (1998). The classic statement of information as the antidote to corruption in the marketplace is Louis D. Brandeis, *Other People's Money and How the Bankers Use It,* Bedford/St. Martin's Press (1914, reprinted 1995). See also William O. Douglas, *Democracy in Industry and Finance,* Speech before the Bond Club of New York (Mar. 24, 1937).
27. On the intertwined nature of government, infrastructure, and industry, the defining work is Alfred D. Chandler, *Strategy and Structure,* MIT Press (1969). An excellent history of the spread of public lighting as an act of government and a spur to industry can be found in Wolfgang Schivelbusch, *Disenchanted Night: The Industrialization of Light in the Nineteenth Century,* University of California Press (1988). See also Maury Klein, *The Power Makers: Steam, Electricity, and the Men Who Invented Modern America,* Bloomsbury Press (2008). On the importance of postal system as platform for the modern age, see David M. Henkin, *The Postal Age: The Emergency of Modern Communications in Nineteenth-Century America,* University of Chicago Press (2007) and Gerald Cullinan, *The Post Office Department,* Praeger Library of U.S. Government Departments (1968).
28. Barack Obama, *Memorandum on the Freedom of Information Act,* White House (Jan. 21, 2009).

to journalists, students, senior citizen investment clubs, employees of the companies reporting and employees of their competitors, in short a raft of new uses that had been impossible before.

26 By exposing the EDGAR database in bulk, the SEC became the platform for a host of new distribution channels, spreading the public filings into the infrastructure and helping to fulfill the SEC's mission of making our markets more efficient and transparent.

27 "Government as platform" means exposing the core information that makes government function, information that is of tremendous economic value to society. Government information—patents, corporate filings, agriculture research, maps, weather, medical research—is the raw material of innovation, creating a wealth of business opportunities that drive our economy forward. Government information is a form of infrastructure, no less important to our modern life than our roads, electrical grid, or water systems.

28 What is hopeful in what we are witnessing today is that some quarters of government appears to be embracing this new role instead of fighting it. One of President Obama's first acts was a memorandum that stated that documents should be no longer be guarded and only grudgingly released, but instead that "all agencies should adopt a presumption in favor of disclosure."

29. While the view that the current system of outsourcing the custody of primary legal materials to 3 foreign-owned multinational corporations is heartily defended by many in the legal profession, we are reminded of the statement of Thomas Paine that "a long habit of not thinking a thing *wrong,* gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defense of custom." Thomas Paine, *Common Sense,* in *Collected Writings,* Library of America (1776, reprinted 1955).
30. U.S. Courts have been extremely clear that no copyright is available to a state actor promulgating a law. See *Wheaton v. Peters,* 33 U.S. (8 Pet.) 591, 668, 8 L.Ed. 1055 (1834), "no reporter has or can have any copyright in the written opinions delivered by this Court." See also *Banks v. Manchester,* 128 U.S. 244, 9 S.Ct. 36, 32 L.Ed. 425 (1888), quoting *Nash v. Lathrop,* 142 Mass. 29, 6 N.E. 559 (1886), "[I]t needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the Justices." Lack of copyright in "private laws" such as building and other public safety codes was specifically addressed in *Veeck v. Southern Building Code Congress,* 293 F.3d 791 (Fifth Circuit, 2002). Salaries and revenues for nonprofits that create standards border on the spectacular. See National Fire Protection Association, *Form 990,* I.R.S. (2007), total revenue of $94 million and CEO compensation of $740,960.
31. See John Markoff, *A Quest to Get More Court Rulings Online, and Free,* New York Times (Aug. 20, 2007), John Markoff, *Documents of Library in Boston to Go on Web,* New York Times (Dec. 27, 2007), John Schwartz, *An Effort to Upgrade a Court Archive System to Free and Easy,* New York Times (Feb. 12, 2009).
32. For executive branch spending on PACER, see James C. Duff, *FOIA Response to Public.Resource.Org,* Administrative Office of the U.S. Courts (June 19, 2009). A survey of 66 major law libraries indicated that 63 of them carefully ration PACER use. Erika V. Wayne, *Survey of Law Libraries,* Stanford University Law Library (Aug. 17, 2009).

