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Secrecy in the Bush Administration

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SECRECY IN THE BUSH ADMINISTRATION

PREPARED FOR

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EXECUTIVE SUMMARY

Open and accountable government is one of the bedrock principles of our democracy. Yet virtually since inauguration day, questions have been raised about the Bush Administration's commitment to this principle. News articles and reports by independent groups over the last four years have identified a growing series of instances where the Administration has sought to operate without public or congressional scrutiny.

At the request of Rep. Henry A. Waxman, this report is a comprehensive examination of secrecy in the Bush Administration. It analyzes how the Administration has implemented each of our nation's major open government laws. The report finds that there has been a consistent pattern in the Administration's actions: laws that are designed to promote public access to information have been undermined, while laws that authorize the government to withhold information or to operate in secret have repeatedly been expanded. The cumulative result is an unprecedented assault on the principle of open government.

The Administration has supported amendments to open government laws to create new categories of protected information that can be withheld from the public. President Bush has issued an executive order sharply restricting the public release of the papers of past presidents. The Administration has expanded the authority to classify documents and dramatically increased the number of documents classified. It has used the USA Patriot Act and novel legal theories to justify secret investigations, detentions, and trials. And the Administration has engaged in litigation to contest Congress' right to information.

The records at issue have covered a vast array of topics, ranging from simple census data and routine agency correspondence to presidential and vice presidential records. Among the documents that the Administration has refused to release to the public and members of Congress are (1) the contacts between energy companies and the Vice President's energy task force, (2) the communications between the Defense Department and the Vice President's office regarding contracts awarded to Halliburton, (3) documents describing the prison abuses at Abu Ghraib, (4) memoranda revealing what the White House knew about Iraq's weapons of mass destruction, and (5) the cost estimates of the Medicare prescription drug legislation withheld from Congress.

There are three main categories of federal open government laws: (1) laws that provide public access to federal records; (2) laws that allow the government to restrict public access to federal information; and (3) laws that provide for congressional access to federal records. In each area, the Bush Administration has acted to restrict the amount of government information that is available.

Laws That Provide Public Access to Federal Records

Beginning in the 1960s, Congress enacted a series of landmark laws that promote “government in the sunshine.” These include the Freedom of Information Act, the Presidential Records Act, and the Federal Advisory Committee Act. Each of these laws enables the public to view the internal workings of the executive branch. And each has been narrowed in scope and application under the Bush Administration.

Freedom of Information Act

The Freedom of Information Act is the primary law providing access to information held by the executive branch. Adopted in 1966, FOIA established the principle that the public should have broad access to government records. Under the Bush Administration, however, the statute’s reach has been narrowed and agencies have resisted FOIA requests through procedural tactics and delay. The Administration has:

- Issued guidance reversing the presumption in favor of disclosure and instructing agencies to withhold a broad and undefined category of “sensitive” information;
- Supported statutory and regulatory changes that preclude disclosure of a wide range of information, including information relating to the economic, health, and security infrastructure of the nation; and
- Placed administrative obstacles in the way of organizations seeking to use FOIA to obtain federal records, such as denials of fee waivers and delays in agency responses.

Independent academic experts consulted for this report decried these trends. They stated that the Administration has “radically reduced the public right to know,” that its policies “are not only sucking the spirit out of the FOIA, but shriveling its very heart,” and that no Administration in modern times has “done more to conceal the workings of government from the people.”

The Presidential Records Act

The Presidential Records Act, which was enacted in 1978 in the wake of Watergate, establishes the important principle that the records of a president relating to his official duties belong to the American people. Early in his term, President Bush issued an executive order that undermined the Presidential Records Act by giving former presidents and vice presidents new authority to block the release of their

records. As one prominent historian wrote, the order “severely crippled our ability to study the inner workings of a presidency.”

The Federal Advisory Committee Act

The Federal Advisory Committee Act prevents secret advisory groups from exercising hidden influence on government policy, requiring openness and a balance of viewpoints for all government advisory bodies. The Bush Administration, however, has supported legislation that creates new statutory exemptions from FACA. It has also sought to avoid the application of FACA through various mechanisms, such as manipulating appointments to advisory bodies, conducting key advisory functions through “subcommittees,” and invoking unusual statutory exemptions. As a result, such key bodies as the Vice President’s energy task force and the presidential commission investigating the failure of intelligence in Iraq have operated without complying with FACA.

Laws that Restrict Public Access to Federal Records

In the 1990s, the Clinton Administration increased public access to government information by restricting the ability of officials to classify information and establishing an improved system for the declassification of information. These steps have been reversed under the Bush Administration, which has expanded the capacity of the government to classify documents and to operate in secret.

The Classification and Declassification of Records

The classification and declassification of national security information is largely governed by executive order. President Bush has used this authority to:

- Reverse the presumption against classification, allowing classification even in cases of significant doubt;
- Expand authority to classify information for longer periods of time;
- Delay the automatic declassification of records;
- Expand the authority of the executive branch to reclassify information that has been declassified; and
- Increase the number of federal agencies that can classify information to include the Secretary of Health and Human Services, the Secretary of Agriculture, and the Administrator of the Environmental Protection Agency.

Statistics on classification and declassification of records under the Bush Administration demonstrate the impact of these new policies. Original decisions to classify information — those in which an authorized classifier first determines that disclosure could harm national security — have soared during the Bush Administration. In fiscal years 2001 to 2003, the average number of original decisions to classify information increased 50% over the average for the previous five fiscal years. Derivative classification decisions, which involve classifying documents that incorporate, restate, or paraphrase information that has previously been classified, have increased even more dramatically. Between FY 1996 and FY 2000, the number of derivative classifications averaged 9.96 million per year. Between FY 2001 and FY 2003, the average increased to 19.37 million per year, a 95% increase. In the last year alone, the total number of classification decisions increased 25%.

Sensitive Security Information

The Bush Administration has sought and obtained a significant expansion of authority to make designations of Sensitive Security Information (SSI), a category of sensitive but unclassified information originally established to protect the security of civil aviation. Under legislation signed by President Bush, the Department of Homeland Security now has authority to apply this designation to information related to any type of transportation.

The Patriot Act

The passage of the Patriot Act after the September 11, 2001, attacks gave the Bush Administration new authority to conduct government investigations in secret. One provision of the Act expanded the authority of the Justice Department to conduct secret electronic wiretaps. Another provision authorized the Justice Department to obtain secret orders requiring the production of “books, records, papers, documents, and other items,” and it prohibited the recipient of these orders (such as a telephone company or library) from disclosing their existence. And a third provision expanded the use of “sneak and peak” search warrants, which allow the Justice Department to search homes and other premises secretly without giving notice to the occupants.

Secret Detentions, Trials, and Deportations

In addition to expanding secrecy in government by executive order and statute, the Bush Administration has used novel legal interpretations to expand its authority to detain, try, and deport individuals in secret. The Administration asserted the authority to:

- Hold persons designated as “enemy combatants” in secret without a hearing, access to a lawyer, or judicial review;

- Conduct secret military trials of persons held as enemy combatants when deemed necessary by the government; and
- Conduct secret deportation proceedings of aliens deemed “special interest cases” without any notice to the public, the press, or even family members.

Congressional Access to Federal Records

Our system of checks and balances depends on Congress being able to obtain information about the activities of the executive branch. When government operates behind closed doors without adequate congressional oversight, mismanagement and corruption can flourish. Yet despite Congress’ constitutional oversight role, the Bush Administration has sharply limited congressional access to federal records.

GAO Access to Federal Records

A federal statute passed in 1921 gives the congressional Government Accountability Office the authority to review federal records in the course of audits and investigations of federal programs. Notwithstanding this statutory language and a long history of accommodation between GAO and the executive branch, the Bush Administration challenged the authority of GAO on constitutional grounds, arguing that the Comptroller General, who is the head of GAO, had no “standing” to enforce GAO’s right to federal records. The Bush Administration prevailed at the district court level and GAO decided not to appeal, significantly weakening the authority of GAO.

The Seven Member Rule

The Bush Administration also challenged the authority of members of the House Government Reform Committee to obtain records under the “Seven Member Rule,” a federal statute that requires an executive agency to provide information on matters within the jurisdiction of the Committee upon the request of any seven of its members. Although a district court ruled in favor of the members in a case involving access to adjusted census records, the Bush Administration has continued to resist requests for information under the Seven Member Rule, forcing the members to initiate new litigation.

Withholding Information Requested by Congress

On numerous occasions, the Bush Administration has withheld information requested by members of Congress. During consideration of the Medicare legislation in 2003, the Administration withheld estimates showing that the bill would cost over

\$100 billion more than the Administration claimed. In this instance, Administration officials threatened to fire the HHS Actuary, Richard Foster, if he provided the information to Congress. In another case, the Administration's refusal to provide information relating to air pollution led Senator Jeffords, the ranking member of the Senate Committee on Environment and Public Works, to place holds on the nominations of several federal officials.

On over 100 separate occasions, the Administration has refused to answer the inquiries of, or provide the information requested by, Rep. Waxman, the ranking member of the House Committee on Government Reform. The information that the Administration has refused to provide includes:

- Documents requested by the ranking members of eight House Committees relating to the prison abuses at Abu Ghraib and elsewhere;
- Information on contacts between Vice President Cheney's office and the Department of Defense regarding the award to Halliburton of a sole-source contract worth up to \$7 billion for work in Iraq; and
- Information about presidential advisor Karl Rove's meetings and phone conversations with executives of companies in which he owned stock.

The 9-11 Commission

On November 27, 2002, Congress passed legislation creating the National Commission on Terrorist Attacks upon the United States (commonly known as the 9-11 Commission) as a congressional commission to investigate the September 11 attacks. Throughout its investigation, however, the Bush Administration resisted or delayed providing the Commission with important information. For example, the Administration's refusal to turn over documents forced the Commission to issue subpoenas to the Defense Department and the Federal Aviation Administration. The Administration also refused for months to allow Commissioners to review key presidential intelligence briefing documents.

The Collective Impact

Taken together, the actions of the Bush Administration have resulted in an extraordinary expansion of government secrecy. External watchdogs, including Congress, the media, and nongovernmental organizations, have consistently been hindered in their ability to monitor government activities. These actions have serious implications for the nature of our government. When government operates in secret, the ability of the public to hold the government accountable is imperiled.

INTRODUCTION

One of the core principles of our democracy is that government should be open and accountable. As stated by William Jennings Bryan in 1915:

The government being the people's business, it necessarily follows that its operations should be at all times open to the public view. Publicity is therefore as essential to honest administration as freedom of speech is to representative government. "Equal rights to all and special privileges to none" is the maxim which should control in all departments of government.¹

Or as Justice Louis D. Brandeis said in 1933, "sunlight is said to be the best of disinfectants."²

Contrary to these open government principles, the Bush Administration has often pursued policies that limit public access to information and allow more secret government operations. Some of these actions have been described in reports and news articles. In September 2003, the Reporters Committee for Freedom of the Press published a white paper entitled "Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public's Right to Know."³ This paper surveys Administration actions that enhance secrecy in the name of the war on terrorism. In December 2003, *U.S. News and World Report* published an investigative report entitled "Keeping Secrets: The Bush Administration Is Doing the Public's Business out of the Public Eye,"⁴ and *NOW with Bill Moyers* ran an associated story entitled "Veil of Secrecy."⁵ Major national newspapers such as

¹ William Jennings Bryan, Secretary of State, *Bryan's Ten Rules for the New Voter*, Baltimore Sun (Apr. 25, 1915) (speech before the City Club, Baltimore, Maryland).

² L. Brandeis, *Other People's Money*, 62 (1933).

³ Reporters Committee for Freedom of the Press, *Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public's Right to Know* (4th ed., Sept. 2003); see also Christopher Gozdor et al., *Where the Streets Have No Name: The Collision of Environmental Law and Information Policy in the Age of Terrorism*, Environmental Law Reporter, 10978 (Dec. 2003).

⁴ *Keeping Secrets*, U.S. News and World Reports (Dec. 22, 2003).

⁵ *Veil of Secrecy*, NOW with Bill Moyers (Dec. 12, 2003). See also Stephen Pizzo, Misleader.org, *Hiding the Truth? President Bush's Need-to-Know Democracy* (Oct. 29, 2003) (online at http://www.misleader.com/pdf/specialreport2_secrecy.pdf). Center for American Progress and OMB Watch, *Special Interest Takeover: The Bush Administration and the Dismantling of Public Safeguards*, 87-99 (May 2004).

the *New York Times*, the *Washington Post*, and the *Los Angeles Times* have also run articles on secrecy in the Bush Administration.⁶

This report looks at secrecy in the Bush Administration from a different vantage point. At the request of Rep. Henry A. Waxman, ranking minority member of the House Committee on Government Reform, it systematically examines how the Bush Administration has implemented the major laws that govern access to government records. It considers each of the principal laws, regulations, or executive orders that provide rights of access to government records or give the government the right to keep information secret. And it documents how the Administration has interpreted and applied — or sought to change — these requirements and precedents. The result is a comprehensive assessment of secrecy in the Bush Administration.

The report is organized into three parts. Part I examines how the Administration has implemented our nation's basic open government laws, like the Freedom of Information Act and the Presidential Records Act. Part II investigates how the Administration has implemented laws that allow the government to keep information from the public, by means such as executive orders on the classification of documents. Part III concludes the report by looking at the special laws and precedents that govern Congress' access to information.

The report reveals that there has been a systematic effort by the Bush Administration to limit the application of the laws that promote open government and accountability. In the case of each of the nation's fundamental open government and secrecy laws, the Bush Administration has sought to curtail public access to information while expanding the powers of government to operate in secret.

PART I: LAWS THAT PROVIDE PUBLIC ACCESS TO FEDERAL RECORDS

I. Freedom of Information Act

The Freedom of Information Act (FOIA) is the key law providing public access to information held by the Executive branch.⁷ FOIA establishes the presumption that the people should be able to obtain information held by their government.⁸

⁶ See, e.g., *Government Openness at Issue as Bush Holds onto Records*, *New York Times* (Jan. 3, 2003); *Under Bush, Expanding Secrecy*, *Washington Post* (Dec. 23, 2003); *Supreme Court to Hear Cheney Secrecy Case*, *Los Angeles Times* (Dec. 16, 2003).

⁷ 5 U.S.C. §552.

Prior to FOIA's adoption in 1966, individuals seeking government records had to prove that they had a unique entitlement to the records they were requesting.⁹ FOIA reversed this. It established that any individual has a right to information held by the government unless the government proves that there is a reason to withhold the information. That reason must fall under one of the specific exemptions that FOIA provides to the disclosure requirements.¹⁰ FOIA lays out the procedures for an individual to request the release of government information. It also provides for an appeals process, including judicial review, if the government denies the request.

The Bush Administration has taken a series of actions to undermine, and in some instances reverse, the principle that the public has a right to government information under FOIA. Specifically, the Bush Administration has:

- Issued guidance reversing the presumption that government documents should be disclosed whenever possible.
- Directed agencies to withhold from release a new category of documents — those that could be considered “sensitive but unclassified.”
- Pursued legislation to create new categories of information that are exempt from disclosure under FOIA, including any information voluntarily provided to the government by a private party and designated “critical infrastructure information.”
- Adopted regulations that block the release of specific types of information under FOIA.
- Delayed and denied fee waivers for FOIA searches, thereby imposing on the public a considerable practical barrier to using FOIA.

⁸ Committee on Government Reform, U.S. House of Representatives, *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records* (2003) (H. Rept. 108-172). This *Citizen's Guide* has been issued and periodically updated by the full Committee on Government Reform (and its predecessors), which has jurisdiction over FOIA, since 1977.

⁹ *Id.*

¹⁰ 5 U.S.C. § 552(a)(3)(A) states:

each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

- Applied FOIA exemptions inappropriately to withhold documents.

Experts on government openness and information policy from academia and citizens' groups who were consulted in the preparation of this report view these actions as significantly constricting access to government information. Jane Kirtley, a professor at the University of Minnesota, stated: "the message is that refusals to disclose information will be defended as long as they have 'a sound legal basis.' . . . It means delay, obfuscation, and frivolous denials will be commonplace."¹¹ Philip Melanson, a professor at the University of Massachusetts, stated: "The Bush Administration has radically reduced the public right to know via executive orders, court cases and policy memos, more so than any administration in modern history."¹² Other independent experts decried "a proliferation of new restrictions on unclassified information,"¹³ "more secrecy,"¹⁴ and the Bush Administration's efforts "[to] roll[] back public access to government records and . . . to shield government from the people."¹⁵

A. The Ashcroft Memo

Recognizing that not all government information can be made public, the Freedom of Information Act exempts certain types of matters from the FOIA requirements. Specifically, section 552(b) excludes matters that fall under nine specific exemptions. Important exempt categories include classified information, certain information compiled for law enforcement purposes, and internal agency documents that would be exempt from discovery in litigation (e.g., documents that reveal the government's predecisional deliberative process and attorney-client privileged documents).¹⁶ Since FOIA was first adopted, a key issue in the

¹¹ E-mail from Jane E. Kirtley, Silha Professor of Media Ethics and Law and Director, Silha Center for the Study of Media Ethics and Law, University of Minnesota, to House Government Reform Committee minority staff, re: Comments on FOIA Policy (July 16, 2004).

¹² Philip H. Melanson, Professor of Policy Studies and Director, Policy Studies Program, University of Massachusetts at Dartmouth, *The Bush Administration and FOIA* (July 10, 2004) (fax communication to House Government Reform Committee minority staff).

¹³ Telephone conversation between Steven Aftergood, Project on Government Secrecy, Federation of American Scientists, and House Government Reform Committee minority staff (July 14, 2004).

¹⁴ E-mail from Meredith Fuchs, General Counsel, National Security Archive, George Washington University, to House Government Reform Committee minority staff (July 21, 2004).

¹⁵ E-mail from David C. Vladeck, Associate Professor, Georgetown University Law Center, to House Government Reform Committee minority staff (June 22, 2004).

¹⁶ The nine exemptions are: (1) classified materials; (2) matters related solely to the internal personnel rules and practices of an agency; (3) matters specifically exempted in

ongoing struggle over government secrecy has been implementation of the exemptions that FOIA delineates.

The Clinton Administration formally took the position that there would be a “presumption of disclosure” for exempt materials. Attorney General Janet Reno issued a memorandum stating that the Department of Justice would defend an agency’s assertion of a FOIA exemption only where “the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.”¹⁷ In other words, the Clinton Administration’s policy was that where there would be no foreseeable harm in releasing a document, an agency should do so, even if there were technical grounds for withholding it under FOIA.

The Bush Administration reversed the Clinton Administration’s position in a memorandum issued by Attorney General Ashcroft on October 12, 2001. The Ashcroft memorandum states that the Department of Justice will defend agencies’ assertions of FOIA exemptions “unless they lack a sound legal basis.”¹⁸ The memorandum further urges the agencies to carefully consider a variety of countervailing interests before making any discretionary disclosure under FOIA. In other words, the Bush Administration’s policy is that agencies are not required to release, and are in fact discouraged from releasing, any document if there are technical grounds for withholding it under FOIA.

For example, the Ashcroft memorandum has had a direct effect on public efforts to gain access to information about how the Bush Administration developed its energy policies. Public interest organizations filed multiple FOIA requests seeking information on the role played by federal agencies in developing the National Energy Policy. After months of stonewalling by the Administration, some records were finally released. But the Department of Energy alone fully or partially withheld over 4,500 documents that were responsive to the FOIA request.¹⁹ Of

other statutes; (4) trade secrets and confidential business information; (5) internal agency documents that would be exempt from discovery in litigation (e.g., attorney-client privileged documents); (6) personnel and medical files; (7) certain information compiled for law enforcement purposes; (8) records regarding supervision of financial institutions; and (9) geological and geophysical information concerning wells.

¹⁷ Janet Reno, Attorney General, *Memorandum for Heads of Departments and Agencies, Subject: The Freedom of Information Act* (Oct. 4, 1993).

¹⁸ John Ashcroft, Attorney General, *Memorandum for Heads of all Federal Departments and Agencies, Subject: The Freedom of Information Act* (Oct. 12, 2001).

¹⁹ *Judicial Watch v. U.S. DOE*, 319 F.Supp.2d 271, 320 (D.D.C. 2004).

these, DOE withheld the vast majority as exempt “deliberative and pre-decisional” information.²⁰

Under the Clinton Administration policy, the agency would have had to identify some actual harm expected from the release of these documents. Under the Ashcroft policy, however, all of these documents were simply automatically withheld from the public.

B. The Card Memo

In a March 2002 memorandum, the Bush Administration further reduced public access to information through FOIA by urging agencies to safeguard records regarding weapons of mass destruction and “other information that could be misused to harm the security of our Nation and the safety of our people.”²¹ The memorandum did not define these terms and left agencies under direction to withhold from disclosure under FOIA any information that could in some conceivable way be used to harm security.

Specifically, the memorandum prepared by White House Chief of Staff Andrew Card directs all federal agencies to review their records management procedures within 90 days to ensure that they are acting in accordance with the directives of the accompanying guidance encouraging agencies to protect from release “sensitive but unclassified information.” This is information that does not meet the criteria for classification (other portions of the guidance urge additional classification of documents), but which is “sensitive information related to America’s homeland security.”²² The guidance also references “information that could be misused to harm the security of our nation or threaten public safety.”²³ However, it provides no further definition of “sensitive but unclassified information.”

