

A Glimpse of Transparency in the USA

| by Ng Liang Yean |

Like many people, my first image of the US was the Statue of Liberty. What I did not know is that it was designed by Frédéric Auguste Bartholdi and originally envisioned for Egypt, but ultimately ended up on Liberty Island, New York. This national monument has represented freedom from tyranny, financial hardship and suffering for many immigrants since the late 1800s. This was one of the many eye-opening facts and facets of the US that I discovered in my journey with the International Visitor Leadership Program.

International Visitor Leadership Program

The IVLP, as it is known, is the premier professional exchange programme of the Department of State,¹ basically the federal executive department of the US. Through short-term visits to the US, current and emerging foreign leaders in a variety of fields are given the opportunity to experience the country first-hand and cultivate lasting relationships with their American counterparts.²

The IVLP usually involves delegates from different countries around the world. Last year, however, the US Department of State organised the “Transparency and Accountability in Government” program, catered specifically for delegates from Malaysia, in the wake of the change in government post-GE14 and the Pakatan Harapan government’s objective to fight corruption and enhance transparency in administration. I was nominated by the Institutional Reforms Committee (IRC) and subsequently selected through interview to participate in the IVLP. There were 10 participants in all, comprising lawyers and political officers from all over Malaysia.

Over a span of 21 days (25 August to 15 September 2018), we visited five cities across the US and attended meetings with various governmental agencies, institutions and stakeholders. The aim was to network and learn how these bodies work hand-in-hand and make up the checks and balances to ensure government transparency and accountability at national and state levels. The IVLP highlighted best practices and case studies in the US, which provided relatable and practical examples on how to establish regulations and processes that promote good governance. Our first stop was Washington, DC, followed by New York, Cleveland, Reno and, finally, Seattle. We had about 40 meetings which were all informative, and for the purposes of this article, I will highlight a few that offered unforgettable insights for me.

The United States Government

In Washington, DC, a meeting with Mr Akram Elias corrected most of our misconceptions of governance in the US. As president and founder of Capital Communications Group, a full-service international consulting firm, he briefed us on American federalism, separation of powers, rule of law and judicial independence.

The US is far from being a unified entity, contrary to how most Malaysians like me would view it. In fact, it operates on a highly decentralised system whereby the Congress (its legislative branch) will only legislate on matters specified in Article I, Section 8 of the Constitution such as national defence, monetary policy, foreign affairs and regulation of commerce with foreign nation and among several states. All remaining powers belong to the individual states. Some states even pass legislation that directly go against the federal government and may initiate legal proceedings against the federal government.

1 United States Department of State Bureau of Educational and Cultural Affairs Exchange Programs, ‘At-a-Glance’ <<https://exchanges.state.gov/non-us/program/international-visitor-leadership-program-ivlp>> (accessed 31 July 2019)

2 *Ibid*

The “united states” federal government is premised upon the idea of collaboration between the states, rather than a top-down hierarchy that is more the Malaysian experience. The objectives of having a highly decentralised system are manifold:

- (1) to allow for the government to be closer to the people for more effective and efficient governance;
- (2) to enable each state to tailor its system based on local lifestyle, culture and identity; and
- (3) in recognition of each state’s powers to determine future direction of the state, independent of the federal government.

Public Acquisition of Land

Our meeting with the American Bar Association (ABA) exposed us to the process for public acquisition of land in the US. There are two types of acquisition in this respect – eminent domain and inverse condemnation.

Eminent domain refers to the power of the government to take private land for public use, provided that just compensation is given to the landowners. There are prescribed procedures that differ from state to state and at the federal level. With this method, the government acts like a private purchaser and negotiates with the landowner. If the negotiation is unsuccessful, the government will file a suit to acquire the land. Depending on state-specific procedures, a just amount of compensation will be determined by an independent commission, sitting judge or civil jury. The burden of proof is on the government to show that the acquisition is necessary and has a true public purpose. This ensures that the acquisition is objective, consistent with public needs, and not influenced by personal interest.

On the other hand, inverse condemnation is where a landowner files a suit against the government to recover

just compensation for his land taken by the government. This happens when the government acquired the private land without following proper procedures and providing just compensation. Given the strong judicial independence in the United States, inverse condemnation enables landowners to protect their own interests and hold the government accountable for its actions.