29 While there is much to applaud, not all is sunlight. For too long, access to public information has been a matter of access to inside information, a matter of access to money and power. There is no better illustration of this than access to primary legal materials of the United States: the court cases, statutes, hearings, regulations, codes, administrative decisions, and other materials that define the operating system of our society, the law of the land.

30 When access to primary legal materials are contracted out to private concerns, as when a state court gives an exclusive contract to a corporation to publish its opinions or when a safety code becomes a revenue opportunity for a nonprofit paying million-dollar salaries, the public domain becomes private property, fenced off to extract value for a few, instead of open as a common good for us all.

31 We have seen this dramatically in the practice of law, where lawyers in public interest law firms and in government agencies—even the Department of Justice—carefully ration their use of the federal judiciary's PACER database and of the three retail services that monopolize the legal market. They limit their use because of cost considerations, meaning they are more poorly prepared than their adversaries from the private sector.

32 The costs are not insignificant. The Administrative Office of the Courts has charged the executive branch $50 million simply to access district court records. Law schools

33. Public.Resource.Org and Creative Commons purchased 50 years of circuit court decisions for $600,000. See Cory Doctorow, *1.8 Million Pages of US Federal Case Law To Go Online For Free,* Boing Boing (Nov. 14, 2007). An offer for a collection of Federal opinions, including District Court opinions equivalent to F. Supp, was made by [redacted], one of the larger vendors, for $6.5 million. Public.Resource.Org declined that offer due to lack of funds. See also Cory Doctorow, *Oregon: our laws are copyrighted and you can't publish them,* Boing Boing (Apr. 15, 2008), Cory Doctorow, *Begging states to try to enforce ridiculous assertion that the law is copyrighted,* Boing Boing (Sept. 3, 2008), Cory Doctorow, *Public Resource demands the source code to America's operating system,* Boing Boing (July 13, 2009). Shrink-wrap agreements on standards incorporated by reference have become common. See American Society of Mechanical Engineers, *Safety Code for Existing Elevators and Escalators,* ASME A17.3–2002, "Opening this sealed package constitutes your acceptance of all the terms and conditions… Licensee may not lease, publish, assign (whether directly or indirectly, by operation of law or otherwise), create derivative works from the Product or any portion thereof." See State of Texas, *Texas Administrative Code, Rule 135.53* (June 18, 2009), "the elevator recall smoke detection system in existing ambulatory surgical centers (ASCs) shall comply with requirements of ASME/ANSI A17.3, Safety Code for Existing Elevators and Escalators, 2002 edition."
34. Public access to PACER data led to the uncovering of substantial privacy issues in 30 District Courts. See Carl Malamud, *Letter to Judge Rosenthal re Audit of District Courts,* Public.Resource.Org (Oct. 24, 2008), Peter Martin, *Letter to Judge Rosenthal re Audit of District Courts,* Cornell University School of Law (Nov. 17, 2008), Senator Joseph I. Lieberman, *Letter to Judge Rosenthal re Audit of District Courts,* U.S. Senate (Feb. 27, 2009), James C. Duff and Lee H. Rosenthal, *Letter to Senator Lieberman,* Judicial Conference of the United States (Mar. 26, 2009), Noel J. Augustyn, *Enhanced Notice of Attorney Redaction Responsibility,* Administrative Office of the U.S. Courts (July 23, 2009).

all carefully ration their use of PACER because the cost make it unworkable for them to grant law students the ability to read the proceedings of our federal trial courts at will. The Administrative Office of the Courts itself spends $150 million to access U.S. law from private contractors, a small fraction of the $10 billion per year Americans spend to access the raw materials of our democracy.