As a mechanism for such withholding, the guidance encourages agencies to apply exemption 2 under FOIA.²⁴ This exempts records “related solely to the internal personnel rules and practices of an agency.” Exemption 2 has been interpreted to

²⁰ See Department of Energy’s Vaughn Index (Apr. 25, 2002), *Judicial Watch v. U.S. DOE*, 319 F.Supp.2d 271 (D.D.C. 2004) (No. Civ.A.01-0981(PLF)) (consolidated with *NRDC v. U.S. DOE* (No. Civ.A.01-2542 (GK))).

²¹ Andrew H. Card, Jr., Assistant to the President and Chief of Staff, *Memorandum for the Heads of Executive Departments and Agencies; Subject: Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security* (Mar. 19, 2002).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

protect agency records where disclosure risks circumvention of agency regulations or statutes, or where disclosure would render them “operationally useless.” Most commonly, agencies have used this exemption to justify withholding information related to employment or law enforcement matters, although longstanding DOJ guidance suggests it could also be applied to shield vulnerability assessments.²⁵ New DOJ guidance referenced in the Card memo encourages an expansive application of exemption 2 to protect “a wide range of information” stating: “Agencies should be sure to avail themselves of the full measure of Exemption 2’s protection for their critical infrastructure information.”²⁶

The guidance also encourages agencies to use exemption 4 of FOIA, stating that information voluntarily submitted to the government from the private sector “may readily fall within the protection of Exemption 4 of the FOIA.”²⁷ Exemption 4, however, does not apply to all voluntarily submitted private sector information, but only to trade secrets and privileged or confidential commercial or financial information.

For example, the Department of Defense relied on the Card memorandum in refusing a FOIA request from the Federation of American Scientists for release of an unclassified report on lessons learned from the 2001 anthrax attacks. This report examined the United States’ preparedness to detect and respond to a bioterrorist assault, and it highlighted improvements needed in the areas of emergency preparations and response.

The Department of Defense did not invoke national security as a basis for withholding this unclassified document, which was prepared by the Center for Strategic and International Studies using entirely public materials. Instead, as recommended in the Card memorandum, the Department applied FOIA’s exemption 2 regarding records related solely to the internal personnel rules and practices of an agency.²⁸ The Federation of American Scientists objected, arguing

²⁵ See DOJ, *Freedom of Information Act Guide* (May 2004); Office of Information and Privacy, DOJ, *FOIA Update; OIP Guidance: Protecting Vulnerability Assessment through Application of Exemption Two* (Summer 1989).

²⁶ Office of Information and Privacy, DOJ, *FOIA Post: New Attorney General FOIA Memorandum Issued* (Oct. 15, 2001).

²⁷ John Ashcroft, *supra* note 18.

²⁸ See Letter from Sandy Ford, FOIA/Privacy Act Officer, Defense Threat Reduction Agency, to Steven Aftergood, Federation of American Scientists (Dec. 12, 2003). The Department of Defense also relied on the Ashcroft memorandum, claiming that it was restricted from “the public distribution of information related to homeland security and protection of critical infrastructure.” *Id.* However, the Ashcroft memorandum provides no legal basis for denying a FOIA request; in fact, it contains no discussion of restriction of information related to homeland security or critical infrastructure.

that release would enhance U.S. biopreparedness by building support for correcting vulnerabilities.²⁹ The Department of Defense finally released a redacted version of the report in March of 2004, almost two years after the report was completed, and after the Federation of American Scientists appealed the Department’s decision to deny the request.³⁰

C. Critical Infrastructure Information

In 2002, President Bush included a major new exemption to FOIA in his legislative proposal creating the new Department of Homeland Security.³¹ This exemption was adopted into law as the “Critical Infrastructure Information Act of 2002” (CIIA), which is part of the Homeland Security Act.³² The CIIA exempts from FOIA any information that is voluntarily provided to the federal government by a private party, if the information relates to the security of vital infrastructure.

The “critical infrastructure information” provisions establish a broad new exemption to FOIA. The definitions used in this Act cover everything from information about a potential leak at a chemical plant to a deficiency in a software program used by the Department of Defense. “Critical infrastructure” includes vital “systems and assets, whether physical or virtual,” whose destruction would have a “debilitating impact on security, national economic security, or national public health or safety.”³³ “Critical infrastructure information” is “information not customarily in the public domain and related to the security of critical infrastructure or protected [computer] systems.”³⁴ The definition encompasses information related to “threatened interference” with critical infrastructure, the ability of critical infrastructure to resist interference (including any vulnerability estimate, risk planning, or testing), and any “planned or past operational problem or solution” regarding “repair, recovery, reconstruction, insurance, or continuity” of critical infrastructure.

The exemption from FOIA applies to information that is “voluntarily” submitted to DHS without DHS exercising its legal authority to obtain the information. A

²⁹ See Letter from Steven Aftergood, Federation of American Scientists to Maj. Gen. Trudy H. Clark, Deputy Director, Defense Threat Reduction Agency (Dec. 12, 2003).

³⁰ *Censored Study on Bioterror Doubts U.S. Preparedness*, New York Times (Mar. 29, 2004).

³¹ White House, *A Bill To Establish a Department of Homeland Security, and for Other Purposes* (undated legislative language provided by the Bush Administration to the Government Reform Committee in 2002).

³² 6 U.S.C. § 131.

³³ 42 U.S.C. § 5195c(e). Critical infrastructure is not defined specifically in the CIIA but is defined in the Homeland Security Act as being the same as in the Patriot Act.

³⁴ 6 U.S.C. § 131.

company must simply accompany the information submitted with an “express statement” identifying it as critical infrastructure information.³⁵ DHS is then barred from releasing such information without written consent from the submitting entity.³⁶ Protected critical infrastructure information cannot be directly used by the government or a private party in any civil action. Any government employee who knowingly releases protected information faces criminal penalties, including possible imprisonment.³⁷ CIIA allows the government or a private party to use information that is “independently obtained,” but this phrase is ambiguous.³⁸

These provisions operate to shield from public scrutiny a broad range of private sector communications with DHS. Communications from the private sector to government agencies are routinely released under FOIA (apart from confidential business information). This is an important check against capture of government agencies by special interests. But under the critical infrastructure information exemption even routine communications by private sector lobbyists can be withheld from disclosure. For example, a corporate lobbyist may now meet secretly with DHS officials to urge changes to federal immigration or customs regulations if the lobbyist asserts that the changes are related to the effort to protect the nation’s infrastructure.

Under a broad interpretation, CIIA could also be used preemptively to shield information that is potentially embarrassing or harmful to a company, such as information that reveals errors or misconduct. A commenter from the Heritage Foundation wrote: “One need not be a Harvard law graduate to see that, without clarification of what constitutes vulnerabilities [of infrastructure], this loophole could be manipulated by clever corporate and government operators to hide endless varieties of potentially embarrassing and/or criminal information from public view.”³⁹

In addition, the blanket nature of the protection will likely block the release of substantial amounts of innocuous information. Under FOIA, records to which an exemption applies must be redacted to allow as much of the requested record as possible to be disclosed. But CIIA exempts from FOIA all information marked

³⁵ 6 U.S.C. § 133.

³⁶ The CIIA’s nondisclosure requirement does not apply in the case of a criminal prosecution, a disclosure to either House of Congress, a congressional committee with jurisdiction, or the Government Accountability Office. 6 U.S.C. § 133.

³⁷ 6 U.S.C. § 133.

³⁸ *Id.*

³⁹ Mark Tapscott, Director, Heritage Foundation’s Center for Media and Public Policy, *Too Many Secrets*, Washington Post (Nov. 20, 2002).

critical infrastructure information. None of the information in a submission marked as critical infrastructure information is likely to be disclosed, even when portions of the information do not themselves constitute critical infrastructure information. Additionally, the harsh penalty provisions will have a further chilling effect on disclosures. Federal employees, faced with criminal penalties if they disclose critical infrastructure information, will certainly prefer to err on the side of nondisclosure.

In April 2003, DHS proposed regulations to implement CIIA.⁴⁰ The proposal included a number of provisions that would have expanded CIIA's impact in limiting public access to information. For example, entities could submit information labeled as critical infrastructure information to another agency with a request to forward the information to DHS.⁴¹ All such information would have been protected unless DHS determined that the information did not meet the definition of critical infrastructure information.⁴²

In the face of sharply critical public comments on the proposed rule, DHS issued an interim final rule in February 2004 that changed some of the troubling provisions in the proposed rule but added others.⁴³ The rule itself provides for direct submissions of critical infrastructure information only to DHS. However, the preamble also states that after the critical infrastructure information program becomes operational, DHS "anticipates the development of appropriate mechanisms to allow for indirect submissions in the final rule and would welcome comments on appropriate procedures for the implementation of indirect submissions."⁴⁴ New contradictory language in the final rule also makes it unclear whether critical infrastructure information voluntarily submitted to DHS is protected even if it is legally required to be submitted to another agency.⁴⁵

⁴⁰ Department of Homeland Security, *Procedures for Handling Critical Infrastructure Information*, 68 Fed. Reg. 18524-29 (Apr. 15, 2003) (proposed rule).

⁴¹ *Id.* at 18525.

⁴² *Id.* at 18527.

⁴³ Department of Homeland Security, *Procedures for Handling Critical Infrastructure Information*, 69 Fed. Reg. 8073-8089 (Feb. 20, 2004) (interim rule). In issuing the final rule as an "interim rule" DHS specified that although the rule was finalized on February 20, 2004, the agency would continue to accept additional comments on the rule through May 20, 2004. DHS indicated that it may make changes to the rule at some unspecified time in the future based on those comments.

⁴⁴ *Id.* at 8075. 6 C.F.R. 29.3 provides: "Information submitted to any other Federal agency pursuant to a Federal legal requirement is not to be marked as submitted or protected under the CII Act of 2002 or otherwise afforded the protection of the CII Act of 2002," but then adds, "provided, however, that such information, if it is separately submitted to DHS pursuant to these procedures, may upon submission to DHS be marked as Protected CII or otherwise afforded the protections of the CII Act of 2002."

⁴⁵ *Id.* at 8084.

In addition, the rule protects information unless DHS determines the information is not eligible for protection, and there is no deadline for DHS to make that determination. While DHS must give the entity that submits the information an opportunity to appeal any adverse determination, there is no procedure for a person requesting information to appeal a decision to protect information, even if circumstances related to DHS's decision to protect the information have changed.⁴⁶

D. Other Statutory and Regulatory Exemptions

1. National Security Agency Operational Files

In 2003, the Bush Administration sought and won a new legislative exemption from FOIA for all National Security Agency “operational files.”⁴⁷ The Administration's main rationale for this new exemption is that conducting FOIA searches diverts resources from the agency's mission.⁴⁸ Of course, this rationale could apply to every agency. As NSA has operated subject to FOIA for decades, it is not clear why the agency now needs this exemption.

In the past, the release of thousands of declassified NSA documents has provided valuable information relating to the use of signals intelligence in space, the Cuban missile crisis, and cryptography in World War II and the Korean War.⁴⁹ In urging Congress to adopt this provision, the Administration argued that NSA would continue to release information under its historical review program to declassify and release records considered historically significant.⁵⁰ While useful, this program cannot fully substitute for FOIA, which gives an individual requesting

⁴⁶ *Id.* at 8086.

⁴⁷ See H.R. 1588-179, § 922, National Defense Authorization Act for Fiscal Year 2004. The final legislation defines these as files held by the Signals Intelligence Directorate and the Research Associate Directorate that document the means by which foreign intelligence or counterintelligence is collected through scientific or technical systems.

⁴⁸ See National Security Agency, *Proposal for Exemption from the Freedom of Information Act for Operational Files* (May 13, 2003). Additionally, the Administration claimed that the information contained in these files is “almost invariably” withheld under FOIA as classified information. *Id.* However, in the past such files have been released in redacted form, protecting the classified portions and providing valuable unclassified information. In addition, the new statutory language explicitly provides that the exemption applies even when information in operational files has been declassified, which refutes the argument that the Administration's purpose here is solely to avoid the waste of effort of searching for files that are “almost invariably” withheld as classified. See 50 U.S.C.A. § 432a(a)(4)(C).

⁴⁹ See NSA, *Id.*

⁵⁰ *Id.*

information the ability to file a FOIA request for specific information and provides recourse to federal court in the event that an agency fails to comply with the FOIA requirements.

2. *Commercial Satellite Data*

In 2004, the Bush Administration pushed for a new legislative FOIA exemption for certain data generated by commercial satellites.⁵¹ Under this provision, agencies are not only authorized to withhold data under FOIA, they are also barred from releasing it. This exemption and ban was added to the Defense Authorization Act for fiscal year 2005, which has been passed by both the House and Senate and is currently in conference.⁵² The ban applies to any “land remote sensing” data that under the Land Remote Sensing Policy Act may only be sold to the government, and it includes “any imagery and other product that is derived from such data.”⁵³ The provision also bars state and local governments from releasing such data under their own information disclosure laws.

The provision is strongly opposed by the news media, who routinely use non-confidential commercial satellite imagery in network and local news broadcasts.⁵⁴ Media representatives note that such imagery has recently been used to provide the public with compelling news coverage of, among other topics, the Iraq and Afghanistan conflicts; nuclear and other weapons of mass destruction sites in Iran and elsewhere; flooding in Bangladesh; deforestation in Brazil; wildfires and tornadoes in the United States, and refugee crises in the Sudan and elsewhere.⁵⁵ This provision, they state, “would result in taxpayer dollars being used to preclude the media from adequately informing the public about matters of critical importance that in no way implicate the national security.”⁵⁶

3. *Vehicle Safety Defect Information*

The Administration has by regulation blocked vehicle safety information from public access through FOIA.

⁵¹ Conversation between House Government Reform Committee minority staff and Senate Armed Services Committee minority staff (July 2004).

⁵² See H.R. 4200; S. 2400 § 1034.

⁵³ S. 2400 § 1034.

⁵⁴ Letter from Barbara S. Cochran, President, Radio-Television News Directors Association, to Rep. Duncan Hunter, Chairman, House Armed Services Committee (Sept. 3, 2004).

⁵⁵ *Id.*

⁵⁶ *Id.*

In October 2000, Congress passed the Transportation Recall Enhancement, Accountability, and Documentation Act (TREAD Act). This law responded to the failure of Ford, Firestone, and the National Highway Transportation Safety Administration (NHTSA) to react promptly to indications of a safety defect in many Firestone tires, particularly when they were used on Ford Explorer SUVs. The defect was reportedly linked to 270 highway deaths.

The TREAD Act required NHTSA to promulgate “Early Warning” reporting requirements to ensure that manufacturers promptly notify NHTSA of potential or known safety defects. The required reporting includes information about claims of death or injury, numbers of property damage claims, consumer complaints, warranty claims, field reports, and other information about equipment repairs or replacements. The law did not provide any exemption from FOIA for this information.

In the past, NHTSA had acquired this type of information during defect investigations. In those cases, including the Ford/Firestone investigation, NHTSA routinely disclosed detailed company documents, including engineering tests, warranty claims, consumer complaints, and even certain production figures.⁵⁷ NHTSA noted this in the proposed rule to implement the early warning reporting requirements:

Historically, these types of information generally have not been considered by the agency to be entitled to confidential treatment, unless the disclosure of the information would reveal other proprietary business information, such as confidential production figures, product plans, designs, specifications, or costs.⁵⁸

NHTSA also noted that the TREAD Act does not affect the right to withhold confidential business information under FOIA. NHTSA clearly indicated that it expected that most of the information submitted under the early warning requirements would be available to the public through FOIA: “accordingly, the agency does not expect to receive many requests for confidential treatment for submissions under the early warning reporting requirements of the TREAD Act.”⁵⁹

⁵⁷ See Public Citizen, *Comments of Public Citizen Regarding 49 CFR Part 512 Confidential Business Information* 67 *Federal Register* (Apr. 30, 2002) (DOT Docket No. NHTSA-02-12150).

⁵⁸ 66 Fed. Reg. 66190, 66214 (Dec. 21, 2001).

⁵⁹ *Id.*

However, NHTSA subsequently reversed its position through amendments to the agency's regulations governing treatment of confidential business information. Under FOIA case law, while a business may claim that the information that it is required to submit to the government is confidential business information, the government cannot withhold that information from release unless it finds that release is likely to cause actual competitive harm.⁶⁰ The final regulations issued by NHTSA in July 2003 make a blanket finding in the regulation itself that release of much of the data to be submitted under the early warning requirements would cause competitive harm.⁶¹ Specifically, NHTSA effectively exempted from FOIA all information on: warranty claims, field reports, and consumer complaints, as well as production numbers for vehicles other than light vehicles, child restraint systems, and tires.

Congress did not intend the TREAD Act to be a cloak to shield information that has always been available to consumers. The congressional authors of the provision, Reps. Billy Tauzin and Edward Markey, had a colloquy on the floor of the House on this precise point.⁶² In fact, NHTSA might never have investigated the Ford/Firestone case itself without pressure from an informed public. NHTSA had received information indicating a problem in July 1998, but did not begin to investigate until two years later, after a Houston TV station broadcast a report that sparked a flurry of consumer complaints.⁶³

4. *Critical Energy Infrastructure Information*

The Federal Energy Regulatory Commission (FERC) has also issued regulations that have the effect of limiting the information released under FOIA.

On February 21, 2003, FERC issued a final rule defining a new category of information termed "critical energy infrastructure information."⁶⁴ Under this rule,

⁶⁰ See 5 U.S.C. § 552(b)(4); *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770-71 (D.C. Cir. 1974).

⁶¹ 68 Fed. Reg. 44209, 44232 (July 28, 2003).

⁶² 146 Cong. Rec. H9629 (daily ed. Oct. 10, 2000). Mr. Markey stated: "Would [Mr. Tauzin] agree that this special disclosure provision for new early stage information is not intended to protect from disclosure [information] that is currently disclosed under existing law such as information about actual defects or recalls?" Mr. Tauzin responded: "[T]he gentleman is correct."

⁶³ Public Citizen, *Chronology of Firestone/Ford Knowledge of Tire Safety Defect* (online at <http://www.citizen.org/autosafety/articles.cfm?ID=5336>).

⁶⁴ Federal Energy Regulatory Commission, *Critical Energy Infrastructure Information*, 68 Fed. Reg. 9857 (Mar. 3, 2003) (Order No. 630). See also Federal Energy Regulatory Commission, *Critical Energy Infrastructure Information*, 68 Fed. Reg. 46456 (July 23, 2003) (Order No. 630-A); Federal Energy Regulatory Commission, *Critical Energy Infrastructure Information*, 68 Fed. Reg. 48386 (Aug. 10, 2003) (Order No. 649).

FERC would generally protect this information from disclosure, but could release it to selected recipients under limited circumstances. FERC claims that the rule does not purport to expand the scope of exemptions under FOIA because the category is limited to information that is already exempt from disclosure under FOIA.⁶⁵

However, in practical terms, FERC's new category of protected information will almost certainly result in less information being released to the public. The preamble to FERC's rule provides an expansive interpretation of several FOIA exemptions to argue that information otherwise meeting the criteria for critical energy infrastructure information would be exempt from FOIA under exemption 2 (records relating to internal agency practices), exemption 4 (information that could cause competitive harm), or 7 (information compiled for law enforcement purposes). For example, FERC opines that because a terrorist attack on energy infrastructure would cause financial harm to the owner, this would put the owner at a competitive disadvantage, justifying withholding information that might facilitate such an attack as "privileged or confidential" "commercial or financial information" under exemption 4.⁶⁶

In comments on FERC's proposed rule, the Reporters Committee for Freedom of the Press pointed out the need for public information on vulnerabilities in energy infrastructure, such as pipelines.⁶⁷ Without information on vulnerabilities, the public will not be able to demand the safety improvements necessary to strengthen the infrastructure. The Reporters Committee noted that between 1985 and 1994, 209 people were killed and 1,056 injured due to gas pipeline accidents. In one incident in 2000 that killed 12 people, the pipeline had not been checked for corrosion since 1950. Release of this information helped generate public pressure that led to passage of the Pipeline Safety Improvement Act of 2002, which attempts to address pipeline safety issues.⁶⁸

⁶⁵ The other criteria for "critical energy infrastructure information" are that it is information about "proposed or existing critical infrastructure" that: (i) relates to the production, generation, transportation, transmission, or distribution of energy; (ii) could be useful to a person planning an attack on critical infrastructure; and (iii) does not simply give the location of the critical infrastructure." 18 CFR 388.113. "Critical infrastructure" is defined even more broadly than it is under the PATRIOT Act to include systems and assets whose incapacity "would negatively affect security, economic security, [or] public health or safety." *Id.*

⁶⁶ 68 Fed. Reg. 9857, *supra* note 64, at 9871.

⁶⁷ Reporters Committee for Freedom of the Press and the Society of Environmental Journalists, *Comments of the Reporters Committee for Freedom of the Press and the Society of Environmental Journalists to Proposed Rules; Re: Public Access to Critical Energy Infrastructure Information* (Nov. 13, 2002) (online at <http://www.rcfp.org/news/documents/20021113ferceiico.html>).

⁶⁸ Pub. Law 107-355 (Dec. 17, 2002).

E. Denying Fee Waivers

As amended in 1986, FOIA provides that an agency may charge fees for the provision of records for a commercial use, limited to reasonable charges for search, duplication, and review of the documents.⁶⁹ Because these charges can be prohibitively expensive for members of the media, public interest organizations, and the general public, the law provides that fee waivers can be granted if one of two conditions is met. First, when the records are not sought for commercial use and the request is made by “an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media,” the agency may only assess duplication fees.⁷⁰ Membership in one of these categories is considered “preferred status” for fee purposes. As established through case law, the term “representative of the news media” is broadly defined to include entities that publish or otherwise disseminate information to the public.⁷¹ Second, FOIA provides that an agency must waive or reduce the fees if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁷²

The Bush Administration, however, has instituted an aggressive policy of questioning, challenging, and denying FOIA requesters’ eligibility for fee waivers under both provisions, using a variety of tactics.⁷³ Among others, these tactics include challenging requesters’ assertion of “preferred status” for fee purposes, challenging requesters’ assertions that the information is likely to contribute significantly to public understanding of government activities, and using

⁶⁹ 5 U.S.C. § 552(a)(4)(A)(ii).