Whistleblowing

As long ago as 30 July 1778, the Continental Congress passed what could very well be the world’s first whistleblower law.³ Hence, on the same day annually, the US celebrates its National Whistleblower Appreciation Day to commemorate and recognise whistleblowers whose honourable actions have protected Americans from fraud and malfeasance. The culture of whistleblowing has gained strong political support from all sides in the US government. Therefore, there have been extensive efforts to encourage people to whistleblow and also to protect the whistleblowers.

The National Whistleblower Center (NWC) is a non-profit, tax-exempt and non-partisan organisation that has advocated whistleblowing for over 30 years. One of the most insightful points highlighted during our meeting with the NWC is the existence of *qui tam* lawsuits under the False Claims Act (FCA). *Qui tam* is the Latin abbreviation for “who sues on behalf of the King as well as for himself”. The word is used to empower citizens to act in the name of the sovereign or government when the government is not taking action. *Qui tam* lawsuits are based on the theory that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting under the strong stimulus of personal ill will or the hope of gain.⁴ In a *qui tam* lawsuit, the whistleblower will receive a monetary reward when the action is successful in recovering government funds.

³ National Whistleblower Center, “Celebrate National Whistleblower Appreciation Day!” <<https://www.whistleblowers.org/news/celebrate-national-whistleblower-appreciation-day/>> (accessed 11 August 2019)

⁴ *United States v Griswold* 24 F. 361, 366 (D. Or. 1885)

The FCA also provides job protection to whistleblowers who file *qui tam* complaints because of the professional and personal risks they take. To protect the identity of the whistleblower, a *qui tam* lawsuit is filed under seal, keeping its content confidential, and the complaint is not served on the defendant. While total anonymity is not provided for under the FCA, the *qui tam* lawsuit is not open to public scrutiny. It is only visible to courts, government prosecutors and the whistleblower's lawyer.

Interestingly, the NWC does not only respond to whistleblowing within the US but also to whistleblowing by foreign nationals. Under the Foreign Corrupt Practices Act (FCPA), US firms and individuals are prohibited from paying bribes to foreign officials to obtain or retain business. Whistleblowers, including foreign nationals, are permitted to apply for monetary rewards based on reporting bribery prohibited under the FCPA.⁵

Transparency

The openness of government in the US is manifested in diverse ways at the state and federal levels.

Performance measurement

When we were in Seattle, we had the opportunity to learn about Results Washington (RW), an organisation that carries out performance measurement on the government in the state of Washington. It works with state agencies to track and report data for key issues such as education, economy, health and safety, and the environment. The performance indicators and results are then published on its website. Every month, the governor of Washington will hold a review session of the data collected, which is televised by TVW, Washington's television network and channel that specialises in airing public affairs of the state. TVW provides gavel-to-gavel coverage of state legislature sessions, Supreme Court sessions and other public events. It is modelled after C-SPAN, the national-level

cable and satellite television network that televises many proceedings of the federal government, political events and public affairs programmes.

Sunshine Laws

During our visit to Cleveland, we were enlightened by the Inspector General of the Cuyahoga County on the "Sunshine Laws" of Ohio. The Sunshine Laws refer to Ohio's public records and open meeting laws — the Public Records Act and the Open Meetings Act. Under the Public Records Act, any person can request for a document, device or item created or received by or coming under the jurisdiction of any public office of the state, or its political subdivisions, which serves to document the organisation, functions, policies, decisions, procedures, operations or other activities of the office.

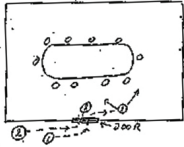
The person making the request does not have to provide any reason and the law requires that the public offices must provide copies of the requested records within a reasonable time and without delay. In addition, public bodies are obligated under the Open Meetings Act to give appropriate notice of its meetings, conduct all deliberations upon official business only in open meetings where the public may attend and observe, and keep and maintain meeting minutes. Secret ballots, whispering of public business and "round-robin" discussions are all prohibited. Any decision made in secret will be invalid.

Declassification

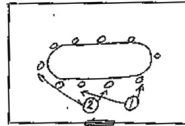
The meeting with Mr Nate Jones from the National Security Archive was eye-opening. We were seated around a conference table. Mr Jones then placed a page from the Central Intelligence Agency (CIA)'s assassination manual entitled, "A Study of Assassination" (1953) in front of each of us. "You could be killed this way," he joked.