33 This is an issue of fundamental importance under our constitution. How can there be equal protection under the law or due process under the law—how can we be a nation of laws, not a nation of men—if the law is locked up behind a cash register, stamped with an unwarranted copyright assertion, and then shrink-wrapped in a license agreement, creating private parcels from the public domain? To purchase in bulk a collection of legal materials costs tens of millions of dollars, a barrier to competition that has resulted in decades of lost innovation for the legal profession.

34 The fees for bulk legal data are a significant barrier to free enterprise, but an insurmountable barrier for the public interest. Scholars, nonprofit groups, journalists, students, and just plain citizens wishing to analyze the functioning of our courts are shut out. Organizations such as the ACLU and EFF and scholars at law schools have long complained that research across all court filings in the federal judiciary is impossible, because an eight cent per page charge applied to tens of millions of pages makes it

35. Carl Malamud, *Loaner Agreement for the SEC,* Internet Multicasting Service (Sept. 11, 1995).
36. See also Appendix A, *29 Things The Government Could Do Today.* Numerous other lists of actionable items exist at organizations such as the Sunlight Foundation.
37. See Ryan Singel, *Firefox Plug-In Frees Court Records, Threatens Judiciary Profits,* WIRED (Aug. 14, 2009), Martha Neil, *Tired of Paying for PACER Docs? Princeton Group Offers Alternative,* ABA Journal (Aug. 14, 2009), Ryan Paul, *Firefox Extension Liberates US Court Docs From Paywall,* Ars Technica (August 14, 2009).
38. "Public Means Online" is a slogan from Andrew Rasiej, *Opening Welcome,* Personal Democracy Forum (June 29, 2009). For efforts to place more government video on the Internet, see Carl Malamud, *Report to Speaker Pelosi,* Public.Resource.Org (Mar. 13, 2007), Carl Malamud, *All the Government's Information,* Google Tech Talks (May 24, 2006), Nancy Pelosi, *Letter to Carl Malamud re FedFlix,* U.S. Congress (Apr. 17, 2008), Carl Malamud and Donald Hagen, *Joint Venture NTIS–1832,* National Technical Information Service (Nov. 2, 2007, extended May 14, 2009), Andrew Noyes, *FedFlix Video Project Gains Steam,* National Journal (July 6, 2009).

prohibitive to identify systematic discrimination, privacy violations, or other structural deficiencies in our courts.

35 Access to the law, and more broadly access to the workings of government, the fundamental databases and systems that make up government as a platform for our society, is about more than economic activity, more than improving democracy and justice, it is an opportunity for citizens to help make government more efficient. For example, when we operated the SEC EDGAR database, it was our pleasure to turn all our source code over to the government—and even configure the SEC's routers and loan them hardware—a service we gladly performed at no charge as part of our mission as a 501(c)(3) nonprofit.

36 I would like to leave you with three propositions that should be true in a democratic society, challenges our government can and should address today:

37 First, if a document is to have the force of law, it must be available for all to read. Artificial restrictions on access are not appropriate for the law of the land. The federal judiciary, in particular, must make their data much more broadly available or they will find others owning their databases, claiming authority and authenticity that should emanate directly from the courts themselves. This is a foundational issue, one that goes to the very heart of our system of justice.