⁷⁰ *Id.*

⁷¹ See *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

⁷² 5 U.S.C. § 552(a)(4)(A)(iii).

⁷³ See, e.g., *Keeping Secrets*, *supra* note 4; *Federal Charge of \$25,280 to Fulfill Records Request Angers Activist*, Los Angeles Times (Jan. 8, 2004); *DOE Charges Watchdog for Lab Data*, Albuquerque Journal (Dec. 20, 2002); Plaintiffs’ First Amended and Supplemented Complaint for Declaratory and Injunctive Relief, 8–9 (June 13, 2003), *Sierra Club et al. v. U.S. Dept. of Interior*, D.D.C. (No. 1:03 CV 00652) (giving examples of recent unprecedented fee waiver denials). Senator Leahy has requested that GAO investigate this issue, and GAO is currently finalizing the design phase of the study. Telephone conversation between staff of Senator Leahy and House Government Reform Committee minority staff (July 26, 2004).

hypertechnical objections as grounds for rejecting substantively meritorious fee waiver requests.⁷⁴

The abrupt shift in policy on fee waivers under the Bush Administration is illustrated by the experience of a professor at the University of Massachusetts at Dartmouth. Professor Philip Melanson states:

Over the past 30 years, prior to this administration, I have made approximately 200 FOIA requests and was granted a fee waiver approximately 95% of the time, due to my academic and library affiliations and publication record. During the last six months, I have initiated 41 requests on eleven topics relating to the war on drugs to: FBI, CIA, DEA, Customs, State Department, and [the] Department of Justice. I was not granted a single fee waiver and have lost all administrative appeals to date.⁷⁵

1. *Narrowing the Definition of “Representative of the News Media”*

Entities and individuals that have long been granted preferred status for FOIA fee purposes are now reporting that Bush Administration officials are frequently attempting to deny them such status.

For example, Dr. Jeffrey Richelson, a Senior Fellow of the National Security Archive and a freelance author and journalist, has made many FOIA requests over the years.⁷⁶ Until 2001, various agencies had for years granted Dr. Richelson preferred status for fee waivers as a representative of the news media.⁷⁷ However, over the past two years, these same agencies suddenly began denying Dr. Richelson preferred status. Among other erroneous grounds for these denials, the Department of Energy took the position that publishing books and articles “is characteristic of an entity that does not publish or broadcast news to the public itself” and an individual that conducts such activities is therefore not a

⁷⁴ In one instance, USDA stated that it was denying a fee waiver because “[w]e believe that your organization does not qualify for a mandatory fee waiver.” Letter from Barbara J. Bryant, Acting FOIA Officer, USDA, to Joseph Mendelson, III, Legal Director, Center for Food Safety (Aug. 7, 2002). USDA identified no reason for its “belief,” and the only concern identified by the agency was that the requester had asked for a voluminous quantity of documents. There is simply no legal basis in the FOIA statute or regulations for denying a fee waiver on these grounds.

⁷⁵ Philip H. Melanson, *supra* note 12.

⁷⁶ Letter from Meredith Fuchs, General Counsel, National Security Archive, to Tara Magner, Professional Staff Member, Committee on the Judiciary, U.S. Senate (Oct. 3, 2003).

⁷⁷ *Id.*

representative of the news media.⁷⁸ As well as being contrary to case law and precedent, this position has the absurd result of denying all freelance journalists preferred status for fee waivers. Ultimately, these denials were resolved through the appeals process. However, they had the effect of delaying the processing of Dr. Richelson’s FOIA requests for many months.⁷⁹

In another example, the Defense Department denied a fee waiver request from the Electronic Privacy Information Center (EPIC), a nonprofit public interest research center and educational organization that publishes newsletters, reports, and books on civil liberties issues including privacy, open government, and free speech.⁸⁰ Since EPIC had been established in 1994, no agency had ever previously challenged its status as a news media requester for FOIA fees purposes.⁸¹ In this instance, however, the Defense Department denied EPIC’s request and subsequent appeals, explaining that “[y]ou state that EPIC is an educational organization that disseminates information instead of being an entity that is both organized and operated to disseminate information.”

The U.S. District Court for the District of Columbia upheld the legitimacy of EPIC’s claim.⁸² The court found that the circumstances “mirror[ed]” those in the controlling case, *National Security Archive v. Dept. of Defense*, in which the DC Circuit had settled this issue in 1989.⁸³ As another basis for upholding EPIC’s claim, the court also noted that EPIC publishes a periodical distributed to over 15,000 readers and that the Defense Department’s own FOIA regulations list publishers of periodicals as an example of the news media.⁸⁴ Finally, the court noted that four other federal agencies, including two operating under the Defense Department’s FOIA regulations (the National Security Agency and the Defense Technical Information Center) had classified EPIC as a representative of the news media.⁸⁵

⁷⁸ See *id.*

⁷⁹ *Id.*

⁸⁰ See the EPIC website at <http://www.epic.org/epic/about.html>.

⁸¹ E-mail from David L. Sobel, General Counsel, EPIC, to House Government Reform Committee minority staff (Dec. 18, 2003).

⁸² *Electronic Privacy Information Center v. Dept. of Defense*, 241 F.Supp.2d 5 (D.D.C. 2003).

⁸³ *Id.* at 9. See also *id.* at 12 (“Simply put, there are no material differences between the National Security Archive and EPIC for purposes of the news media status determination”).

⁸⁴ *Id.* at 12–13.

⁸⁵ *Id.* at 14.

2. *Claiming Information Would Not Contribute to Public Understanding*

Under the Bush Administration, agencies have also attempted to deny fee waiver requests by asserting that the information requested would not contribute significantly to the public's understanding of government operations, and therefore the request is not eligible for a fee waiver. Under this approach, the government decides what the public needs to know.

For example, the Bureau of Alcohol, Tobacco and Firearms (ATF) denied a FOIA fee waiver request from the Brady Center to Prevent Gun Violence regarding a request for inspection reports on a specific firearms dealer. The dealer was alleged to have illegally sold a gun that had been used to shoot two police officers.⁸⁶ Yet the Bureau denied the fee waiver on the grounds that the Brady Center had already received such information about other gun dealers, so there would be no benefit to releasing information on the dealer in question.⁸⁷

3. *Using Sequential Fee Waiver Denials*

The Bush Administration is also delaying processing FOIA requests by raising multiple objections sequentially to individual fee waiver requests. Under this approach, an agency waits for an applicant to satisfy one objection before raising another, which significantly stretches out the process timeline. Two examples demonstrate the extent of the Administration's efforts to deny fee waivers.

In 2001, the Natural Resources Defense Council (NRDC) requested information from the National Institute of Environmental Health Sciences (NIEHS) regarding a memorandum of understanding between NIEHS and the American Chemistry Council. This memorandum established a partnership to fund testing of chemicals for human health effects.⁸⁸

NIEHS denied the fee waiver requested by NRDC on two grounds.⁸⁹ First, NIEHS claimed that NRDC had not demonstrated that the information would be widely distributed. Second, the agency claimed that NRDC had "not presented evidence of a unique capability to educate the public beyond other individuals

⁸⁶ See *Store Agrees to Pay \$1 Million to Officers Shot with Gun It Sold*, Associated Press (June 23, 2004).

⁸⁷ Letter from Marilyn R. LaBrie, Treasury Department, Bureau of Alcohol, Tobacco and Firearms, to Elizabeth S. Haile, Brady Center (May 22, 2003).

⁸⁸ Letter from Steven G. Gurney, Geologist, NRDC to Joyce Bumann, FOI/Privacy Act Specialist, NIEHS, Re: FOIA Request (Aug. 10, 2001).

⁸⁹ Letter from Susan R. Cornell, Esqu., FOIA Officer, NIH to Steven G. Gurney, Geologist, NRDC, Re: FOI Case No. 26846 (Oct. 15, 2001).

and/or groups that have the same concerns.”⁹⁰ The FOIA officer concluded that “[b]ecause of these reasons, I have determined that to furnish the information to you at no cost does not outweigh the burden that will be placed on the NIEHS in supplying the records.”⁹¹

NRDC appealed the denial and provided substantial additional detail regarding its demonstrated capacity to widely distribute information obtained through FOIA requests.⁹² More than ten months later, NIEHS responded to the appeal, again denying the fee waiver request, but this time on new grounds.⁹³

In this second round, the agency claimed that NRDC had not demonstrated how disclosure of the information was likely to contribute significantly to the public’s understanding of government activities, how disclosure would reveal such information that was not already public knowledge, and how it would advance the understanding of the general public, as opposed to a narrow set of interested persons.⁹⁴ The agency also found “no evidence” to support NRDC’s statements regarding the organization’s capability to distribute information.

NRDC had in fact discussed at length in its initial request how disclosure would contribute to the general public’s understanding of an arrangement that could “give regulated industry an unprecedented influence on prioritizing federal funded research,” the dangers of tainted public health research, and the current press coverage of this issue.⁹⁵ The initial denial gave no indication that this discussion was inadequate.

Moreover, the requester (one of the nation’s most prominent environmental advocacy organizations) had already stated that it had 15 people on staff specifically devoted to communications work, and the requester had attached a

⁹⁰ *Id.*

⁹¹ *Id.* As an initial matter, neither the FOIA law nor regulations requires any showing of a “unique capability to educate the public beyond other individuals or groups.” Thus, this basis for denying a fee waiver appears illegal (and the agency did not attempt to defend it upon appeal). The balancing test that NIEHS enunciated between the interest in providing free information and the burden on the agency is also not a legal criterion for granting a fee waiver.

⁹² Letter from Jon P. Devine, Jr., Senior Attorney, NRDC, to Deputy Assistant Secretary for Public Affairs (Media), HHS, Re: FOIA Appeal — Case No. 26846 (Oct. 17, 2001). (NRDC also provided information demonstrating its unique capability to educate the public on these matters, although noting that this is not required.)

⁹³ Letter from William A. Pierce, Deputy Assistant Secretary for Public Affairs/Media to Jon P. Devine, Jr., Senior Attorney, NRDC (Aug. 23, 2002).

⁹⁴ *Id.*

⁹⁵ See Letter from Steven G. Gurney, *supra* note 88.

list of 53 citations in the news media regarding NRDC and FOIA.⁹⁶ NIEHS did not provide any indication of what evidence would be sufficient in the agency's view to prove the requester's ability to disseminate information.

The Brady Center experienced similar sequential denials with respect to a fee waiver request it submitted to ATF on July 7, 2003. In this case, its underlying FOIA request was for inspection reports and variances pertaining to manufacturers of semiautomatic assault weapons.⁹⁷ The Brady Center wanted to know how many times ATF had granted variances to allow assault weapons manufacturers to replace "defective" banned assault weapons with newly manufactured replacement weapons.⁹⁸ ATF denied the fee waiver request on August 26, 2003, on the grounds that the documents were "similar and repetitive."⁹⁹ ATF asserted that the public interest would be just as well served by releasing a sampling of documents, covering five or so of the 62 manufacturers.¹⁰⁰

In its appeal, the Brady Center pointed out that a sampling of documents would not produce information necessary to inform the public whether ATF's variance practices were undermining the assault weapons ban. ATF responded over a month later, again denying the fee waiver, but on an entirely new basis.¹⁰¹ ATF acknowledged "that the Brady Center has the resources to disseminate information" and that ATF had previously granted the Brady Center fee waivers for similar types of requests. But ATF now asserted, for the first time, that the Brady Center had failed to inform ATF "how, where or when" it intended to disseminate the information to the public.¹⁰²

F. Inappropriate Use of Exemptions

Under the Bush Administration, agencies are making extensive use of FOIA exemptions, often inappropriately or with inadequate justification. As discussed above, an agency may withhold a document from release under FOIA only if one of the nine specific exemptions identified in the law applies to the document. The

⁹⁶ Letter from Jon P. Devine, Jr., *supra* note 92.

⁹⁷ Letter from Daniel R. Vice, Brady Center, to Bureau of Alcohol, Tobacco, Firearms and Explosives (July 7, 2003).

⁹⁸ *Id.*

⁹⁹ Letter from Marilyn R. LaBrie, Disclosure Specialist, Bureau of Alcohol, Tobacco and Firearms, to Daniel R. Vice, Brady Center (Aug. 26, 2003).

¹⁰⁰ *Id.*

¹⁰¹ Letter from Marilyn R. LaBrie, Disclosure Specialist, Bureau of Alcohol, Tobacco and Firearms, to Daniel R. Vice, Brady Center (Oct. 15, 2003).

¹⁰² *See id.* The Brady Center has provided additional information and appealed this determination, but has not yet received a response from the agency.

examples below include the improper use of exemptions both to withhold entire documents and to redact information in documents.

1. *Making Frivolous Exemption Claims*

In August 2002, anti-war activists Rebecca Gordon and Jan Adams were detained and searched at San Francisco International Airport while boarding a flight to Boston. They were told that they had been stopped because their names appeared on a secret national “No-Fly” list.¹⁰³ Hoping to learn why they were included on such a list, Ms. Gordon and Ms. Adams contacted the ACLU of Northern California (ACLU-NC), which filed FOIA requests with the Transportation Security Administration (TSA) and the Federal Bureau of Investigation (FBI).¹⁰⁴ After receiving no answer, the ACLU-NC filed suit, and subsequently received 94 pages of heavily redacted documents that failed to answer most of its questions about the composition of, and criteria for inclusion on, the No-Fly list.¹⁰⁵ The ACLU-NC went back to court to obtain an adequate response.

After reviewing large portions of the information withheld, a federal district court ordered the TSA and FBI to reconsider their withholding of each of the documents. The court found that the government, had “in many instances . . . not come close to meeting its burden [of proving its right to claim exemptions], and, in some instances, [had] made frivolous claims of exemption.”¹⁰⁶ The court identified several striking examples of abuse of FOIA exemptions:

- The TSA cited exemption 3 to withhold not only the names of people on the No-Fly lists, but the number of people listed, without providing any explanation of how this information was “sensitive security information.”¹⁰⁷
- The FBI cited exemption 7(C) to withhold an e-mail it had received summarizing the complaints of Ms. Adams, Ms. Gordon, and others, contending that it would invade Ms. Adams’s and Ms. Gordon’s privacy to give them information about themselves.¹⁰⁸

¹⁰³ American Civil Liberties Union of Northern California, *Federal Judge Says Government Is Using “Frivolous Claims” in Refusing to Disclose No-Fly Documents* (June 17, 2004) (online at www.aclunc.org/pressrel/040617-nofly.html).

¹⁰⁴ *Id.* The ACLU-NC also filed requests under the Privacy Act.

¹⁰⁵ *Id.*

¹⁰⁶ *Gordon v. FBI*, No. C 03-01779 CRB at 7 (N.D. Cal. June 15, 2004) (order for production of documents).

¹⁰⁷ *Id.* at 3–4.

¹⁰⁸ *Id.* at 4–5.

- The TSA cited exemption 6 to redact, among other things, the names of prominent officials within the TSA, even though the identity of those officials was public knowledge, and even though the documents in question contained no personal information about them.¹⁰⁹
- The FBI used exemption 7(C) to redact the names of government employees, including “even the name of the FBI employee who was responsible for responding to inquiries from the public regarding names appearing on No Fly lists.”¹¹⁰

2. *Abusing the Deliberative Process Privilege*

Under the Federal Land Policy and Management Act of 1976, the Bureau of Land Management (BLM) of the Department of the Interior (DOI) is required to inventory federal lands to determine which areas might be eligible for protection as wilderness.¹¹¹ In 1996, the State of Utah sued BLM to prevent it from conducting such an assessment on certain lands in the state.¹¹² The suit was dismissed, except for one claim, which languished in District Court until 2003.¹¹³ Then, over a two-week period, Utah refiled its complaint and reached a settlement with the Department of the Interior.¹¹⁴ The settlement provided that despite prior interpretations of the law, BLM had no further authority to conduct inventories.¹¹⁵

The Wilderness Society filed FOIA requests to obtain information about the settlement and how it was reached, ultimately suing DOI to compel a response to its requests.¹¹⁶ DOI had withheld most of the requested information by citing FOIA exemption 5, which covers predecisional and deliberative documents prepared by agency staff, as well as documents created by agency attorneys in anticipation of litigation. Upon reviewing these claims, however, The Wilderness Society found that DOI:

- Designated as “predecisional” documents composed after the date of the settlement. These included documents developed four weeks after the

¹⁰⁹ *Id.* at 6–7.

¹¹⁰ *Id.*

¹¹¹ See 43 U.S.C. § 1711(a), 43 U.S.C. § 1782(a).

¹¹² Tom Turner, *Unsettling Development*, *Environmental Forum*, 32 (Jan./Feb. 2004).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Plaintiffs’ Memorandum in Support of Its Motion for Summary Judgment, 1 (Feb. 13, 2004), *Wilderness Soc’y v. Norton*, Civ. No. 03-CV-01801 (D.D.C. 2004).

settlement that were apparently intended to address its impact on agency public relations.¹¹⁷

- Withheld documents discussing how to communicate with the media and explain Department policy as “predecisional and deliberative.”¹¹⁸
- Withheld strictly factual material as “deliberative” in some cases, and in other cases failed to segregate factual material from policy discussion.¹¹⁹
- Claimed attorney-client privilege for documents whose authors and recipients were unidentified, which were not shown to be associated with an actual attorney, and which did not appear to have been handled confidentially.¹²⁰

3. *Abusing the Law Enforcement Exemption*

The United Mine Workers Association (UMWA) requested notes from a September 2002 meeting between officials of the federal Mine Safety and Health Administration (MSHA) and representatives of the Ohio Valley Coal Company (OVCC), including OVCC’s president and Robert Murray, a major Republican campaign contributor.¹²¹ Although MSHA released copies of the notes pursuant to the UMWA’s FOIA request, the agency redacted the bulk of the text, rendering the notes mostly incomprehensible. Copies of the unredacted notes were obtained by the *Mine Safety and Health News*.¹²²

The full notes show that much of the deleted material consisted of accusations, threats, and profane invective directed by Mr. Murray and his associates against MSHA officials. Among other things, the OVCC representatives repeatedly referred to one MSHA official as a “puppet,” accused MSHA officials of “acting maliciously, capriciously, unprofessionally,” and repeatedly threatened to have them fired. To buttress these threats, Mr. Murray noted that “[Kentucky Senator] Mitch McConnell calls me one of the five finest men in America.”¹²³

¹¹⁷ *Id.* at 18.

¹¹⁸ *Id.* at 26.

¹¹⁹ *Id.* at 27–30.

¹²⁰ *Id.* at 31–33.

¹²¹ *MSHA Not Adhering to FOIA Requirements According to Committee*, *Mine Safety and Health News* (Mar. 3, 2003); see Center for Responsive Politics, *Ohio Valley Coal 2000 PAC Summary Data* (<http://www.opensecrets.org/pacs/lookup2.asp?strID=C00255315&cycle=2000>) (listing Ohio Valley Coal PAC as the top coal mining contributor to Republicans in the 2000 election cycle).

¹²² *MSHA Not Adhering to FOIA Requirements According to Committee*, *id.*

¹²³ *Comparison of MSHA/Murray Meeting Notes, September 11, 2002*, *Mine Safety and Health News* (Mar. 3, 2003).

The legal basis for MSHA's redactions is tenuous. MSHA cited FOIA exemptions 7(A) and 7(C), which apply to law enforcement records whose release could interfere with enforcement proceedings or threaten an unwarranted invasion of personal privacy, and exemption 5, which protects agency deliberative documents.¹²⁴ The meeting had no apparent law enforcement purpose, and even if it had, it is unclear how release of the redacted material could have either interfered with enforcement or constituted an unwarranted invasion of personal privacy. Moreover, the notes were a factual record of a conversation with outside parties, not intra-agency deliberative material.

4. *Withholding Data on Telephone Services*

On August 4, 2004, the Federal Communications Commission (FCC) reversed its longstanding policy of providing public access to telephone service providers' reports on service outages.¹²⁵ The FCC expanded the outage reporting requirements to cover providers of wireless and satellite communications, but also added a presumption in the regulations that all such outage reports would be confidential and withheld from FOIA requestors.¹²⁶

In initially adopting the outage reporting requirements in 1992, the FCC identified four purposes of the requirements, two of which were to "serve as a source of information to the public," and to "assist in dissemination of information to those affected."¹²⁷ Noting that "outages have been of enormous public concern," the FCC at that time decisively rejected commenters' requests that outage reports should routinely be treated as confidential, stating, "the public is entitled to full and forthcoming explanations of these events."¹²⁸

The FCC's proposal in March 2004 to expand the outage reporting requirements did not include any proposal to withhold the reports from the public.¹²⁹ In its comments on the proposal, however, the Department of Homeland Security urged

¹²⁴ 5 U.S.C. § 552(b).

¹²⁵ FCC, *In the Matter of New Part 4 of the Commission's Rules Concerning Disruptions to Communications, Report and Order and Further Notice of Proposed Rule Making*, ET Docket No. 04-35 (Aug. 4, 2004) (FCC 04-188) (online at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-188A1.pdf) (hereinafter "FCC Order").

¹²⁶ 47 C.F.R. 4.2.