5 National Whistleblower Center, "The Foreign Corrupt Practices Act and Whistleblowing" <<https://www.whistleblowers.org/know-your-rights/international-whistleblower/>> (accessed 11 August 2019)

CONFERENCE ROOM TECHNIQUE

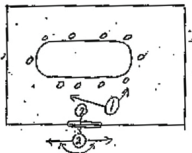


1. (1) Enters room quickly but quietly
- (2) Stands in doorway

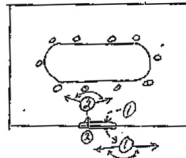


2. (2) Opens fire on first subject to react. Swings across group toward center of mass. Times burst to empty magazine at end of swing.

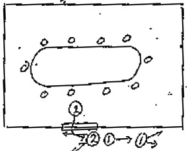
- (1) Covers group to prevent individual dangerous reactions; if necessary, fires individual bursts of 3 rounds.



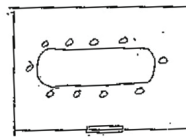
3. (2) Finishes burst. Commands "shift." Drops back thru [sic] door. Replaces empty magazine. Covers corridor.
- (1) On command "shift", opens fire on opposite side of target, swings one burst across group.



4. (1) Finishes burst. Commands "shift". Drops back thru [sic] door. Replaces magazine. Covers corridor.
- (2) On command "shift", re-enters room. Covers group: kills survivors with two-round bursts. Leaves propaganda.



5. (2) Leaves room. Commands "GO". Covers rear with nearly full magazine.
- (1) On command "GO", leads withdrawal, covering front with full magazine.



- 6.

An excerpt from "A Study of Assassination" (1953).

Reading the page on "Conference Room Technique" for assassination sent chills down my spine. It took me awhile to accept that this was a non-fictional, government document. It was an impactful moment. It prompted me to ponder on the significance of public

access to government documents for transparency and accountability. The assassination manual was among numerous controversial government records declassified pursuant to requests under the Freedom of Information Act (FOIA). The FOIA was signed into law by President Lyndon Baines Johnson in 1966, and has since played an important role in keeping the government transparent and accountable.⁶ It provides US citizens with a statutory right to access government information from any executive branch agency, although there are statutory exemptions. Redactions are allowed in certain categories of information, such as that involving national security and personal privacy. A requester does not need to provide any reason when making a request.

We were told that a request is made by completing a form. It is a fairly straightforward process. If the initial request is rejected by the government or if the information disclosed is greatly redacted, there is an avenue for administrative appeal to court. The appeal comes in the form of a formal letter and the National Security Archive frequently assists in making such appeals.

Contrary to my initial impression, given its name, the National Security Archive is neither established nor funded by the government. It is incorporated as an independent, non-profit organisation. Funding comes from its publication revenues and grants from individuals and foundations. Among its impressive accomplishments, the National Security Archive has spurred the declassification of over 10 million pages of government documents through 60,000 FOIA requests.⁷ Whenever the National Security Archive receives an important and newsworthy document that is declassified, it will contact the press and media to publish it and spread awareness to the public. It was fascinating to learn that, apart from journalists and historians, FOIA requests were mostly made by corporations. Corporations usually request to examine decision-making documents relating to grants of contracts and patents, to find out where they failed.

6 History.com Editors, "Freedom of Information Act" (21 August 2018) <<https://www.history.com/topics/1960s/freedom-of-information-act>> (accessed 12 August 2019)
 7 National Security Archive 'Accomplishments' <<https://nsarchive.gwu.edu/accomplishments>> (accessed 12 August 2019)

Reflections

From legislation to television, I was impressed by the freedom of information and the generosity of space accorded to Americans to voice out their discontent against government without fear. The level of public involvement in holding government accountable in the US, especially through NGOs, is something the country can brag about. These NGOs are legitimate watchdogs who are taken seriously by the government. They are also generously funded by the public. In contrast, the inconvenient truth in Malaysia is that NGOs tend to be perceived or regarded as agitators and instigators of hatred against the government. More should be done to recognise and support their efforts in protecting public interest and human rights. As Franklin D Roosevelt once said:

“Let us never forget that government is ourselves and not an alien power over us. The ultimate rulers of our democracy are not a President and senators and congressmen and government officials, but the voters of this country.”

Malaysia has made but a first small step in the last election to move towards transparency, accountability and a healthier check and balance of power. **LH-AG**

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Group photo with other IVLP participants and our liaison officers, Zilda and Renee
(L-R: Jay Jay, Razi, Charmaine, Wei Ling, Jamilah, Zilda, Renee, Yean, Anis, Brenndon, Ulya, Hariri)



Meeting with the American Bar Association



Visit to a retired judge's home in Reno, Nevada