38 Second, if a meeting that is part of the law-making process is to be truly public, in this day and age, that

39. Although the most pressing concern for transparency of public meetings in Washington, D.C. rests with the legislative branch due to the sheer number of hearings, a strong argument can be made that a lack of cameras in the Supreme Court permits only those well-heeled law students who happen to be enrolled in school Inside the Beltway to attend oral arguments, which feature the best legal practitioners in the country at the top of their form, while depriving poorer students of the same experience. See Fred Rodell, *TV or No TV in Court?* reprinted in *Rodell Revisted: Selected Writings of Fred Rodell,* Fred B. Rothman (1994). See also, Brian P. Lamb, *Letter to Chief Justice William Rehnquist,* C-SPAN (1988), Brian P. Lamb, *Letter to Chief Justice John G. Roberts,* C-SPAN (2005). The UK Supreme Court has recently confirmed its proceedings will be televised. See Dominic Casciani, *Inside the UK Supreme Court,* BBC (July 15, 2009).
40. A patchwork of uneven policies in states and municipalities has fragmented the "market" for access to primary legal materials. For example, California asserts copyright over the California Code of Regulations with an exclusive contract with West for commercial publication. See Office of Administrative Law, *Paperwork Reduction Act Response to Public.Resource.Org,* State of California (June 4, 2009). Likewise, exclusive rights to publish California Title 24 public safety codes have been farmed out to 3 different organizations. See Building Standards Commission, *State Building Standards Code Agreement Between California Building Standards Commission and the International Code Council,* State of California (Aug. 1, 2007). See also Noam Cohen, *Who Owns the Law? Arguments May Ensue,* New York Times (Sept. 28, 2008).
41. A variety of legislative proposals could be used to enshrine into law or directive the 8 Principles. See Ad Hoc Working Group of 30, *8 Principles of Open Government Data,* Public.Resource.Org (2008). Given the sheer number of lawyers working in the federal government, combined with the 200 ABA-approved law schools (many of which receive state support), there is an opportunity to exercise the power of the purse to create an alternative means for distributing and accessing primary legal materials.

means it must be on the Internet. Today, public means online. When Congress holds hearings, hearings that lead to laws that we must all obey, those hearings must take place in a forum that all may attend and observe. Today, they do not.

39 If you want to attend a hearing today, you'd best live inside of the Beltway and have the means to hire somebody to guard your place in line. When Congress does webcast, the efforts are half-hearted and of poor quality. Many committees webcast a few select hearings, but then systematically withdraw their archives from the net. Shielding hearings from the public eye reduces the legitimacy of the Congress. Broadcast-quality video from every hearing should be made available on the Internet so our legislative process becomes more visible to all Americans.

40 Third, the rule of law in our federalist system is a matter that applies to all three branches of the federal government, and also to all 50 states and the local jurisdictions. The principle that primary legal materials should be available to all is a principle that needs to be driven by the leadership of the executive branch and applied to all levels of government.

41 Our new administration has many noted constitutional scholars—Solicitor General Kagan, Attorney General Holder, President Obama—who must surely understand the importance of making America's operating system

42. The author would like to thank Martin R. Lucas for his careful review and helpful comments and the Sunlight Foundation, Elbaz Family Foundation, and Omidyar Network for their generous support. The author would also like to thank for their comments and suggestions Sally Greene, Clay Johnson, Paul Jones, Lawrence Lessig, Ellen Miller, Tim O'Reilly, Tim Stanley, and Nathan Torkington. All errors of fact and historical interpretation remain the sole responsibility of the author. Cover photograph of the author's great-grandparents taken in Kishinev, Moldova (1911).

open source. Through litigation, legislation, and executive memorandum, the Administration could and should lead a fundamental reform in how we make our laws available to our citizens, turning the private enclaves of today into the public parks of tomorrow.

The promise of the Internet wave is the promise of an opportunity for more efficient government, for more economic activity, and for a better democracy. Artificial and unjust limits on access to information based on money and power can be abolished from our society's operating system, giving us at long last a government that truly is of the people, by the people, and for the people.

Appendix A

29 Things Government Could Do Today

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A1 OMB Circular A-130 should be modified to specify 3 levels of distribution for government data: first government makes bulk data available; second, government creates an API to access the bulk data; third, government builds a web site using their own API.

A2 The 8 Principles of Government Bulk Data should be encoded into law, supplementing the case-by-case access of the Freedom of Information Act with basic principles of distribution for all government information.

A3 The House of Representatives Broadcast Studio contains hundreds of congressional hearings. Congress should make this archive available to digitize so we can re-release this important historical material back into the public domain.

A4 When Congress webcasts, they usually use proprietary webcast technologies, such as Real Video. But, all of these proprietary solutions also contain the capability to encode content in less-proprietary formats, such as MPEG4. All committees in the U.S. Congress that webcast should be required to switch to open formats.

A5 Broadcast-quality video from Congressional hearings could be made available today for download by FTP for selected committees. Congress should start trials now instead of continuing to delay.