¹²⁷ FCC, *In the Matter of Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions*, 7 F.C.C.R. 2010 (Feb. 13, 1992).

¹²⁸ *Id.*

¹²⁹ FCC, *Commission's Rules Concerning Disruptions to Communications: Proposed Rule*, 69 Fed. Reg. 15761 (Mar. 26, 2004).

the FCC to reverse its policy on security grounds.¹³⁰ In the final rule, the FCC justified the withholding under exemption 4 of FOIA, which exempts confidential business information, explaining that competitors could use information about the scope and frequency of a company’s service disruptions in marketing campaigns.¹³¹

After the final rule was announced, consumer advocates, state regulators, and some businesses denounced the new policy, saying that the outage data are “essential to your ability to understand what is going on.”¹³² Critics say the information is necessary to evaluate the reliability of phone service and make business decisions such as building networks and locating data centers.¹³³

G. Denial through Delay

In numerous instances, the Bush Administration has simply failed to respond to FOIA requests. Whether this is just inordinate delay or an unstated final refusal to respond to the request, the effect is the same: the public is denied access to the information.

FOIA recognizes that the timeliness of information is often critical to its usefulness, and hence the statute sets very tight timeframes for agencies to respond to FOIA requests. By law, within 20 business days of a request an agency must notify a requester whether the agency will comply with the request.¹³⁴ The agency may extend these time limits only by giving the requester written notice setting forth the “unusual circumstances” that necessitate an extension and specifying a date by which the agency expects to provide the information.¹³⁵ Similar timelines apply in handling appeals.¹³⁶ The statute also allows requesters to ask for expedited responses to their requests and it authorizes agencies to set up multi-track processing systems to allow smaller and simpler requests to move forward quickly, while longer requests are ongoing.¹³⁷

¹³⁰ DHS, *Comments of the Department of Homeland Security, In the Matter of New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, ET Docket No. 04-35 (June 2, 2004); DHS, *Reply Comments of the Department of Homeland Security, In the Matter of New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, ET Docket No. 04-35 (June 29, 2004).

¹³¹ FCC Order at 24–26.

¹³² *FCC Cuts Public Line to Phone Outage Data*, Washington Post (Aug. 28, 2004).

¹³³ *Id.*

¹³⁴ 5 U.S.C. § 552(a)(6)(A).

¹³⁵ 5 U.S.C. § 552(a)(6)(B).

¹³⁶ 5 U.S.C. § 552(a)(6).

¹³⁷ 5 U.S.C. § 552(a)(6)(D), (E).

In practice, many agencies frequently fail to meet these deadlines and many have substantial backlogs of FOIA requests that date back from before the Bush Administration.¹³⁸ Nevertheless, anecdotal evidence indicates a very high level of frustration on the part of FOIA requesters with respect to apparently unlimited delays by agencies under the Bush Administration. Many requesters have not yet received responses to numerous FOIA requests made in the past few years, even where the request is relatively narrow, specific, and unlikely to involve documents subject to an exemption.

For example, the National Security Archive is an independent research institute and library located at George Washington University, which collects and publishes declassified documents acquired through FOIA. As of early 2004, the National Security Archive had over 300 outstanding FOIA requests submitted in 2001, for which the government had provided no substantive response.¹³⁹ Among these, for example, was an August 2001 FOIA request to the CIA for a Scientific Intelligence Committee report, “Science and Technology in Communist China through 1970,” dating to circa 1966.¹⁴⁰ Although the CIA acknowledged the request, the agency neither released nor denied the request for the record.¹⁴¹ No explanation was given for the delay in processing a request for a specifically identified single document relating to matters over 30 years old. Similarly, the Archive has received only an acknowledgment of its simple request in September 2001 to the State Department for “the State Department’s contract with DynCorp for services in Colombia, contract #2071-125123E1.”¹⁴²

A second example involves the Arctic National Wildlife Refuge. In February 2002, several environmental groups submitted a FOIA request to the Department of Interior for records related to the Department’s positions on oil exploration and

¹³⁸ GAO, *Information Management: Update on Freedom of Information Act Implementation Status*, 32 (Feb. 2004) (GAO-04-257) (indicating a governmentwide FOIA backlog of roughly 160,000 requests in 2000); National Security Archive, *Justice Delayed is Justice Denied: The Ten Oldest Pending FOIA Requests; Freedom of Information Act Audit, Phase Two* (Nov. 17, 2003).

¹³⁹ E-mail from Meredith Fuchs, General Counsel, National Security Archive, to House Government Reform Committee minority staff (Jan. 15, 2004).

¹⁴⁰ Letter from William Burr, National Security Archive, to Kathryn I. Dyer, FOIA and Privacy Coordinator, CIA (Aug. 27, 2001).

¹⁴¹ See Letter from Kathryn I. Dyer, FOIA and Privacy Coordinator, CIA to William Burr, National Security Archive (Sept. 17, 2001).

¹⁴² See Letter from Michael Evans, National Security Archive, to Margaret P. Grafeld, Director, Department of State (Sept. 13, 2001); Letter from Katrina M. Wood, Department of State to Michael Evans, National Security Archive (Nov. 16, 2001).

development in the Arctic Refuge.¹⁴³ In April 2002, the groups submitted a second FOIA request to Interior for documents relating to a revision of a report by U.S. Geological Survey scientists on the wildlife impacts of oil drilling in the Arctic Refuge.¹⁴⁴ For both of these requests, Interior responded with various delaying tactics. These included invoking the statutory time extension without citing any “exceptional circumstances” as required, refusing to classify requesters as “educational” institutions for fee waiver purposes, reinterpreting and narrowing the scope of the request contrary to the groups’ explicit language in the request, and “closing” the request file when the Department did not hear back from the groups within 20 days.¹⁴⁵

The groups addressed Interior’s last set of objections on June 27, 2002, and May 15, 2002, respectively, but received no response.¹⁴⁶ They wrote again on September 19, 2002, but received no response.¹⁴⁷ On March 11, 2003, the groups filed suit on both requests.¹⁴⁸ After the suit was filed, Interior released some of the requested documents.¹⁴⁹

H. The Views of Experts

In preparing this report, the staff of the Special Investigations Division interviewed experts in FOIA law and practitioners with extensive experience in making requests for information under FOIA to obtain their views on how public access to government information has changed under the Bush Administration. Across the board, these experts believe that the Bush Administration is significantly more secretive than previous administrations, and that it is fundamentally resistant to providing public access to information held by the government. As Harry Hammitt, the editor of *Access Reports*, stated: “The Bush Administration has shown a dislike for the concept of open government from the top.”¹⁵⁰

¹⁴³ Plaintiffs’ First Amended and Supplemented Complaint for Declaratory and Injunctive Relief, 14 (June 13, 2003), *Sierra Club et al. v. U.S. Dept. of Interior*, D.D.C. (No. 1:03 CV 652).

¹⁴⁴ *Id.* at 12.

¹⁴⁵ *Id.* at 13–17.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ E-mail from Harry Hammitt, Editor, *Access Reports*, to House Government Reform Committee minority staff, re: Bush and FOIA (June 25, 2004).

The experts see this attitude shift as driving a myriad of changes, both large and small, in the government's FOIA policies. Furthermore, they believe that these actions, taken together, "radically" limit the public's ability to find out what the government is doing. For example:

- Jane E. Kirtley, Silha Professor of Media Ethics and Law at the University of Minnesota and former Executive Director of the Reporters Committee for Freedom of the Press, wrote: "The Bush Justice Department does not seem to view the FOIA as a law, like any other law, that must be enforced to promote the legislative goal of openness and accountability. Instead, it regards the exemptions as loopholes to be interpreted as broadly as possible in order to thwart the public's right to know what its government is up to."¹⁵¹ She further wrote: "It is impossible to overestimate the significance on the Ashcroft FOIA memo. In implementing FOIA, government agencies take their cue from the Justice Department. If the Justice Department makes clear that it intends to enforce FOIA's provisions and spirit — the presumption of openness, the idea that exemptions should be narrowly construed, and discretionary disclosure unless there is a serious risk of actual harm — agencies will take that directive seriously, and therefore handle requests seriously. If, on the other hand, as with the Ashcroft memo, the message is that refusals to disclose information will be defended as long as they have a 'sound legal basis' (a standard easily met, given the many disparate FOIA decisions from a variety of federal courts), agencies will interpret this to mean, at the very least, 'when in doubt, don't give it out.' It means delays, obfuscation, and frivolous denials will become commonplace."¹⁵²
- Prominent open-government advocate Steven Aftergood, who heads the Project on Government Secrecy at the Federation of American Scientists wrote: "The problem of classified information is bad enough. But in the last couple of years there has been a proliferation of new restrictions on unclassified information. Whether they are called 'sensitive but unclassified,' or 'for official use only,' or 'critical infrastructure information,' barriers to public access are springing up right and left."¹⁵³
- Meredith Fuchs, the General Counsel for the National Security Archive at George Washington University wrote: "The Bush Administration started on a bad foot when Attorney General Ashcroft introduced a policy that discouraged government agencies from releasing records under FOIA even when they have the discretion to release. It got worse when they elevated

¹⁵¹ E-mail from Jane E. Kirtley, *supra* note 11.

¹⁵² *Id.*

¹⁵³ Telephone conversation with Steven Aftergood, *supra* note 13.

privacy, corporate and other interests above any public interest in information. Then journalists began to get hassled for fees that they should not have to pay. As the General Accounting Office and the National Security Archive found in separate audits of federal agency FOIA practice, all of this has meant more secrecy.”¹⁵⁴

- Professor Philip H. Melanson, Director of the Policy Studies Program at the University of Massachusetts at Dartmouth, wrote: “The Bush administration has radically reduced the public right to know via executive orders, court cases and policy memos, more so than any administration in modern history. The Freedom of Information Act of 1966 has been so narrowed by the policies and decisions of the White House and Attorney General Ashcroft that it has been weakened to a point that threatens its viability.”¹⁵⁵
- Rebecca Daugherty, Director of the FOI Service Center, Reporters Committee for Freedom of the Press, wrote: “The Department of Justice under the Bush Administration will go to court on the flimsiest of excuses to protect information that is vital to the public’s understanding of what is going on in government. . . . It insists also that people locked up in connection with the War on Terrorism have a privacy interest in not having the public know that they are locked up — never mind the public’s interest in knowing whether there are systematic civil liberties abuses going on. National security and privacy are twin veils that smother the public’s ability to evaluate what is going on. Access to information has never been this difficult since passage of the Freedom of Information Act.”¹⁵⁶
- Professor Barbara Croll Fought at the S.I. Newhouse School of Public Communications at Syracuse University wrote: “The Freedom of Information Law is all about openness, access and accountability. Particularly at this time of terrorism and war, citizens need to understand what our government is doing, how our tax money is being spent and why decisions are made. The policies and pronouncements of the Bush administration — in particular the Ashcroft and Card memos — are not only sucking the spirit out of the FOIA, but shriveling its very heart.”¹⁵⁷

¹⁵⁴ E-mail from Meredith Fuchs, *supra* note 14.

¹⁵⁵ Philip H. Melanson, *supra* note 12.

¹⁵⁶ E-mail from Rebecca Daugherty, Director of the FOI Service Center, Reporters Committee for Freedom of the Press, to House Government Reform Committee minority staff (Aug. 31, 2004).

¹⁵⁷ E-mail from Barbara Croll Fought, Associate Professor, S.I. Newhouse School of Public Communications, Syracuse University, to House Government Reform Committee minority staff (July 16, 2004).

- Professor David C. Vladeck of the Georgetown University Law Center, who specializes in open government litigation, wrote: “George W. Bush will go down in the annals of history as ‘The Secrecy President.’ No president in modern times has done more to conceal the workings of government from the people. Not just with regard to asserted national security information, but on every front Bush has rolled back public access to government records and has tried to shield government from the people. For those who believe that democracy can flourish only with open and accountable government, the Bush Administration has been a nightmare.”¹⁵⁸

Television news journalist Bill Moyers has echoed these concerns:

It’s always a fight, to find out what the government doesn’t want us to know. It’s a fight we’re once again losing. Not only has George W. Bush eviscerated the Presidential Records Act and FOIA, he has clamped a lid on public access across the board. It’s not just historians and journalists he wants locked out; it’s Congress . . . and it’s you, the public and your representatives.¹⁵⁹

II. Presidential Records Act

The purpose of the Presidential Records Act is to ensure that after a President leaves office, the public will have full access to White House documents used to develop public policy. On November 1, 2001, however, President Bush issued an executive order that threatens to undermine this important law.

Congress passed the Presidential Records Act in 1978, following the bitter controversy over public access to Nixon Administration records relating to the Watergate break-in and coverup.¹⁶⁰ Before the enactment of the Presidential Records Act, a president’s papers relating to his official duties were considered to be his personal property. While most presidents of the modern era preserved their records and eventually made them public, absent the Presidential Records Act there is no guaranteed public access.

The Presidential Records Act establishes that the records of a president relating to his official duties belong to the American people.¹⁶¹ The law gives the Archivist of

¹⁵⁸ E-mail from David C. Vladeck, *supra* note 15.

¹⁵⁹ *Bill Moyers on the Freedom of Information Act*, NOW with Bill Moyers (Apr. 5, 2002) (online at <http://www.pbs.org/now/commentary/moyers4.html>).

¹⁶⁰ 44 U.S.C. § 2201-2207.

¹⁶¹ 44 U.S.C. § 2202.

the United States custody of these records and the “duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act.”¹⁶²

The Act recognizes the need for some limits on public access. For the first five years after a president leaves office, there is generally no access to the presidential records except by Congress and the courts.¹⁶³ The Act also permits a former president to restrict public access to sensitive records for up to 12 years after leaving office.¹⁶⁴ The Act specifies six categories of records eligible for such a restriction, such as confidential communications between a president and his advisers.¹⁶⁵ When the 12 years expire, the Presidential Records Act restrictions on release are eliminated, and access to the records is governed by the Freedom of Information Act. The Archivist must release records in response to FOIA requests, except that the exemption from FOIA for materials involving the government’s internal deliberative processes does not apply and such materials would be released.¹⁶⁶ The Presidential Records Act does not affect any rights a president or former president may have to assert executive privilege, which is a recognized constitutional privilege to maintain confidentiality of presidential documents under certain circumstances.¹⁶⁷

On January 16, 1989, President Reagan issued Executive Order 12667.¹⁶⁸ This order established a process for handling potential executive privilege claims over records covered by the Presidential Records Act. It provided the sitting president and former presidents notice that records would be released and also provided an opportunity to assert executive privilege. If the former president asserted executive privilege, the claim would be reviewed by federal officials. Ultimately, the materials would be released unless either the current president or the Archivist concurred with the claim of privilege.

On November 1, 2001, President Bush replaced the Reagan executive order with Executive Order 13233.¹⁶⁹ Under the law and the Reagan order, the presumption was that most documents would be released. In contrast, the Bush executive order establishes a process that generally operates to block the release of presidential papers.

¹⁶² 44 U.S.C. § 2203(f).

¹⁶³ 44 U.S.C. §§ 2204, 2205.

¹⁶⁴ 44 U.S.C. § 2204(a).

¹⁶⁵ *Id.*

¹⁶⁶ 44 U.S.C. § 2204(c); 5 U.S.C. § 5(b)(5).

¹⁶⁷ 44 U.S.C. § 2204(c)(2).

¹⁶⁸ Exec. Order No. 12667, 54 Fed. Reg. 3403 (Jan. 18, 1989).

¹⁶⁹ Exec. Order No. 13233, 66 Fed. Reg. 56025 (Nov. 1, 2001).

The Bush order made several significant changes to the implementation of the Presidential Records Act. First, the order allows a former president unilaterally to block the release of records by asserting executive privilege. If, after being notified of the intent to release documents, the former president makes an executive privilege claim, the Archivist must withhold the records, even if neither the Archivist nor the incumbent president concur. Individuals seeking access to the records must initiate litigation to obtain an independent review of the legitimacy of the former president's executive privilege claim.

Second, the order facilitates the ability of a former president to defend an assertion of executive privilege in court. The order provides that "absent compelling circumstances," the incumbent president "will concur in the privilege decision of the former President." Whenever the incumbent president concurs in a privilege claim, the order provides that the incumbent president, who is represented by the Justice Department, will defend the claim of privilege in any litigation. This shifts the cost of defending the claim from the former president to the taxpayer.

Third, the Bush order enables the president or former president to block release of records indefinitely, even without asserting executive privilege. The Presidential Records Act requires claims to withhold documents to be considered within specific time frames to assure expedited release. Under the Bush order, the incumbent and former presidents have 90 days to review documents prior to their release, but they can request an unlimited extension of that review time, blocking any release of documents in the interim.

Fourth, the Bush order expands the scope of protected records to include vice presidential records. It also allows the former vice president to assert an executive privilege claim with respect to such records, as long as either the incumbent or former president authorizes the claim.

Finally, the Bush order allows the designated representatives of the former president to invoke executive privilege on the president's behalf, even after the death of the president. In addition, the Bush order designates the former president's family as the representative in the event of the death or disability of a president prior to the designation of a representative. This is in direct conflict with the Presidential Records Act, which says: "Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter shall be exercised by the Archivist

unless otherwise previously provided by the President or former President in a written notice to the Archivist.”¹⁷⁰

The reaction of historians to the Bush order was sharply critical:

- Dr. Stanley Kutler, whose efforts forced the release of the Nixon tapes and who was instrumental in making the case for the Presidential Records Act, wrote: “If his action stands, Bush will have substantially shut down historical research of recent presidents. With this order, we would have no studies of recent events such as we have for the Vietnam War, using Lyndon Johnson’s and Richard Nixon’s records to reveal their own doubts about the war, including its origins and attempts to make peace.”¹⁷¹
- Prominent writer and reporter Richard Reeves wrote: “With a stroke of the pen on Nov. 1, President Bush stabbed history in the back and blocked Americans’ right to know how presidents (and vice presidents) have made decisions.”¹⁷²
- Historian Robert Dallek wrote: “President Bush, however, has severely crippled our ability to study the inner workings of a presidency. On Nov. 1, he issued an executive order that all but blocks access to the Reagan White House and potentially that of all other recent presidents.”¹⁷³

Editorial writers across the country were similarly outraged.¹⁷⁴

The Bush Administration’s approach to the release of thousands of previously confidential documents in 2001 and 2002 demonstrates the potential impact of the Bush order on public access to historical information.

¹⁷⁰ 44 U.S.C. § 2204(d).

¹⁷¹ *Classified! George W. Uses 9/11 as a Pretext to Reverse the Will of Congress and Wall off Presidential Records*, Chicago Tribune (Jan. 2, 2002).

¹⁷² *Writing History to Executive Order*, New York Times (Nov. 16, 2001).

¹⁷³ *All the Presidents’ Words Hushed*, Los Angeles Times (Nov. 25, 2001).

¹⁷⁴ See *Cheating History*, New York Times (Nov. 15, 2001); *A Flawed Approach on Records*, Washington Post (Nov. 9, 2001); *A Dark Oval Office*, Los Angeles Times (Nov. 6, 2002) (“The more the public knows about how government business is conducted, the stronger a democracy becomes. This attempt to gut the 1978 Presidential [Records] Act is an attack on the principle of open government”); *Self-Serving Secrecy*, USA Today (Nov. 12, 2001); *People’s Papers; Executive Order Shows Contempt for Law and What’s Right*, Houston Chronicle (Nov. 26, 2001); *A Knife in History’s Back*, St. Louis Post-Dispatch (Nov. 25, 2001); *Guarding History*, St. Petersburg Times (Nov. 24, 2001); *Abusing the Privilege; Bush’s Order Cloaking Records in Secrecy Must Be Rescinded Now or Overturned in Court Later*, Plain Dealer (Nov. 20, 2001).

On January 20, 2001, the 12-year Presidential Records Act restrictions on President Reagan's papers expired. Soon after that, the National Archives and Records Administration informed both former Presidents Reagan and Bush that it would begin to release documents. The Archives announced that it was prepared to release approximately 68,000 pages of documents that were responsive to FOIA requests filed in the previous seven years, but that had been withheld under the Presidential Records Act as confidential communications. The Bush Administration first delayed release of these documents by requesting multiple extensions of the 30-day deadline for asserting executive privilege that was imposed by the Reagan Executive Order. It then announced the new executive order, which changed the process for reviewing and releasing documents, further delaying the release.

The Bush Administration finally began to allow the release of these papers in January 2002, but many were withheld until June 2002, fully 15 months after they were initially scheduled to be released. That same month, the Archives sent notice that it would open another 1,654 pages of these previously confidential documents. More than six months later, 1,580 of those pages were released.¹⁷⁵ The final 74 pages were withheld after former President Reagan and President George W. Bush asserted constitutionally-based privilege.¹⁷⁶

Over the coming years, millions more pages of Reagan presidential papers, George H.W. Bush vice-presidential papers, and George H.W. Bush presidential papers will be requested under the Freedom of Information Act and prepared for release. Under the Bush order, the release of each set of these papers can be delayed indefinitely by both the incumbent president and the former president. Any can be blocked with an assertion of executive privilege by the president or the former president or his family. This will delay analysis of these historical documents and will unnecessarily bar valuable historic papers from release.

III. Federal Advisory Committee Act

In 1972, Congress adopted the Federal Advisory Committee Act to govern how the Executive branch obtains advice from groups of advisors outside the federal government.¹⁷⁷ FACA sets out rules for the operation of advisory bodies such as

¹⁷⁵ National Archives and Records Administration, *NARA's Opening of Presidential Records under the Presidential Records Act* (July 19, 2004) (e-mail to House Government Reform Committee minority staff).

¹⁷⁶ Letter from Alberto R. Gonzales, Counsel to the President, to Gary M. Stern, General Counsel, National Archives and Records Administration (Jan. 12, 2004).

¹⁷⁷ 5 U.S.C. App. 2.

boards, task forces, and commissions to promote the “good government” values of openness, accountability, and a balance of viewpoints. The goal of FACA is to prevent secret advisory bodies from exercising a hidden influence on government policy.

FACA applies to any advisory group that is established or used by a federal agency and has at least one member that is not a federal employee.¹⁷⁸ The membership of a group subject to FACA must be “fairly balanced in terms of the points of view represented and the functions to be performed.”¹⁷⁹

Generally, FACA requires that advisory committees announce their meetings, hold their meetings in public, take minutes of the meetings, and provide the opportunity for divergent viewpoints to be represented.¹⁸⁰ The public must be given access to the minutes as well as other records, reports, and transcripts.¹⁸¹ To protect sensitive information, FACA includes exemptions for information that relates to national security issues and information that is classified.¹⁸²

The Bush Administration, however, has acted to weaken and avoid FACA’s requirements. The Administration has supported legislative changes to carve out new exemptions to the law. In other instances, the Administration has carefully structured the way it solicits advice from private entities to avoid establishing an advisory committee subject to FACA. And sometimes the Administration simply ignores FACA requirements.

A. Limiting FACA through Legislation

The Bush Administration has supported specific legislative carve-outs from FACA, just as it has done with FOIA. As these categorical exemptions accumulate over time, FACA will no longer be a generally applicable requirement supporting open government across government agencies and activities.

In the proposal to Congress to establish a new Department of Homeland Security, President Bush proposed to exempt all advisory committees established by DHS

¹⁷⁸ See GSA, *The Federal Advisory Committee Act (FACA) Brochure* (undated) (online at http://www.gsa.gov/Portal/gsa/ep/contentView.do?pf=y&channelId=-13171&contentId=11869&programId=9140&pageTypeId=8203&oooid=9755&contentType=GSA_BASIC&programPage=/ep/program/gsaBasic.jsp&P=MC).

¹⁷⁹ 5 U.S.C. App. 2 § 5(b)(2).

¹⁸⁰ 5 U.S.C. App. 2 § 10.

¹⁸¹ 5 U.S.C. App. 2 § 10(b), (c).

¹⁸² 5 U.S.C. App. 2 § 10(d).

from FACA.¹⁸³ As finally adopted in the Homeland Security Act, this across-the-board exemption was dropped, but it was replaced by a mechanism likely to have a similar result. The Act gives the Secretary of Homeland Security the authority to exempt any advisory committee from FACA on a committee-by-committee basis. The only requirement is that the Secretary must publish notice of the committee in the Federal Register.¹⁸⁴ Amendments to the Medicare law, signed in December 2003, establish another new exemption from FACA. The law creates “competitive acquisition programs” to provide for the furnishing of competitively priced items and services and to award contracts for various types of medical equipment and supplies.¹⁸⁵ Section 302 establishes an advisory committee to give the Secretary of Health and Human Services advice and technical assistance in implementing this program. In particular, the committee is to offer advice on establishing data collection requirements and “the development of proposals for efficient interaction among manufacturers, providers of services, suppliers . . . and individuals.” This advisory committee is exempted from the requirements of FACA.¹⁸⁶

The Administration also supported a new FACA exemption that affects Department of Energy advisory committees with members that are federal contractors.¹⁸⁷ This provision, included in the fiscal year 2004 authorization bill for the Defense Department, allows DOE contractors to be considered federal employees for purposes of FACA when they are serving on an advisory committee. Because advisory committees composed solely of federal employees are not subject to FACA, the effect of the provision is to allow these contractors to provide advice to DOE officials without triggering FACA. The potential for abuse is significant given that federal contractors have a substantial financial stake in many DOE decisions, such as how best to clean up DOE sites with nuclear waste or which research and development activities to fund.

B. Avoiding and Disregarding FACA

In several instances, it appears that the Bush Administration has either violated FACA or structured its operations very carefully to avoid triggering FACA applicability. In some cases, the Bush administration has established groups of government employees that work extremely closely with outside entities, primarily

¹⁸³ White House, *Homeland Security Act of 2002*, legislative proposal transmitted to Congress June 18, 2002.

¹⁸⁴ Homeland Security Act of 2002, Pub. L. 107-296, §871.

¹⁸⁵ Medicare Prescription Drug and Modernization Act of 2003, Pub. L. 108-173, § 302(b).

¹⁸⁶ *Id.*

¹⁸⁷ Pub. L. 108-136, section 3112; see Letter from Linton F. Brooks, National Nuclear Security Administration, DOE, to Rep. Edward J. Markey (Sept. 3, 2003).

from industry, to gather and channel advice to government agencies or the White House. In others, the Administration or the advisory committee has exploited loopholes in the law to avoid FACA applicability.

Vice President Cheney's energy task force is the most prominent instance of an advisory body established by the Bush Administration that either violated or deliberately skirted FACA requirements. In this case, Vice President Cheney headed a task force to develop a national energy policy. The task force was ostensibly composed of the heads of nine federal agencies and several high-ranking White House officials. As partially revealed through news accounts, some documents obtained under FOIA, and an investigation by the Government Accountability Office, the task force engaged in extensive consultations with key representatives of the energy industry, particularly with coal, oil and gas, and nuclear interests.¹⁸⁸ While the full extent of these consultations is not known, the task force had minimal contact with individuals representing environmental and consumer interests related to a national energy policy.¹⁸⁹

A lawsuit brought by the Sierra Club and Judicial Watch alleges that the consultations with industry representatives were sufficient to make the representatives de facto members of the task force and hence to subject the task force to the requirements of FACA.¹⁹⁰ The district court, upheld by the D.C. Circuit Court of Appeals, issued decisions allowing the plaintiffs to conduct discovery of task force records that would show the role of nongovernmental parties in the operations of the task force.¹⁹¹ On appeal, however, the Supreme Court vacated the D.C. Circuit's opinion and sent the case back to the D.C. Circuit to consider whether to block the discovery requests in light of separation-of-powers considerations, among other concerns.¹⁹²

The energy task force is not the only instance where the Bush Administration has sought to avoid the application of FACA. Another example is the President's Commission on Intelligence on Weapons of Mass Destruction, which President Bush established on February 6, 2004.¹⁹³ The WMD Commission has been

¹⁸⁸ GAO, *Energy Task Force: Process Used to Develop the National Energy Policy* (Aug. 2003) (GAO-03-894); *Top G.O.P. Donors in Energy Industry Met Cheney Panel*, New York Times (Mar. 1, 2002); *Bush's Energy Plan Bares Industry Clout*, Los Angeles Times (Aug. 26, 2001).

¹⁸⁹ See *id.*

¹⁹⁰ *Judicial Watch v. National Energy Policy Development Group*, 219 F.Supp.2d 20 (D.D.C. 2002), *aff'd sub nom In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003), *vacated and remanded sub nom Cheney v. U.S. Dist. Court for Dist. of Columbia*, 124 S.Ct. 958.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Exec. Order No. 13328, 69 Fed. Reg. 6901 (Feb. 6, 2004).

charged with investigating intelligence capabilities and failures with regard to weapons of mass destruction, including the Administration’s assessments of Iraq’s possession of WMD.¹⁹⁴ Despite the broad public interest in the work of the WMD Commission, President Bush included in the executive order a provision whose sole purpose appears to be to exempt the Commission from FACA.

The WMD Commission is established within the Executive Office of the President, its members are appointed by the President, the Commission reports to the President, its stated mission is to advise the President, and the Commission is directed to “solely advise and assist the President.”¹⁹⁵ Using this structure does not affect the applicability of FACA, but it does make the Commission’s records exempt from FOIA, which applies to federal agencies but not White House entities that solely advise and assist the President.¹⁹⁶ However, the executive order also includes a single sentence stating: “The Central Intelligence Agency and other components of the Intelligence Community shall utilize the Commission and its resulting report.”¹⁹⁷ Since FACA includes an explicit exemption for any advisory committee “utilized” by the CIA, the effect of this sentence appears to be to make FACA inapplicable to the WMD Commission.¹⁹⁸ In a recent *Federal Register* notice, the Administration refused to apply FACA to the Commission.¹⁹⁹

Other examples of commissions structured or operated to avoid the application of FACA include:

- **The President’s Commission to Strengthen Social Security.** The President’s Commission to Strengthen Social Security was established by Executive Order 13210 as an advisory committee to provide the President with “bipartisan recommendations to modernize and restore the fiscal soundness to the Social Security System.” The Commission conducted much of its work through two subgroups, or subcommittees, which held closed

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See DOJ, *Freedom of Information Act Guide*, Entities Subject to the FOIA (May 2004) (online at <http://www.usdoj.gov/oip/procereq.htm#entities>).

¹⁹⁷ Exec. Order No. 13328, *supra* note 193.

¹⁹⁸ 5 U.S.C. App. 2 §4(b)(1).

¹⁹⁹ Executive Office of the President, Office of Administration, *Notice of Meeting of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction*, 69 Fed. Reg. 39481 (June 30, 2004) (“While the Commission does not concede that it is subject to the requirements of the Federal Advisory Committee Act . . . it has been determined that the July 14–15 meeting would fall within the scope of exceptions (c)(1) and (c)(9)(B) of the Sunshine Act . . . and thus could be closed to the public if FACA did apply to the Commission”).

meetings and refused repeated requests for records of those proceedings. The Commission maintained that only the full committee, not its subcommittees, was subject to FACA. While regulations issued by the General Services Administration allow this interpretation, it is contrary to the fundamental principles of FACA, and the result was to severely limit public understanding of the commission's work. When members of Congress objected to the Commission's evasion of FACA requirements, they were rebuffed.²⁰⁰

- **The Energy Project Streamlining Task Force.** President Bush established the White House Task Force on Energy Project Streamlining by executive order in May 2001.²⁰¹ The Streamlining Task Force has no statutory authorization, directives, or limitations.²⁰² The group is composed solely of federal employees. Yet it appears to function primarily as a mechanism for energy companies to enlist support from the White House on decisions that are supposed to be made by government scientists and regulators in agencies such as the Bureau of Land Management, the Forest Service, the U.S. Fish and Wildlife Service, and EPA.²⁰³ The Streamlining Task Force solicits recommendations for specific proposed energy projects for which the Task Force is needed to "facilitate" government permitting decisions.²⁰⁴ In its first solicitation, industry representatives requested aid from the Streamlining Task Force in obtaining approvals for 68 specific energy projects. While industry requests are posted on a web page, the White House has provided little

²⁰⁰ See Letter from Rep. Robert T. Matsui, Ranking Minority Member, Subcommittee on Social Security, Committee on Ways and Means, and Rep. Henry A. Waxman, Ranking Minority Member, Committee on Government Reform, to the Honorable Daniel Patrick Moynihan and Mr. Richard Parsons, Co-Chairmen, President's Commission to Strengthen Social Security (Aug. 21, 2001); Letter from Rep. Robert T. Matsui, Ranking Minority Member, Subcommittee on Social Security, Committee on Ways and Means, and Rep. Henry A. Waxman, Ranking Minority Member, Committee on Government Reform, to the Honorable Daniel Patrick Moynihan and Mr. Richard Parsons, Co-Chairmen, President's Commission to Strengthen Social Security (Nov. 8, 2001); Letter from Charles P. Blauhous, Executive Director, President's Commission to Strengthen Social Security to Reps. Henry A. Waxman and Robert T. Matsui (Nov. 14, 2001).

²⁰¹ Exec. Order No. 13212, 66 Fed. Reg. 28357 (May 18, 2001).

²⁰² Section 341 of the energy bill conference report would permanently establish this body and rename it the Office of Federal Energy Project Coordination. While the House has passed the conference report, it appears unlikely that the Senate will pass it during the 108th Congress.

²⁰³ See White House Task Force on Energy Project Streamlining, *Proceedings of the First Year* (Dec. 2002) (briefly describes task force activity on eight of the 68 projects that were submitted to the task force in its initial solicitation).

²⁰⁴ See White House Task Force on Energy Project Streamlining, online project or issue submission form at <http://www.etf.energy.gov/htmls/comments.html>.

information about actions taken by the Task Force on specific projects.²⁰⁵ An investigative news report gives accounts, however, of numerous occasions on which task force officials have pressured government experts in the field, urging land managers to speed activities needed to grant permits.²⁰⁶

- **The Rocky Mountain Energy Council.** The Streamlining Task Force established another body, the Rocky Mountain Energy Council (RMEC). The RMEC is described as a state and federal partnership for the management of energy production and the development of energy policies on federal and state public lands in the Rockies.²⁰⁷ The first meeting of the RMEC in July 2003 included representatives from the White House, numerous federal agencies, the States of Colorado, Montana, Utah, and Wyoming, and the Western Governors' Association, which is not a government body.²⁰⁸ After a public outcry erupted over this closed meeting and the limited information available about the RMEC,²⁰⁹ the Council on Environmental Quality held a public meeting of the RMEC in August 2003. At the August meeting, there was explicit discussion of how to structure the RMEC to avoid FACA.²¹⁰ The

²⁰⁵ See White House Task Force on Energy Project Streamlining website at <http://www.etf.energy.gov/htmls/comments.html>; White House Task Force on Energy Project Streamlining, *Proceedings of the First Year* (Dec. 2002).

²⁰⁶ *White House Puts the West on Fast Track for Oil, Gas Drilling*, Los Angeles Times (Aug. 25, 2004).

²⁰⁷ See Council on Environmental Quality, *White House Task Force on Energy Project Streamlining; Public Organization Meeting of the Proposed Rocky Mountain Energy Council*, 68 Fed. Reg. 44950 (July 31, 2003).

²⁰⁸ The federal agencies included: Interior, BLM, Fish and Wildlife Service, the Forest Service, EPA, DOE, and the Office of Surface Mining. See White House Task Force on Energy Project Streamlining, *Participating Organizations* (online at http://www.etf.energy.gov/pdfs/RMEC_PartOrg.pdf).

²⁰⁹ See *Let Public Shape Energy Policy*, Denver Post (July 13, 2003) (editorial) (“The Bush administration is deciding the fate of our public lands in secret meetings. . . . Last week, the first meeting of the newly created Rocky Mountain Energy Council, held at the Denver Federal Center in Lakewood, was closed to the public. The secrecy is both indefensible and worrisome”); *Gas Pains*, Salt Lake Tribune (July 8, 2003) (editorial).

²¹⁰ A White House staff person told the members that FACA would not apply if the RMEC membership was comprised of employees of federal and state agencies and local and tribal governments. Rocky Mountain Energy Council, *RMEC Implementation and Public Comment Meeting, Final Summary*, 4–5 (Aug. 26, 2003) (online at <http://www.etf.energy.gov/pdfs/rmecfinalmin-82603.pdf>). This advice appears to rely on an exemption provided under FACA for intergovernmental communications between federal employees and employees of state, local, and tribal governments relating to the implementation of federal programs that inherently share intergovernmental responsibilities. See Unfunded Mandates Reform Act, 2 U.S.C. §1533.

Administration disbanded the RMEC in 2004, with the explanation that there were other ways to achieve its objectives.²¹¹

Recently, the White House Office of Management and Budget (OMB) formally advised agencies that they could avoid FACA's requirements by hiring a contractor to manage advisory committees convened to conduct peer reviews. In September 2003, OMB proposed draft guidelines to vastly expand the application of peer review procedures to science used by government regulators.²¹² In the proposed guidance, OMB stated that in creating peer review panels, agencies should assess whether the panel would be subject to FACA.²¹³ OMB also stated that agencies could retain outside firms to oversee the peer review process, advising that if they did so, the peer review panel would be exempt from FACA.²¹⁴ In a later reproposal of the peer review guidelines issued in April 2004, OMB did not reference FACA.²¹⁵ However, OMB also did not disclaim its earlier position. This apparently leaves in place OMB's interpretation that using outside contractors would exempt a peer review process from FACA, as well as OMB's endorsement of that approach.

PART II: LAWS THAT RESTRICT PUBLIC ACCESS TO FEDERAL RECORDS

The Clinton Administration significantly increased public access to government information by restricting the ability of officials to classify information and establishing an automatic system for the declassification of documents. In a 1995 executive order that revised the classification system for the first time since the end of the Cold War, President Clinton established a presumption against classification in cases of significant doubt and required the automatic declassification of most historically valuable information over 25 years old.²¹⁶ The declassification provisions covered over 1.6 billion pages of secret records created over the past 50 years.²¹⁷

²¹¹ *Drilling Council Called Off; Energy Task Force to Use Other Ways of Streamlining*, Rocky Mountain News (Mar. 20, 2004).

²¹² 68 Fed. Reg. 54023 (Sept. 15, 2003).

²¹³ *Id.* at 54028.

²¹⁴ *Id.*

²¹⁵ 69 Fed. Reg. 23230 (Apr. 28, 2004).

²¹⁶ Exec. Order No. 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995).

²¹⁷ National Archives and Records Administration, Information Security Oversight Office, *2001 Report to the President*, 3 (Sept. 20, 2002).

The Bush Administration has reversed this trend toward openness and dramatically increased the volume of government information concealed from public view. This is particularly evident in the Bush Administration's expanded use of national security classification. Original classification decisions, the most important measure of classification activity, have increased dramatically over the past three years. In fiscal years 2001 to 2003, the average number of original classifications per year increased 50% over the average for the previous five fiscal years.²¹⁸ President Bush also increased the number of agencies with original classification authority and delayed the pace of declassification to an annual average rate of 60% lower than annual rates during the Clinton Administration.²¹⁹

The recent comments of J. William Leonard, the Director of the Information Oversight office, are informative. He told a seminar of classification officials: "Unfortunately, I have lately found some to use war as an excuse to disregard the basics of the security classification system."²²⁰ In recent Congressional testimony, Carol A. Haave, the Deputy Undersecretary of Defense for Counterintelligence and Security, admitted that as many as half of all government secrets are improperly classified.²²¹

The Bush Administration has also obtained unprecedented authority to conduct government operations in secret, with little or no judicial oversight. Under expanded law enforcement authority in the PATRIOT Act, the Justice Department can more easily use secret orders to obtain library and other private records, obtain "sneak and peek" warrants to conduct secret searches, and conduct secret wiretaps. In addition, the Bush Administration has used novel legal interpretations to expand its authority to detain, try, and deport individuals in secret. It has detained hundreds of "unlawful enemy combatants" secretly at the Guantanamo Bay Naval Station, authorized secret trials of these combatants, and established mechanisms for the secret detention and deportation of aliens.

²¹⁸ National Archives and Records Administration, Information Security Oversight Office, *Report to the President 2003*, 5 (Mar. 31, 2004); National Archives and Records Administration, *Report to the President 2002*, 24 (June 30, 2003). The Information Security Oversight Office reported the following original classification decisions between FY 1996 and FY 2003: 105,163 for FY 1996; 158,788 for FY 1997; 137,005 for FY 1998; 169,735 for FY 1999; 220,926 for FY 2000; 260,674 for FY 2001; 217,288 for FY 2002; 234,052 in FY 2003.

²¹⁹ See *infra* notes 249–53 and 262 and accompanying text.

²²⁰ J. William Leonard, Director, Information Security Oversight Office, *The Importance of Basics* (June 15, 2004) (remarks before the National Classification Management Society's Annual Training Seminar).

²²¹ *Half of all Secrets Are Improperly Classified, Official Says*, *Secrecy News* (Aug. 25, 2004); *Too Much Secrecy*, *Washington Post* (Aug. 28, 2004).

I. National Security Classification of Government Records

Since 1940, presidents have issued executive orders that govern the classification and safeguarding of national security information.²²² Under these orders, information can be classified at three levels, depending on the degree of damage that would reasonably be caused by an unauthorized disclosure. Information classified as “confidential” is expected to cause damage to national security. “Secret” information is expected to cause serious damage, and “top secret” information is expected to cause exceptionally grave damage.²²³ In addition to this regime of classification, certain agencies — such as the Energy Department, Central Intelligence Agency, Defense Department, and National Security Agency — promulgate different classification levels and standards for information within their areas of responsibility.²²⁴

Prompted by changing security requirements after the end of the cold war, President Clinton issued Executive Order 12958, which significantly restricted the classification of information and established a revised system for the declassification of information.²²⁵ For instance, the Clinton order established a presumption against classification. The Clinton order made other changes to lift the veil of secrecy, such as limiting the duration of classification in most cases to ten years, requiring within five years of the order the automatic declassification of most historically valuable records at least 25 years old,²²⁶ authorizing classification challenges, and establishing the Interagency Security Classification Appeals Panel to adjudicate classification controversies.²²⁷ In the first six years following the Clinton order, the executive branch increased the average number of records that it declassified by more than ten times, and it increased by more than five times the number of records declassified from 1980 to 1994.²²⁸

The Bush Administration, however, reversed the trend toward openness and dramatically increased the volume of information restricted as classified.

²²² See Congressional Research Service, *Security Classification Policy and Procedure: E.O. 12958, as Amended* (May 14, 2003) (97-771 GOV).

²²³ Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 25, 2003).

²²⁴ J. William Leonard, Director, Information Security Oversight Office, *Information Sharing and Protection: A Seamless Framework or Patchwork Quilt?* (June 12, 2003) (remarks before the National Classification Management Society’s Annual Training Seminar).

²²⁵ Exec. Order No. 13292, *supra* note 223, at 1, 3–6.

²²⁶ This deadline was later extended from five to six and a half years.