A6 Credentials to broadcast or film congressional hearings are controlled by the Radio-TV Correspondents Gallery, governed by a committee of old media stalwarts. It is no surprise "new" media are always denied credentials. Congress should reform the credentials process.

A7 The Supreme Court should install their own cameras to provide footage of oral arguments. Allowing print reporters and releasing audio, but refusing to provide video is an artificial barrier on access that is elitist, benefiting those who live and work inside of the Beltway at the expense of the rest of America.

A8 All PDF documents entered into the judiciary's PACER system should be signed by the court indicating when they are received and showing that no changes to the documents have been made since filing.

A9 All PACER documents should be made available to the Federal Depository Library Program so that libraries might archive and preserve the records of the federal judiciary.

A10 A complete audit of the PACER system for privacy violations, such as Social Security Numbers, names of minor children, and improperly unsealed documents should be conducted as a matter of pressing urgency.

A11 Bulk access to the PACER system should be provided to allow download of large numbers of documents.

A12 The PACER system brings in far more in revenue than it costs to operate the system. Even if free access is not provided, costs should be immediately reduced to comply with the law.

A13 The Federal Judicial Center spends millions of dollars producing video that is only available on J-Net, an intranet that reaches only courtrooms. This educational material should be made available to the public on the Internet.

A14 The Librarian of Congress, Smithsonian Secretary, National Archivist, and Public Printer should get together to create a public domain video library.

A15 The Government Printing Office should make press-quality PDFs available of any documents they print that are not subject to security or privacy considerations. In particular, press-quality masters for any high-end books should be made available so the private sector can reprint and repurpose them.

A16 The Government Printing Office runs an Institute of Federal Printing right next to Union Station. They should dramatically upgrade the program into a U.S. Publishing Academy that provides comprehensive training to the rest of the government on how to publish and communicate effectively.

A17 The Government Printing Office has infinite power in its downtown location and is directly on most major fiber routes. GPO should put in an extensive machine room in cooperation with other government "cloud" efforts at GSA and NASA.

A18 Congressional computer systems are so antiquated that House mail accounts are limited to 200 Mbytes. The Government Printing Office should provide 1 petabyte of disk to the Congress.

A19 The Federal Depository Library Program archive should be immediately scanned and the legislation governing FDLP modified so that dual regional repositories per state are no longer required.

A20 The Library of Congress should withdraw copyright assertions and stop charging for bibliographic data and copyright registration databases.

A21 Binders for all U.S. Patents should be digitized and released in bulk at no charge. Binders contain the application, any rulings, the grant, and any appeals for a patent.

A22 The IRS should stop selling non-profit tax returns as a series of DVDs containing one TIFF file per page and should instead publish PDF files for FTP access at no charge.

A23 The CIO in the Executive Office of the President should fund the immediate creation of an open source redaction toolkit built on top of open source OCR software such as Tesseract.

A24 The Official Journals of Government should be modified to include basic formatting features such as indented lists, tagging of dates, and tagging of cross-links.

A25 The Smithsonian has 6,288 public domain photographs available as high-resolution scans. They should release those photos back in the public domain and lead in the creation of a public domain stock footage library for creative applications such as films.

A26 The Smithsonian should host a Maker Faire on the National Mall to spotlight the "risk-takers, the doers, the makers of things" both inside and outside of government.

A27 OMB should periodically audit all government web sites for broken links, invalid HTML, and Section 508 violations and publish ranked charts of how different departments compare with each other.

A28 The State Department should commission an immediate audit of the U.S. Passport and Secure Travel Document programs to assess if the use of RFID chips pose a danger to the bearers.

A29 Private and proprietary law should not be used in federal or state law. Incorporation by Reference of standards from bodies such as ANSI or Underwriters Laboratories should only be allowed if the underlying standards are made freely available.

A long habit of not thinking a thing WRONG, gives it a superficial appearance of being RIGHT, and raises at first a formidable outcry in defense of custom.

Thomas Paine, Common Sense (1776)