²²⁷ Exec. Order No. 12958, *supra* note 216.

²²⁸ Public Citizen, *Analysis of Executive Order 13292: Changes in Classification Policy Imposed by the Bush Administration Executive Order* (2003) (citing Information Security Oversight Office, *Report to the President, 2001*, 3–4 (Nov. 2002)).

A. President Bush’s Executive Order 13292

On March 25, 2003, President Bush issued Executive Order 13292 to amend the system for classifying, safeguarding, and declassifying national security information. Although it retained some elements of Clinton order, it also made significant changes favoring secrecy.

1. *Eliminating the Presumption of Disclosure*

Among the distinctive features of the Clinton order were two instructions to err on the side of openness in cases of significant doubt. The Clinton order expressly provided that “[i]f there is significant doubt about the need to classify information, it shall not be classified.”²²⁹ Similarly, when there was significant doubt about the appropriate level of classification, the Clinton order specified that the information be classified at the lower level.²³⁰ President Bush deleted both of these provisions from the Bush order, permitting officials to classify information even when the need to do so was in significant doubt.

2. *Postponing or Avoiding Automatic Declassification*

The Clinton order established a system that limited the duration of classified treatment and resulted in automatic declassification. Under the Clinton order, a classification authority was required to establish a time period — generally within ten years — after which the document would lose its classified status. To establish a classification period exceeding ten years, the original classification authority needed to conclude that disclosure would reasonably be expected to cause one of eight specified harms.²³¹

The Bush order removes these limitations, allowing an original classification authority to select periods of up to 25 years if it merely determines that such a period is required by the sensitivity of the information.²³² In another departure

²²⁹ Exec. Order No. 12958, *supra* note 216, at § 1.2(b).

²³⁰ *Id.* at § 1.3(c).

²³¹ *Id.* at § 1.6(d). These include: (1) revealing an intelligence source, method, or activity; (2) revealing information that would assist in the development or use of weapons of mass destruction; (3) revealing information that would impair technology within a U.S. weapon system; (4) revealing military or emergency preparedness plans; (5) revealing foreign government information; (6) damaging relations between the U.S. and a foreign government, revealing a confidential source, or undermining long term diplomatic activities; (7) impairing the ability to protect the President and other officials; and (8) violating a statute, treaty, or international agreement.

²³² Exec. Order No. 13292, *supra* note 223, at § 1.5(b).

from the Clinton order, which imposed a limit of extensions to ten-year periods, the Bush order allows classifiers to extend these time periods without any apparent limitation.²³³

The Bush order also weakens the system of automatic declassification established under the Clinton order for records more than 25 years old and determined by the Archivist to have permanent historical value. Under the Clinton order, an agency head could exempt records from automatic declassification if release “should” be expected to result in one of several categories of serious harm.²³⁴ Under the Bush order, an agency can withhold release if it merely “could” cause one of the specified harms.²³⁵ Moreover, the Bush order further extended the deadline for automatic declassification procedures to take effect. President Clinton had extended his own deadline to April 2003 to accomplish this requirement with respect to multiple agency documents and information pertaining to intelligence sources and methods.²³⁶ The Bush order delays implementation of this requirement until December 2006.²³⁷

Spending decisions by the Bush Administration have also contributed to delays in declassification. For FY 2001, federal agencies reported spending approximately \$232 million on declassification efforts.²³⁸ Since then, estimated spending on declassification plummeted 77%, falling to \$53.8 million for FY 2003.²³⁹ The Information Security Oversight Office predicts that these funding decisions will clearly affect the ability of agencies to review their classified holdings for declassification, warning that “[t]he consequence will be a shift back to the ever increasing ‘mountain’ of classified records being stored in secure locations or containers across Government and contractor facilities.”²⁴⁰

3. *Protecting Foreign Government Information*

“Foreign government information” is information provided to the U.S. government by foreign governments and international organizations with “an

²³³ *Id.* at § 1.5(c); Exec. Order No. 12958, *supra* note 216, at § 1.6(d).

²³⁴ Exec. Order No. 12958, *supra* note 216, at § 3.4(b).

²³⁵ Exec. Order No. 13292, *supra* note 223, at § 3.3(b).

²³⁶ Exec. Order No. 13142, § 2, 64 Fed. Reg. 66089 (Nov. 19, 1999).

²³⁷ Exec. Order No. 13292, *supra* note 223, at § 3.3(a).

²³⁸ National Archives and Records Administration, Information Security Oversight Office, *Report to the President 2001*, 8 (Sept. 20, 2002).

²³⁹ National Archives and Records Administration, Information Security Oversight Office, *Report on Cost Estimates for Security Classification Activities for 2003*, 3 (July 2004); *Report to the President 2002*, *supra* note 218, 14.

²⁴⁰ *Report to the President 2002*, *supra* note 218, 27.

expectation that the information is to be held in confidence.”²⁴¹ In Executive Order 12356, President Reagan established a presumption that unauthorized disclosure of this information would cause damage to U.S. national security, increasing the likelihood of a decision to classify the information. The Clinton order eliminated the presumption, but the Bush Administration restored it.²⁴²

4. *Reclassifying Information*

The Bush order expands the authority to reclassify information that had previously been declassified. The Clinton order had provided that “information may not be reclassified after it has been declassified and released to the public under proper authority.”²⁴³ Under the Bush order, such information can be reclassified if the agency head or deputy provides authorization, the information “may be reasonably recovered,” and the action is reported to the Director of the Information Security Oversight Office.²⁴⁴

5. *Weakening the Interagency Security Classification Appeals Panel*

The Bush order retained the Interagency Security Classification Appeals Panel (ISCAP), which reviews decisions to exempt documents from automatic declassification and adjudicates challenges to classification and requests for mandatory declassification. The Bush order, however, transfers significant authority from ISCAP to the Director of Central Intelligence. The Bush order allows the CIA Director to reject ISCAP decisions if he or she determines that declassification “could reasonably be expected to cause damage to the national security and to reveal (1) the identity of a human intelligence source, or (2) information about the application of an intelligence source or method.” The CIA Director’s decision can be overridden only by the president.²⁴⁵

CIA Director George Tenet reportedly used this authority for the first time in December 2003 to block the partial declassification of a 1968 issue of the President’s Daily Brief. A researcher had requested the document because it apparently discussed the Soviet manned lunar program. Until the CIA Director’s intervention, ISCAP had ruled in favor of partial declassification. The researcher has appealed the veto to the White House.²⁴⁶

²⁴¹ Exec. Order No. 13292, *supra* note 223.

²⁴² *Id.* at § 1.1(c); Exec. Order No. 12958, *supra* note 216.

²⁴³ Exec. Order No. 12958, *supra* note 216, at § 1.8(c).

²⁴⁴ Exec. Order No. 13292, *supra* note 223, at § 1.7(c).

²⁴⁵ *Id.* at § 5.3.

²⁴⁶ *CIA Vetoes Release of 1968 Presidential Brief*, Secrecy News (Dec. 11, 2003).

6. *Exempting Vice Presidential Records from Mandatory Declassification Review*

President Clinton designated the Vice President an original classification authority.²⁴⁷ The Bush order expands upon this provision by exempting any information classified by the Vice President from the mandatory declassification review.²⁴⁸

B. President Bush’s Expansion of “Original Classification Authorities”

The executive orders on classification have specified that only certain individuals have the authority to classify information in the first instance. These have included the President, designated agency heads, and other officials designated by the President or delegated this authority.²⁴⁹

President Bush has made significant additions to the number of individuals who can originally designate documents as classified. On December 10, 2001, President Bush added the Secretary of Health and Human Services to the list of agencies that can classify information originally as “secret.”²⁵⁰ On May 6, 2002, he added the Administrator of the Environmental Protection Agency,²⁵¹ and on September 26, 2002, he added the Secretary of Agriculture.²⁵² On September 17, 2003, he upgraded the authority of the Director of the Office of Science and Technology Policy to classify information originally as “top secret.”²⁵³

²⁴⁷ 60 Fed. Reg. 53845 (Oct. 17, 1995).

²⁴⁸ Exec. Order No. 13292, *supra* note 223, at § 3.5(b).

²⁴⁹ As of the end of the Clinton Administration, 19 offices and agencies were authorized original classification authorities. President Clinton authorized the following to classify information originally at the top secret level: Executive Office of the President, Chief of Staff to the President, Director of the Office of Management and Budget, National Security Advisor, Director of the Office of National Drug Control Policy, Chairman of the President’s Foreign Intelligence Advisory Board, Secretary of State, Secretary of Treasury, Secretary of Defense, Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Attorney General, Secretary of Energy, Chairman of the Nuclear Regulatory Commission, Director of the U.S. Arms Control and Disarmament Agency, Director of Central Intelligence, NASA Administrator, and FEMA Director. President Clinton authorized the following to classify information originally at the secret level: Executive Office of the President, U.S. Trade Representative, Chairman of the Council of Economic Advisers, Director of the Office of Science and Technology Policy, Secretary of Commerce, Secretary of Transportation, AID Administrator, and Director of U.S. Information Agency. President Clinton authorized the following to classify information at the confidential level: President of the Export-Import Bank and President of the Overseas Private Investment Corporation. 60 Fed. Reg. 53845 (Oct. 13, 1995).

²⁵⁰ 66 Fed. Reg. 64347 (Dec. 10, 2001).

²⁵¹ 67 Fed. Reg. 31109 (May 6, 2002).

²⁵² 67 Fed. Reg. 61465 (Sept. 26, 2002).

²⁵³ 68 Fed. Reg. 55257 (Sept. 23, 2003).

C. The Impact on Classification Decisions

The impact of these decisions has been dramatic. Original classification decisions — those in which an authorized classifier first determines that disclosure could harm national security — have risen significantly during the Bush Administration. In fiscal years 2001 to 2003, the average number of original classifications per year increased 50% over the average for the previous five fiscal years.²⁵⁴ Because original classification decisions precede all other aspects of the security classification system, the Information Security Oversight Office considers them to be the most important indicator of classification activity.²⁵⁵

Derivative classification decisions, which involve incorporating, restating, or paraphrasing information that had previously been classified, have also increased significantly during the Bush Administration. Between FY 1996 and FY 2000, derivative classifications averaged 9.96 million per year. Between FY 2001 and FY 2003, the average increased to 19.37 million per year, a 95% increase.²⁵⁶ In the last year alone, the combined total of derivative and original classification activity increased 25%.²⁵⁷

The rapid growth of secrecy is further reflected by the increasing cost of classification for the government and private industry. The classification system includes programs to conduct background checks of government and contractor personnel, assure the physical security of classified information and facilities, establish policies and procedures to protect classified information, declassify information, maintain secure information technology systems, and provide appropriate training.²⁵⁸ According to the National Archives' Information Security Oversight Office, the total cost borne by the government and private industry to

²⁵⁴ *Report to the President 2003*, *supra* note 218, 5; *Report to the President 2002*, *supra* note 218, 24.

²⁵⁵ *Report to the President 2003*, *supra* note 218, 13.

²⁵⁶ *Id.* at 17. *Report to the President 2002*, *supra* note 218, 24. Combined classification activity significantly increased between FY 1999 and FY 2000, mainly because of an anomaly reported by the Department of State. In that year, the Department of State registered a 394% increase over the previous year, which is attributable in part to changes in its reporting procedures. National Archives and Records Administration, Information Security Oversight Office, *2000 Report to the President* (Sept. 17, 2001) (online at www.archives.gov/isoo/reports/isoo_reports.html).

²⁵⁷ Federation of American Scientists Project on Government Secrecy, *Secrecy News* (Apr. 27, 2004).

²⁵⁸ *Report to the President 2002*, *supra* note 218, 13-14.

maintain the classification system was \$6.5 billion in FY 2003, \$1.8 billion (or 38%) more than the cost in FY 2001.²⁵⁹

At the same time that classification activity increased, the pace of declassification decreased. In the four years following the Clinton order, from FY 1996 to FY 1999, the executive branch declassified approximately 720 million pages, averaging 180 million pages per year.²⁶⁰ In the first three fiscal years of the Bush Administration, the executive branch declassified approximately 219 million pages, averaging 73 million per year.²⁶¹ This represents a 60% decrease in the average number of pages declassified each year of the Bush Administration. During FY 2002, the Administration declassified just 44.4 million pages of permanently valuable historical records, the largest decline in the number of pages declassified in any one year since the Clinton order became effective in October 1995.²⁶²

Because classified documents are not available to the public, it can be hard to assess the legitimacy of classification decisions. However, it appears that some of these decisions have had the effect of suppressing embarrassing information. This not only shields government officials from public scrutiny, it violates President Bush's own executive order, which expressly prohibits the classification of information to "conceal violations of law, inefficiency, or administrative error" or to "prevent embarrassment to a person, organization, or agency."²⁶³

For example, the Defense Department classified the entire March 2004 investigative report of Major General Antonio Taguba, which detailed the unlawful mistreatment of Iraqi prisoners of war in U.S. custody. One reporter who had reviewed a widely disseminated copy of the report raised the issue in a Defense Department briefing with General Peter Pace, the Vice Chairman of the Joint Chiefs of Staff, and Secretary Rumsfeld. The reporter noted that "there's clearly nothing in there that's inherently secret, such as intelligence sources and methods or troop movements" and asked: "Was this kept secret because it would be embarrassing to the world, particularly the Arab world?" General Pace responded that he did not know why the document was marked secret. When asked whether he could say why the report was classified, Secretary Rumsfeld answered: "No, you'd have to ask the classifier."²⁶⁴

²⁵⁹ *Classification Costs Skyrocket*, *Secrecy News* (July 21, 2004).

²⁶⁰ *Report to the President 2002*, *supra* note 218, 27.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Exec. Order No. 13292, *supra* note 223, at § 1.7.

²⁶⁴ Department of Defense, *News Transcript: Defense Department Operational Update Briefing* (May 4, 2004) (<http://www.fas.org/sgp/news/2004/05/dod050404.html>).

Because the classification decision appeared to violate the executive order's prohibition against classification to conceal violations of law, the Federation of American Scientists requested an inquiry by the Information Security Oversight Office, which agreed to review the matter.²⁶⁵ Alluding to the Taguba report in a recent speech before classification professionals, the Director of the Information Security Oversight Office described how concealment of misconduct is fundamentally counterproductive:

And what is gained by classifying such activity? Our values as a society are such that they will invariably serve as a self-correcting measure when confronted with such abuses — thus the inevitability that such information will eventually become widely known. At the same time, the initial act of classification can negatively impact the timeliness and completeness of notifications provided to certain Government officials, thus impairing their ability to deal with ensuing issues. In the final analysis, we only succeed in keeping the information from those who need to know it the most — the American people and their leaders — and even then, we only delay the inevitable.²⁶⁶

In another apparent example of improper classification, the Defense Department retroactively classified embarrassing weaknesses in the National Missile Defense program after this unclassified information had been disclosed and widely disseminated. Details about flaws in the National Missile Defense system emerged in September 2000, when Philip Coyle, the director of the Pentagon's office of Operational Test and Evaluation, appeared as a hearing witness before a subcommittee of the Government Reform Committee. Mr. Coyle testified that his office had prepared a report on major deficiencies in the missile defense testing program, which concluded that the program was so immature that a rigorous assessment of the system could not even be made. He also said that the report set forth 50 recommendations explaining how the system should be tested for any future deployment.²⁶⁷

²⁶⁵ Letter from Steven Aftergood, Director, Project on Government Secrecy, Federation of American Scientists, to J. William Leonard, Director, Information Security Oversight Office (May 6, 2004); Letter from J. William Leonard, Director, Information Security Oversight Office, to Steven Aftergood, Project on Government Secrecy, Federation of American Scientists (May 6, 2004).

²⁶⁶ J. William Leonard, *supra* note 220.

²⁶⁷ Subcommittee on National Security, Veterans Affairs, and International Relations, Committee on Government Reform, *Hearing on National Missile Defense: Test Failures and Technology Development*, 106th Cong. (Sept. 8, 2000); see Letter from Rep. Henry A. Waxman and Rep. John F. Tierney to Defense Secretary Donald Rumsfeld (Mar. 25, 2004).

Despite Mr. Coyle's agreement to provide the subcommittee a complete report, the Defense Department refused to turn over the document for eight months, releasing it only after 55 members of Congress wrote to Secretary Rumsfeld and demanded its immediate delivery. The document was then posted on the internet by Rep. Christopher Shays, Chairman of the Subcommittee on Emerging Threats, National Security and International Relations, and was the subject of several news articles and editorials.²⁶⁸ Over two years later, the General Accountability Office, during its review of the testing program, was informed that the Defense Department had subsequently classified the 50 specific recommendations set forth by the office of Operational Test and Evaluation.²⁶⁹ Since the recommendations had already been released and publicized, the retroactive classification did nothing to protect national security and served only to limit public debate on a controversial weapons system.

In another example, the Justice Department retroactively classified information that it had previously given to Senate staff members nearly two years earlier concerning allegations made by Sibel Edmonds, an FBI translator who accused the Bureau of gross mismanagement and whistleblower retaliation.²⁷⁰ According to Ms. Edmonds, the FBI terminated her contract after she reported to her supervisors (1) that a coworker had failed to translate intelligence-related information recorded during an FBI investigation, (2) that this coworker had ties with the organization under investigation, and (3) that supervisors instructed Ms. Edmonds to slow the pace of her work to justify additional funding.²⁷¹ The FBI,

²⁶⁸ E.g. *Science and Politics Ride on Missile Test*, Boston Globe (July 15, 2001); *ABM Tests Mostly Miss Real Issues, Analysts Say Tracking Capabilities Have Lagged for Decades*, Boston Globe (Sept. 2, 2001); *Missile Defense; The Media Must Demand Truth from the Testers*, Los Angeles Times (Aug. 19, 2001).

²⁶⁹ Briefing by Robert E. Levin, Director, Acquisition and Sourcing Management, General Accountability Office, to House Government Reform Committee minority staff (Feb. 12, 2004). The Defense Department contends that it did not reclassify the Coyle Report but instead classified a draft GAO analysis of the Coyle report that added additional sensitive information. Letter from Michael W. Wynne, Acting Under Secretary of Defense for Acquisition, Technology, and Logistics to Rep. Henry A. Waxman (Aug. 19, 2004). An internal Missile Defense Agency memorandum, however, makes clear that the Defense Department specifically classified an appendix to the GAO's draft report that contained nothing more than the Coyle report's recommendations. Memorandum from Art Tysen, Assistant Director for Organizational Security, Missile Defense Agency, to Louis Villalobos, Project Integrator Directorate (May 20, 2003).

²⁷⁰ *Material Given to Congress in 2002 Is Now Classified*, New York Times (May 20, 2004).

²⁷¹ *Press Release: Statement of FBI Whistleblower Sibel Edmonds and Her Attorneys*, WashingtonPost.com (Aug. 13, 2002) (<http://www.washingtonpost.com/wp-srv/onpolitics/articles/whistleblowerpr.html>); *Lost In Translation*, 60 Minutes (July 13, 2003) (<http://www.cbsnews.com/stories/2002/10/25/60minutes/printable526954.shtml>); 2

after conducting its own investigation, corroborated much of Ms. Edmonds's account.²⁷²

After Ms. Edmonds alleged this misconduct, Senate staff members received two unclassified briefings concerning Ms. Edmonds in June and July 2002. Nearly two years later, in May 2004, the Justice Department retroactively classified the same information, including the languages Ms. Edmonds translated, the types of cases she handled, and which employees she worked with.²⁷³ Republican Senator Charles Grassley called the post hoc decision to classify this information “ludicrous” and “about as close to a gag order as you can get.” He said that classifying information already in the public domain “does harm to transparency in government, and it looks like an attempt to cover up the FBI’s problems in translating intelligence.”²⁷⁴

Members of both parties have recognized the deterioration of the classification system. Senators Ron Wyden, Trent Lott, Bob Graham, and Olympia Snow introduced a bill on July 15, 2004, to establish an Independent National Security Classification Board. The purpose of this three-member board would be to review current classification policies, recommend needed reforms, and reexamine disputed classification decisions.²⁷⁵

II. Expanded Protection of “Sensitive Security Information”

As with national security classification, the Bush Administration has dramatically expanded existing authority to make designations of “sensitive security information,” a category of sensitive but unclassified information originally established to protect the security of civil aviation. Disclosure of this information is limited to covered persons in government and the private sector with a “need to know.” Sensitive security information is exempt from mandatory disclosure under FOIA, and unauthorized disclosures are punishable by civil penalties or adverse personnel action for government employees.²⁷⁶

Established in 1974 with passage of the Air Transportation Security Act, the category of sensitive security information applied to information created through

FBI Whistle-Blowers Allege Lax Security, Possible Espionage, Washington Post (Jun. 19, 2002).

²⁷² *2 FBI Whistle-Blowers Allege Lax Security, Possible Espionage*, *id.*

²⁷³ *Material Given to Congress in 2002 Is Now Classified*, *supra* note 270.

²⁷⁴ *Id.*

²⁷⁵ Federation of American Scientists Project on Government Secrecy, *Senators Introduce Bill To Revamp Classification Policy*, Secrecy News (July 16, 2004).

²⁷⁶ 49 U.S.C. § 40119(b)(1).

Federal Aviation Administration research and development “to protect passengers and property against acts of criminal violence, aircraft piracy and terrorism and to ensure security.”²⁷⁷ The types of information subject to protection included airport and air carrier security programs and other details of aviation security programs the release of which would: (1) be an unwarranted invasion of personal privacy; (2) reveal a trade secret or privileged or confidential commercial or financial information; or (3) be detrimental to the safety of passengers in air transportation.²⁷⁸

After the attacks of September 11, 2001, the Bush Administration sought and obtained authority to expand significantly the scope of protected sensitive security information. As part of the Aviation and Transportation Security Act, Congress transferred the responsibility for aviation security to a newly created Transportation Security Administration (TSA). In the process, it deleted the word “air” in the law authorizing sensitive security information, expanding its scope to include all modes of transportation.²⁷⁹ The Homeland Security Act transferred TSA to a newly created Homeland Security Department and gave the new department similar authority to prescribe regulations prohibiting the disclosure of sensitive security information.²⁸⁰

Pilots, flight attendants, and consumer advocates have accused TSA of using sensitive security information to muzzle debate of security initiatives and insulate TSA from criticism. For instance, TSA held an open meeting with aviation and security representatives to discuss a report on ways to improve air cargo security. TSA, citing sensitive security information concerns, refused to release the report and barred participants from discussing the report’s details during the session.²⁸¹ Similarly, in January 2003, TSA cited sensitive security information concerns to limit information about a security incident at Dallas/Fort Worth Airport. A federal screener allowed a man to pass through security after his luggage had tested positive for explosives, and the airport was closed for over an hour. A spokesman for TSA said that the agency was not going to issue any kind of report into the incident because it would reveal sensitive security information.²⁸²

²⁷⁷ *Id.* § 40119(a); see Congressional Research Service, *Sensitive Security Information and Transportation Security: Issues and Congressional Options*, 3 and 3 n.8 (June 9, 2004) (RL32425).

²⁷⁸ Transportation Security Administration, *Protection of Sensitive Security Information*, 69 Fed. Reg. 28066 (May 18, 2004) (interim final rule).

²⁷⁹ *Id.*

²⁸⁰ *Id.*; 49 U.S.C. § 114(s).

²⁸¹ *TSA Faulted for Restricting Information; Consumer, Aviation Groups Criticize Labeling Pilot, Program Data “Sensitive,”* Washington Post (Oct. 10, 2003).

²⁸² Congressional Research Service, *Sensitive Security Information (SSI) and Transportation Security: Background and Controversies* (Feb. 5, 2004) (RS21727).

Using its expanded statutory authority, TSA issued an interim final rule in May 2004 expanding the category of sensitive security information to include information related to the Coast Guard and to maritime transportation.²⁸³ This expansion has prompted criticism from open government advocates who complain that the authority is ambiguous and gives the Department of Transportation and Homeland Security Department unlimited discretion to withhold information.²⁸⁴ The Bush Administration, seeking to expand sensitive security information authority even further, requested additional authority to override disclosure requirements of state and local open government laws. A provision conferring this authority appears in the Senate version of the transportation appropriations bill and is currently an issue for the conference committee to resolve.²⁸⁵

III. Weakened DHS Disclosure under the National Environmental Policy Act

The Department of Homeland Security has proposed new categorical exclusions to disclosure requirements that have been in place for more than three decades under National Environmental Policy Act (NEPA).²⁸⁶ Enacted in 1970, NEPA established the Council on Environmental Quality (CEQ) within the Executive Office of the President and committed the federal government to take all practicable steps to improve specified aspects of environmental quality, including assuring healthful surroundings, using the environment without degrading it, and achieving a balance between population and resources.²⁸⁷

Among its other provisions, NEPA requires that all federal agencies consider environmental values in decision making, assess the environmental impacts of major federal actions before they are taken, and disclose information related to these environmental impacts to the extent that they not exempted by FOIA.²⁸⁸ Under current law, CEQ regulations expressly limit these exemptions to “proposed actions which are specifically authorized under criteria established by an Executive

²⁸³ Transportation Security Administration, *supra* note 278.

²⁸⁴ *A Fine Mess: TSA’s New Information Security Rule Leaves Stakeholders Confused*, CQ Homeland Security (July 21, 2004).

²⁸⁵ *Highway Bill’s Secrecy Rules Spark Public-Safety Debate*, Louisville Courier-Journal (June 27, 2004).

²⁸⁶ 42 U.S.C. § 5321 *et seq.* Congressional Research Service, *Environmental Laws: Summaries of Statutes Administered by the Environmental Protection Agency*, 112–13 (Mar. 3, 2003) (RL30798).

²⁸⁷ Congressional Research Service, *id.*

²⁸⁸ *Id.*; see *SEJ Voices Concern over NEPA Secrecy at Homeland Security*, Society of Environmental Journalists TipSheet (July 15, 2004).

Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact classified pursuant to such Executive Order or statute.”²⁸⁹

In June 2004, the Homeland Security Department proposed procedures for implementing NEPA that would greatly expand the types and volume of information categorically exempt from public disclosure.²⁹⁰ In addition to classified, proprietary, or other information exempt from disclosure under the Freedom of Information Act, DHS also proposed to exempt critical infrastructure information, sensitive security information, and other information described in unspecified “laws, regulations, or Executive Orders prohibiting or limiting the release of information.”²⁹¹

Environmental advocacy organizations protested the proposed DHS directive, pointing out that it created a major loophole in a law that has been a keystone of environmental protection for 34 years.²⁹² The agencies comprising DHS include the Coast Guard, Border Patrol, and FEMA. These and other agencies within DHS routinely make major decisions that affect the environment, such as those relating to oil spills, border security measures, flood plain designation, and chemical plant security.²⁹³ The Natural Resources Defense Council explained that information about a gas pipeline’s potential to leak or explode — information that had been previously available to the public as part of the NEPA process — could now fall within a categorical exemption for critical infrastructure information. This is precisely the type of information that communities rely on in evaluating the potential impacts of a proposed pipeline.²⁹⁴

IV. Laws That Expand Secret Government Operations

Another way the Bush Administration has limited public scrutiny of its actions has been by expanding the federal government’s authority to conduct law enforcement operations in secret, with limited or no judicial oversight. The Bush Administration has achieved this expansion through the enactment of new laws, such as the USA PATRIOT Act, and novel interpretations of existing authorities.

²⁸⁹ 40 C.F.R. § 1507.3(c).

²⁹⁰ Department of Homeland Security, *Proposed Management Directive 5100.1, Environmental Planning Program*, 69 Fed. Reg. 33043 (June 14, 2004).

²⁹¹ *Id.* at 33063.

²⁹² *SEJ Voices Concern over NEPA Secrecy at Homeland Security*, *supra* note 288.

²⁹³ National Resources Defense Council, *Comments to Proposed Management Directive 5100.1, Environmental Planning Program* (July 14, 2004).

²⁹⁴ *Id.*

A. The USA PATRIOT Act

In response to the terrorist attacks of September 11, 2001, Congress passed the USA PATRIOT Act.²⁹⁵ Enacted quickly on October 26, 2001, after little committee deliberation, the law made sweeping changes in many law enforcement areas, including interception of communications in criminal investigations, domestic investigation of foreign intelligence activities, and detention and removal of illegal immigrants.²⁹⁶

A number of commentators have addressed the impact of the PATRIOT Act on civil liberties.²⁹⁷ Less attention, however, has been focused on provisions of the law that dramatically expand the ability of the executive branch to conduct secret law enforcement and intelligence operations without oversight by the public, Congress, or the courts. Among its other features, the PATRIOT Act expands the ability of the executive branch to use the secret Foreign Intelligence Surveillance Court, to use secret grand juries for intelligence collection, and to use other secret law enforcement tools.

1. *Obtaining Records in Secret*

Section 215 of the PATRIOT Act expands the authority of the Justice Department to obtain library and other private records secretly through the Foreign Intelligence Surveillance Court.²⁹⁸ Under this authority, the Justice Department not only obtains these orders through a secret process, it imposes a duty of secrecy on the persons in possession of the records sought by the government. Persons who receive these orders are prohibited from “disclos[ing] to any other person (other than those persons necessary to produce the tangible things under this section) that the FBI sought or obtained tangible things under this section.”²⁹⁹

²⁹⁵ Pub. L. 107-56, 115 Stat. 272 (2001). The full title of the law is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act).”

²⁹⁶ See Congressional Research Service, *The USA PATRIOT Act: A Legal Analysis* (Apr. 15, 2002) (RL31377).

²⁹⁷ E.g., Jeffrey Toobin, *The USA-PATRIOT Act and the American Response to Terror: Can We Protect Civil Liberties after September 11?*, *American Criminal Law Review*, 1501 (Fall 2002).

²⁹⁸ Created in 1978 as part of the Foreign Intelligence Surveillance Act (FISA), this court is composed of 11 specially designated federal district court judges and housed in a restricted room within the Justice Department. The court and its operations are completely hidden from public view. See Nola K. Breglio, *Leaving FISA Behind: The Need To Return to Warrantless Foreign Intelligence Surveillance*, *Yale Law Journal*, 179, 187 (Oct. 2003).

²⁹⁹ 50 U.S.C. § 1861(d).

Prior to the PATRIOT Act, federal authorities could obtain such an order only for access to hotel, airline, storage locker, or car rental business records.³⁰⁰ The PATRIOT Act expanded the scope of this authority to include “any relevant tangible item (including books, records, papers, documents, and other items).”³⁰¹ It also removed a requirement in preexisting law that an order could be issued only upon specification of a reason to believe that the records sought were those of a foreign power or one of its agents.³⁰²

Librarians and others around the country have expressed concern that this secret authority will be used to monitor the reading materials of library users.³⁰³ For instance, the American Library Association Council adopted a resolution that called this section “a present danger to the constitutional rights and privacy rights of library users.”³⁰⁴

In an attempt to determine if section 215 had been used against libraries, the chairman of the House Judiciary Committee posed a series of questions to the Justice Department. The Justice Department responded, in part, that “[t]he number of times the Government has requested or the Court has approved requests under this section since passage of the PATRIOT Act, is classified, and will be provided in an appropriate channel.”³⁰⁵

2. Conducting Secret Wiretaps

Under the Foreign Intelligence Surveillance Act (FISA), an officer authorized by the Attorney General can apply to the secret Foreign Intelligence Surveillance Court for a warrant to conduct foreign intelligence surveillance in the United States. Upon application, one of the FISA judges must decide whether there is probable cause to believe that the proposed target of surveillance is a “foreign power or an agent of a foreign power.”³⁰⁶ If the FISA requirements are met, the court has no discretion but to approve the application and permit the surveillance.³⁰⁷

³⁰⁰ Congressional Research Service, *Libraries and the PATRIOT Act*, 1 (Feb. 26, 2003) (RS21441).

³⁰¹ *Id.* at 4.

³⁰² *Id.* at 3.

³⁰³ *Id.* at 2.

³⁰⁴ *Id.*

³⁰⁵ *Id.* (quoting Letter from Assistant Attorney General Daniel J. Bryant to House Judiciary Committee Chairman F. James Sensenbrenner, Jr. (Aug. 26, 2002)).

³⁰⁶ 50 U.S.C. § 1805(a)(3)(A).

³⁰⁷ 50 U.S.C. § 1805(a).

The PATRIOT Act blurred the line between counterintelligence surveillance and ordinary criminal surveillance, allowing the less stringent standards of the secret FISA court to be used for a broader range of investigations. Prior to the enactment of the PATRIOT Act, one of FISA’s statutory requirements was that the National Security Adviser or a designated official certify, among other things, that “the purpose” of the proposed electronic surveillance was to obtain foreign intelligence information.³⁰⁸ The PATRIOT Act weakened this limitation. Under section 218 of the PATRIOT Act, the certifying official need only certify to the FISA court that “a significant purpose” of the electronic surveillance is to obtain foreign intelligence information.³⁰⁹ This line was further blurred by section 504 of the PATRIOT Act, which authorizes federal officers who conduct electronic FISA surveillance to coordinate investigative efforts with other federal law enforcement authorities.³¹⁰ One observer noted that after the PATRIOT Act, “[a] FISA warrant has become little more than a regular Title III warrant issued secretly with no required showing of probable cause of criminal activity.”³¹¹

The scant public information available about FISA court activities suggests that the court defers to the judgment of the executive branch and exercises little independent judicial oversight. The Justice Department’s Office of Intelligence Policy and Review reported that as of July 2001, the FISA court had never denied a single one of the more than 16,000 government applications it had received.³¹² One former National Security Administration staff member wrote that the FISA court procedures were lacking in legal formalities and that “[t]here is little question that these judges exercise virtually no judicial review.”³¹³

3. Expanding Use of “Sneak and Peek Warrants”

The PATRIOT Act permits expanded use of “sneak and peek warrants,” which allow federal authorities to conduct a search without notifying the subject of the search. These searches can involve physical or virtual entry, visual examination, taking photographs, copying documents, or any other kind of search that does not

³⁰⁸ Congressional Research Service, *The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework and Recent Judicial Decisions*, 17 n. 26 (Mar., 31, 2003) (RL30465).

³⁰⁹ *Id.*

³¹⁰ *See id.* at 33.

³¹¹ Nola K. Breglio, *supra* note 298, 180. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 regulates electronic surveillance for criminal investigations unrelated to foreign intelligence collection. 18 U.S.C. § 2510 *et seq.*

³¹² *Id.* at 188.

³¹³ *Id.* at 190 (citing Benjamin Wittes, *Inside America’s Most Secretive Court*, Legal Times (Feb. 19, 1996)).

include the seizure of tangible property.³¹⁴ As a general matter, the Fourth Amendment requires officers to knock and announce their presence before executing a search warrant.³¹⁵ Courts have, however, recognized the occasional need for delayed notification of searches in pressing circumstances, as well as in cases involving electronic communications in the hands of a third party, foreign intelligence surveillance, or Title III wiretaps, or in the case of some drug investigations.³¹⁶

Section 213 of the PATRIOT Act expands these authorities by permitting delayed notice in any case where a court finds that giving notice may have an adverse result. “Adverse results” are defined in a separate part of the criminal code to include (1) endangering life or physical safety; (2) flight from prosecution; (3) destruction of evidence; (4) intimidation of witnesses; and (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.³¹⁷ Of these potential grounds, civil liberties groups have expressed particular concern over the last, which they contend is a very low standard that is likely to be abused.³¹⁸

4. *Expanding the Use of Federal Grand Juries*

Section 203 of the PATRIOT Act authorizes disclosure of foreign intelligence or counterintelligence information collected by a federal grand jury to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official. This change permits the executive branch to use the secret power of the grand jury to collect intelligence without any meaningful judicial oversight.³¹⁹

A federal grand jury enjoys virtually unfettered power to conduct secret investigations. The grand jury conducts its business outside the supervision of a judge, without the presence of a witness’s lawyer, and under strict rules of secrecy. Although prosecutors have access to these proceedings, the rules of secrecy also limit how the government can use grand jury information. Matters discussed

³¹⁴ Congressional Research Service, *supra* note 296, at 62–63.

³¹⁵ *Id.* (citing *Richards v. Wisconsin*, 520 U.S. 385 (1997)).

³¹⁶ *Id.*; Jacob R. Lilly, *National Security at What Price?: A Look into Civil Liberty Concerns in the Information Age under the USA PATRIOT Act of 2001 and a Proposed Constitutional Test for Future Legislation*, *Cornell Journal of Law and Public Policy*, 447, 461–63 (Spring 2003); Kevin Corr, *Sneaky But Lawful: The Use of Sneak and Peek Search Warrants*, *University of Kansas Law Review*, 1103 (Aug. 1995).

³¹⁷ 18 U.S.C. § 2705 (a)(2).

³¹⁸ *E.g.* American Civil Liberties Union, *How the USA-PATRIOT Act Expands Law Enforcement “Sneak and Peek” Warrants* (Mar. 7, 2002) (<http://www.aclu.org/Privacy/Privacy.cfm?ID=9769&c=39> html).

³¹⁹ See Congressional Research Service, *The Federal Grand Jury* (Feb. 5, 2002) (95-1135).

before the grand jury generally cannot be disclosed to other law enforcement officials unless they are deemed necessary to assist a government attorney to enforce federal criminal law.³²⁰ The Supreme Court has explained that revealing grand jury information to other government employees, such as those prosecuting or defending civil actions, might tempt prosecutors “to manipulate the grand jury’s powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely.”³²¹

The PATRIOT Act, however, opens the grand jury to a wide variety of government officials when the matters discussed involve foreign intelligence or counterintelligence. Section 203(a) of the PATRIOT Act amends Rule 6(e) of the Federal Rules of Criminal Procedure to allow disclosures of such grand jury information “to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.”

One former federal prosecutor warned that “wider disclosure could undermine the integrity of the grand jury in that the government will be enticed into using the unique weapons available to the grand jury to gather evidence in cases where no criminal prosecution is contemplated.”³²² Moreover, these weapons are even more prone to abuse once they are outside the hands of federal prosecutors, as intelligence or defense officials who receive grand jury material do not appear to be subject to grand jury rules of secrecy or the court’s contempt power.³²³

B. Secret Detentions, Trials, and Deportations

Since the September 11, 2001, attacks, the Bush Administration has asserted unprecedented authority to detain anyone whom the executive branch labels an “enemy combatant” indefinitely and secretly.³²⁴ The Administration has claimed the right to designate and hold such individuals in secret without access to any

³²⁰ Fed. R. Crim. Proc. 6(e)(3)(A).

³²¹ *United States v. Sells Eng’g*, 463 U.S. 418, 432 (1983).

³²² Jennifer M. Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community under the USA PATRIOT Act*, *American Criminal Law Review*, 1261, 1276 n. 39 (Summer 2002).

³²³ *Id.* at 1281.

³²⁴ Jeffrey Toobin, *supra* note 297, at 9–10; Lawyers Committee on Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* (Sept. 2003); see Congressional Research Service, *Detention of American Citizens as Enemy Combatants*, 2–4 (Dec. 18, 2003) (RL31724).

judicial review, a position recently rejected by the Supreme Court.³²⁵ It has authorized military trials that can be closed not only to the public but also to the defendants and their own attorneys. And the Administration has authorized procedures for the secret detention and deportation of aliens residing in the United States.

1. *Detentions of Enemy Combatants*

Since the terrorist attacks of September 11, the U.S. military and CIA have operated a worldwide network of detention centers, many of them secret, holding an estimated 9,000 prisoners.³²⁶ Although the Administration has released limited information about these detentions, it has not provided a complete account of how many individuals are currently being held by the U.S. authorities at military and intelligence detention facilities, what legal status the detainees have been accorded, and what process was followed to determine their legal status.³²⁷ The International Committee of the Red Cross (ICRC) recently issued a statement that it is “increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations” and identified the collection of this information as “an important humanitarian priority.”³²⁸

At one facility — the U.S. Naval Station at Guantanamo Bay, Cuba — the Bush Administration has held detainees from over 40 countries in near total secrecy as unlawful enemy combatants.³²⁹ Approximately 650 are reportedly in custody today at the facility, many for more than two years.³³⁰ Limited information about these detentions, as well as the conditions of confinement and the interrogations, have prompted criticism from international humanitarian organizations and the legal community. The ICRC, for example, complained that “U.S. authorities have placed the internees in Guantanamo beyond the law. This means that, after more than eighteen months of captivity, the internees still have no idea about their fate,

³²⁵ Jeffrey Toobin, *supra* note 297, at 10; *Rasul v. Bush*, No. 03-334, Slip Op. at 16–17 (S. Ct. June 28, 2004).

³²⁶ *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light*, Washington Post (May 11, 2004).

³²⁷ Human Rights First (formerly named the Lawyers Committee for Human Rights), *Ending Secret Detentions*, 8 (June 2004).

³²⁸ *Id.* at 4.

³²⁹ Congressional Research Service, *Treatment of “Battlefield Detainees” in the War on Terrorism* (Mar. 15, 2004) (RL31367); *Guantanamo — A Holding Cell in the War on Terror: Prison Represents a Problem That’s Tough To Get out Of*, Washington Post (May 2, 2004).

³³⁰ *Id.*, *Rasul v. Bush*, *supra* note 325, at 2.

and no means of recourse through any legal mechanism.”³³¹ In proceedings before the United States Supreme Court, military lawyers representing the detainees depicted their detentions as a “legal black hole.”³³²

Very little is known about the identity of the Guantanamo Bay internees or the circumstances of their confinement. Detainees have no access to family, and few have been allowed to consult with an attorney.³³³ Journalists who visit the detention facility must sign contracts not to speak to detainees, and in one reported instance, military escorts abruptly ended the tour of a group of journalists who, when asked by a detainee if they were journalists, merely replied that they were from the BBC.³³⁴ According to Amnesty International, military authorities have withheld information about the precise numbers, identities, or nationalities of the prisoners.³³⁵ In addition to holding individuals in secret, the Bush Administration took the position that the cases of these individuals were not entitled to judicial review. The Supreme Court recently rejected this position, holding that U.S. courts have jurisdiction to consider challenges to the legality of the secret detentions.³³⁶

If little is known about detainees held by the U.S. military at Guantanamo Bay and other military facilities, even less is known about “ghost detainees” in the custody of the CIA. The March 2004 report by General Taguba into abuses of Iraqi prisoners found that military police at the Abu Ghraib prison held CIA ghost detainees “without accounting for them, knowing their identities, or even the reason for their detention.”³³⁷ Defense Secretary Donald Rumsfeld has admitted that he ordered secret detentions of prisoners captured in Iraq at the request of the CIA, and in at least one instance instructed military officials not to register a detainee with the ICRC.³³⁸ An Army inquiry completed in August 2004 found eight documented cases, but two Army generals testified the following month that the number was far higher. Gen. Paul Kern, who oversaw the inquiry, told the

³³¹ International Committee of the Red Cross, *Guantanamo Bay: Overview of the ICRC's Work for Internees* (Jan. 30, 2004).

³³² See, e.g., *Al Odah v. United States*, No. 03-343 (S. Ct. Jan. 14, 2004) (Brief of the Military Attorneys Assigned to the Defense in the Office of Military Commissions as Amicus Curiae in Support of Neither Party).

³³³ *Justices To Rule on Detainees' Rights: Court Access for 660 Prisoners at Issue*, Washington Post (Nov. 11, 2003).

³³⁴ *Guantanamo — A Holding Cell in the War on Terror*, *supra* note 329.

³³⁵ Amnesty International, *The Threat of a Bad Example — Undermining International Standards as “War on Terror” Detentions Continue*, 18 (Aug. 2003).

³³⁶ *Rasul v. Bush*, *supra* note 325, at 4–6.

³³⁷ *Secret World of U.S. Interrogation*, *supra* note 326.

³³⁸ *Rumsfeld Admits To Holding “Ghost Detainees,” Knight Ridder Newspapers* (June 18, 2004).

Senate Armed Services Committee that “[t]he number is in the dozens, to perhaps up to 100.” He and another general both testified, however, that they could not give a precise number because no records were kept on most of the CIA detainees.³³⁹

In February 2004, after human rights groups expressed concern about the open-ended imprisonment of detainees, Secretary Rumsfeld promised annual reviews of detainees. These reviews, however, will reportedly exclude some detainees to keep their existence secret for intelligence reasons.³⁴⁰

2. *Trials of Enemy Combatants*

On November 13, 2001, President Bush issued an order, unprecedented in its scope, authorizing military commissions to conduct trials of non-U.S. citizens who are alleged to be al-Qaeda members or members of other terrorist organizations.³⁴¹ Under the order and implementing guidelines promulgated by the Defense Department, any noncitizen is subject to detention and trial by military tribunal if the President, in his sole discretion, finds “reason to believe that such individual . . . has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore,” that could harm the United States.³⁴²

Under the rules established by the Bush Administration, the commissions will consist of panels of three to seven U.S. military officers and one or more alternate members determined to be competent by the Secretary of Defense.³⁴³ In these proceedings, the government will have broad discretion to close proceedings to the public, to civilian defense counsel, and even to the defendant.³⁴⁴ For instance, the military orders governing the commissions permit the prosecution to deny the defendant and his or her civilian counsel access not only to classified information, but also to “protected information.” This is defined broadly to include information “concerning intelligence and law enforcement sources, methods, or

³³⁹ *Army Says CIA Hid More Iraqis than It Claimed*, New York Times (Sept. 10, 2004).

³⁴⁰ *Pentagon Reportedly Aimed To Hold Detainees in Secret: Proposal To Keep Some Prisoners “off the Books” Went against Promise for Yearly Case Reviews*, Los Angeles Times (July 9, 2004).

³⁴¹ *Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (hereinafter “Military Order”).

³⁴² Military Order, *supra* note 340, at §2; Lawyers Committee on Human Rights, *supra* note 324, at 56.

³⁴³ Congressional Research Service, *Trying Terrorists by Military Commission* (Sept. 8, 2004) (online at <http://www.congress.gov/brbk/html/ebter206.html>).

³⁴⁴ Human Rights First (formerly the Lawyers Committee for Human Rights), *Trials under Military Order: A Guide to the Final Rules for Military Commissions*, 3 (June 2004).

activities or . . . concerning other national security interests.”³⁴⁵ Civilian attorneys representing defendants must acknowledge under oath that their qualification as counsel does not guarantee their presence at closed proceedings or guarantee access to any protected information.³⁴⁶ Assigned military defense counsel may be allowed to be present when civilian counsel are excluded, but they are prohibited from discussing this information with excluded individuals, including the defendant.³⁴⁷

The President’s order appears to be broader in scope than any similar order issued by past presidents.³⁴⁸ It has drawn criticism from human rights groups and the criminal defense bar. The National Association of Criminal Defense Lawyers has taken the position that it is “unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation.”³⁴⁹

3. *Detentions and Deportations of Aliens*

The Bush Administration has detained hundreds of aliens in the United States who resemble the ethnic, national origin, and religious characteristics of the September 11 hijackers and has subjected many to closed deportation proceedings.³⁵⁰ Following the September 11 terrorist attacks, the Attorney General directed the FBI and other federal law enforcement agencies to use “every available law enforcement tool” to arrest persons who “participate in, or lend support to, terrorist activities.”³⁵¹ Within two months, law enforcement authorities had detained more than 1,200 citizens and aliens.³⁵² Of this number, the INS detained 762 aliens whom the FBI believed had a connection to the

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *See Id.* at 1.

³⁴⁹ Lawyers Committee on Human Rights, *supra* note 324, at 58 (citing National Association of Criminal Defense Lawyers (NACDL), Ethics Advisory Committee, Op. 03-04 (approved by the NACDL Board of Directors Aug. 2, 2003)).

³⁵⁰ Congressional Research Service, *Detention of Noncitizens in the United States*, 25 (Nov. 4, 2002) (RL31606).

³⁵¹ U.S. Department of Justice, Office of Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, 1 (Apr. 2003) (quoting Memorandum from Attorney General John Ashcroft to United States Attorneys, *Anti-Terrorism Plan* (Sept. 17, 2001)).

³⁵² *Id.*

terrorist attacks or could not be cleared of involvement in terrorism.³⁵³ Many of these aliens and others who were subsequently detained were subject to removal for violating immigration laws. The Justice Department identified some aliens as “special interest cases” on the grounds that they “might have connections with, or possess information pertaining to, terrorist activities against the United States.”³⁵⁴

Apart from exclusion hearings, immigration hearings are generally required to be open to the public. Immigration judges are authorized, however, to close or limit attendance at hearings in limited circumstances, such as to protect witnesses, parties, or the public interest.³⁵⁵ Shortly after September 11, the Attorney General authorized Michael J. Creppy, the Chief Immigration Judge, to issue instructions requiring immigration judges “to close the hearing[s] to the public, and to avoid discussing the case[s] or otherwise disclosing any information about the case[s] to anyone outside the Immigration Court.”³⁵⁶ The instructions require judges to exclude visitors, family, and press, and prohibit even confirming or denying whether a special interest case is on the docket or scheduled for a hearing.³⁵⁷ One court of appeals characterized the rules as a “complete information blackout along both substantive and procedural dimensions.”³⁵⁸

Plaintiffs in several lawsuits have sought, with mixed results, to obtain information about alien detainees in special interest cases. The American Civil Liberties Union filed suit in New Jersey state court seeking names and other information about alien detainees housed in INS facilities located in the state. The trial judge initially ordered disclosure of the information under New Jersey law, but the decision was later reversed on appeal.³⁵⁹ In another case, the Center for National Security Studies and other civil liberties groups sought disclosure of detainee names in a Freedom of Information Act suit filed in federal court. The trial judge found that the federal government could not justify exempting disclosure of the identities of the detainees or their lawyers under FOIA, but the court of appeals

³⁵³ *Id.* at 2.

³⁵⁴ *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (3rd Cir. 2002), *cert. denied*, 123 S.Ct. 2215 (2003).

³⁵⁵ 8 C.F.R. § 1003.27(b). The other exceptions authorized include limiting attendance to conform to the physical limitations of the facility; closing hearings to protect the privacy of abused alien spouses or children; or to protect information subject to a protective order. *Id.*

³⁵⁶ *North Jersey Media Group*, *supra* note 345, at 202–03.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ Congressional Research Service, *supra* note 350, at 27 (citing *ACLU of New Jersey v. County of Hudson*, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002)).

partially reversed the decision, holding that this information fell within FOIA's law enforcement exemption and could be withheld from the public.³⁶⁰

Plaintiffs in other suits have attempted to open removal proceedings in special interest cases, also with mixed results. In *Detroit Free Press v. Ashcroft*, members of the press and public sought a declaration that closure of removal proceedings violated their First Amendment right of access.³⁶¹ In a major setback for the Administration, the Sixth Circuit Court of Appeals held that the Chief Immigration Judge's order impermissibly infringed on the plaintiffs' constitutional rights. The court wrote:

the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them "special interest" cases. The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors.³⁶²

Another federal court of appeals, however, reached the opposite conclusion in a similar case. In *North Jersey Media Group v. Ashcroft*, the Third Circuit Court of Appeals held that newspapers did not have a First Amendment right of access to deportation proceedings which, in the view of the Attorney General, presented significant national security concerns.³⁶³

Since these decisions, the Attorney General issued regulations authorizing immigration judges to close hearings on a case-by-case basis and to issue protective orders as needed to protect sensitive national security information.³⁶⁴ The Chief Immigration Judge issued another memorandum implementing these guidelines.³⁶⁵

Civil libertarians have criticized the secrecy of these proceedings and their effectiveness as a tactic in the war on terror. David Cole, a law professor at Georgetown University, observed: "Just as the Palmer Raids turned up no actual bombers and the McCarthy era tactics identified few spies or saboteurs, so also the government's yield of actual terrorists from its current preventive detention

³⁶⁰ *Center for National Security Studies v. Dep't of Justice*, 215 F. Supp.2d 94 (D.D.C. 2002), *rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).

³⁶¹ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2003).

³⁶² *Id.* at 683.

³⁶³ *North Jersey Media Group*, *supra* note 354.

³⁶⁴ Congressional Research Service, *supra* note 350, at 31.

³⁶⁵ *Id.*

program has been staggeringly small.”³⁶⁶ He points out that of the approximately two thousand aliens detained by the Bush Administration, only four at that time had been charged with any crime relating to terrorism.³⁶⁷

PART III: CONGRESSIONAL ACCESS TO INFORMATION

Under the system of checks and balances established by the Constitution, Congress has the authority and responsibility to exercise oversight of executive branch activities. Congressional oversight encompasses investigation, review, and monitoring of federal agencies’ programs and activities.³⁶⁸ As the Supreme Court has held, the oversight authority derives from Congress’ enumerated powers in the Constitution.³⁶⁹ In addition, Congress has adopted laws to facilitate its oversight, including numerous laws requiring the executive branch to provide information to or report to Congress.

Compared to previous Administrations, the Bush Administration has operated with remarkably little congressional oversight. The most striking contrast is with the Clinton Administration, which received intense and extensive oversight. In addition to holding hearings and calling for outside investigations, Congress obtained vast quantities of information from the Clinton White House and administrative agencies.

While President Clinton was in office, Congress demanded and received information concerning discussions between the President and his advisors, confidential communications from the White House Counsel’s Office, internal White House e-mails, and Department of Justice and FBI investigative and prosecutorial materials.³⁷⁰ The total amount of material provided to Congress was enormous. For example, GAO found that over an 18-month period from October 1996 to March 1998, White House staff spent over 55,000 hours responding to over 300 congressional requests, producing hundreds of thousands of pages of

³⁶⁶ David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, Harvard Civil Rights-Civil Liberties Law Review, 1, 25 (Winter 2003).

³⁶⁷ *Id.*

³⁶⁸ See Congressional Research Service, *CRS Report for Congress: Congressional Oversight* (Jan. 2, 2001) (97-936 GOV).

³⁶⁹ *McGrain v. Daugherty*, 273 U.S. 135, 174, 47 S.Ct. 319, 328 (1927) (“We are of opinion that the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function.”)

³⁷⁰ Minority Staff, House Committee on Government Reform, *Congressional Oversight of the Clinton Administration* (undated) (online at <http://www.democrats.reform.house.gov/Documents/20040625102138-25063.pdf>).

documents and hundreds of video and audio tapes to Congress.³⁷¹ The House Government Reform Committee alone received well over 1.2 million pages of documents from the Clinton Administration between January 1997 and January 2001.³⁷²

The Bush Administration has been subject to no similar oversight. This is partially attributable to the alignment of the parties. The Republican majorities in the House and the Senate have refrained from investigating allegations of misconduct by the White House. Another major factor has been the Administration's resistance to oversight. The Bush Administration has consistently refused to provide to members of Congress, the Government Accountability Office, and congressional commissions the information necessary for meaningful investigation and review of Administration activities.

For example, the Administration has:

- Contested in court the power of the Government Accountability Office to conduct independent investigations.
- Refused to comply with the statutory Seven Member Rule, which allows members of the House Government Reform Committee to obtain information from the executive branch, forcing the members to go to court to enforce their rights under the law.
- Ignored and rebuffed numerous requests for information made by members of Congress attempting to exercise their oversight responsibilities with respect to executive branch activities.
- Repeatedly withheld information from the investigative commission established by Congress to investigate the September 11 attacks.

I. GAO Authority to Investigate

The U.S. Government Accountability Office is the nonpartisan, investigative arm of Congress. GAO serves Congress and the public as “the government’s accountability watchdog,” and its investigative authority is a key tool used by Congress in overseeing activities of the executive branch.³⁷³

³⁷¹ Minority Staff, House Committee on Government Reform and Oversight, *The Cost of Congressional Campaign Finance Investigations to the U.S. Taxpayer*, 3 (Oct. 7, 1998).

³⁷² Minority Staff, House Committee on Government Reform, *supra* note 370.

³⁷³ GAO, *The History of GAO* (online at <http://www.gao.gov/about/history/introduction.htm>).

The authority of GAO was challenged early on by the Bush Administration. In June 2001, the Administration refused to comply with GAO's request for information on the energy task force chaired by Vice President Cheney.³⁷⁴ This refusal and the outcome of the resulting lawsuit limited GAO's power to conduct independent investigations. As a result, Congress is less able to oversee executive branch activities, and the executive branch has a greater ability to operate in secret.

GAO was created in 1921 by the Budget and Accounting Act.³⁷⁵ At the request of members of Congress and on its own initiative, GAO has the authority to investigate all matters related to the use of public money.³⁷⁶ GAO reports are made available to Congress and to the public, providing an important window into government operations.

The challenge to GAO's authority came in a case involving the National Energy Policy Development Group, a task force established by President Bush in January 2001 to develop a national energy policy. Vice President Cheney chaired the NEPDG, which was composed of Administration officials. In April 2001, following reports that major campaign contributors had special access to the task force while environmental and consumer groups and the public were shut out, Rep. Waxman, the ranking member of the Government Reform Committee, and Rep. John D. Dingell, the ranking member of the Energy and Commerce Committee, asked GAO to investigate the NEPDG.³⁷⁷ Specifically, the members requested that GAO determine "who serves on this task force; what information is being presented to the task force and by whom it is being given; and . . . the costs involved in the gathering of the facts."³⁷⁸

The members' request to GAO was routine. During the Clinton Administration, GAO investigated the White House China Trade Relations Working Group and the Task Force on Health Care Reform. These investigations were similar to the NEPDG investigation in both the type of task force being investigated and the information being requested. In both cases, the Clinton Administration provided GAO extensive information regarding the groups' participants and contacts with

³⁷⁴ Letter from David S. Addington, Counsel to the Vice President, to Anthony Gamboa, General Counsel, General Accountability Office (June 7, 2001).

³⁷⁵ 42 Stat. 20 (1921).

³⁷⁶ 31 U.S.C. § 712.

³⁷⁷ Letter from Reps. John D. Dingell and Henry A. Waxman to Comptroller General David M. Walker (Apr. 19, 2001) (online at <http://www.democrats.reform.house.gov/Documents/20040831095928-35054.pdf>).

³⁷⁸ *Id.*

outside parties.³⁷⁹ In a letter to the Vice President, GAO noted that information of this sort “has been commonly provided to GAO for many years spanning several administrations.”³⁸⁰

The GAO statute requires executive branch agencies to comply with GAO requests, and sets out a specific process GAO should follow in the face of Administration recalcitrance. If the executive branch refuses to comply with a request and does not make one of three types of certification that allow it to withhold information, GAO may sue the agency to gain access to the records it has requested. Until the NEPDG case, GAO had always been able to negotiate successfully with agencies to gain access to necessary information, rather than using its authority to sue.

In the NEPDG case, GAO followed all of the required steps to request and then demand information. Contrary to the statute, the Administration did not produce the requested materials and neither the President nor the Director of the Office of Management and Budget made any certification that would have blocked a lawsuit. Instead, the Vice President’s office took the position that GAO did not have the authority to conduct the investigation, arguing that the inquiry “would unconstitutionally interfere with the functioning of the Executive Branch.”³⁸¹ The Vice President maintained this stance and refused to negotiate with GAO, even after GAO narrowed its request to include only “limited factual and non-deliberative information.”³⁸²

In February 2002, nine months after requesting information about the NEPDG from the White House, the Comptroller General filed suit to gain access to the requested information, with the strong support of the original requestors and the chairs of four Senate committees and subcommittees.³⁸³ In a January 30, 2002,

³⁷⁹ GAO, *Report from Comptroller General of the United States David M. Walker to the Vice President of the United States*, 5 (Aug. 17, 2001).

³⁸⁰ *Id.*

³⁸¹ Letter from Vice President Richard B. Cheney to the House of Representatives (Aug. 2, 2001) (online at <http://www.democrats.reform.house.gov/Documents/20040830233716-42929.pdf>).

³⁸² GAO, *supra* note 379, at 4.

³⁸³ Letter from Reps. John D. Dingell and Henry A. Waxman to Comptroller General David M. Walker (Jan. 24, 2002); Letter from Sen. Fritz Hollings et al. to Comptroller General David M. Walker (Jan. 22, 2002). While the Vice President’s Office provided GAO with 77 pages of information, GAO stated that these “contain little useful information or insight into the overall costs” of the task force, which GAO was unable to determine. GAO, *Energy Task Force: Process Used to Develop the National Energy Policy*, 22 (Aug. 2003) (GAO-03-894). The suit requested documents that provide information about (1) who attended NEPDG meetings, (2) the professional staff assigned to provide support to NEPDG, (3) with whom each of the members and staff of the NEPDG met to gather

letter, GAO wrote: “In our view, failure to pursue this matter could lead to a pattern of records access denials that would significantly undercut GAO’s ability to assist Congress in exercising its legislative and oversight authorities.”³⁸⁴

The District Court dismissed GAO’s suit in December 2002, finding that the Comptroller General lacked the standing to sue. The court relied in large part on the rationale that requests for the investigation and the continuation of the lawsuit came from six individual members of Congress, but no committees. The Comptroller General made it clear that “GAO strongly believes the district court’s decision is incorrect.”³⁸⁵ However, the Comptroller General decided not to appeal the decision.

The result of the litigation was a substantial victory for secret government. GAO’s ability to investigate executive branch activities has been curtailed by the loss of a credible enforcement mechanism.³⁸⁶ Although GAO had never sued the executive branch prior to this case, it had effectively used the threat of lawsuit as leverage to gain access to information.³⁸⁷ The implications of the decision are particularly troubling for periods of one-party control of Congress and the executive branch. If independent congressional investigators have limited access to information during these periods, the President, the Vice President, and the executive branch agencies can operate without critical scrutiny and effective oversight.

II. Seven Member Rule

The Bush Administration has also challenged the authority of members of the Committee on Government Reform to obtain information under the statutory Seven Member Rule, which provides any seven members of the Committee with a right to information within the Committee’s oversight jurisdiction. As a result, Committee members were for the first time in history forced to go to court to enforce their rights under the rule.

information for the National Energy Policy, as well as the date, subject, and location of each meeting, and (4) direct and indirect costs incurred by the NEPDG.

³⁸⁴ Letter from Comptroller General David M. Walker to Rep. Henry A. Waxman (Jan. 30, 2002).

³⁸⁵ GAO, *GAO Press Statement on Walker v. Cheney* (Feb. 7, 2003).

³⁸⁶ See Congressional Research Service, *Walker v. Cheney: District Court Decision and Related Statutory and Constitutional Issues*, 5–6 (updated Mar. 8, 2004).

³⁸⁷ *Id.* at 6–7; Congressional Research Service, *Walker v. Cheney: District Court Decision and Issues on Appeal* (Feb. 3, 2003).

In 1928, Congress passed a law, known as the Seven Member Rule, to require an executive agency to provide information on any matter within the jurisdiction of the Committee on Government Reform upon the request of any seven of its members.³⁸⁸ The Seven Member Rule provides that:

an Executive agency, on request of the Committee on Government Operations [now the Committee on Government Reform] of the House of Representatives, or of any seven members thereof, or on request of the Committee on Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.³⁸⁹

As a matter of legal interpretation, the Department of Justice has taken the position that the Seven Member Rule does not entitle members of the Government Reform Committee to information from the executive branch.³⁹⁰ As a matter of practice, however, federal agencies have commonly complied with requests under the Seven Member Rule. For example, members of the Government Reform Committee have used the rule to obtain information from the U.S. Merit Systems Protection Board,³⁹¹ the Federal Deposit Insurance Corporation (FDIC),³⁹² the Office of Thrift Supervision,³⁹³ the Food and Drug Administration,³⁹⁴ the Department of State,³⁹⁵ and the Department of Energy.³⁹⁶

³⁸⁸ 5 U.S.C. § 2954. The statutory language refers to the “Committee on Government Operations.” The Committee was renamed the Committee on Government Reform and Oversight in the 104th Congress and again renamed the Committee on Government Reform in the 106th Congress. References in law to the Committee on Government Operations are treated as referring the Committee on Government Reform. See *References in Law to Committees and Officers of the House of Representatives*, Pub. L. No. 104-14, § 1(6), 109 Stat. 186 (1995).

³⁸⁹ *Id.*

³⁹⁰ See Letter from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Dr. Lee A. DuBridg, Director, Office of Science and Technology (June 3, 1970); Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, on S. 2170, the Congressional Right to Information Act, before the Senate Committee on Government Operations, Subcommittee on Intergovernmental Relations (Oct. 23, 1975); and Letter from Kent Markus, Acting Assistant Attorney General, Office of Legislative Affairs, to Rep. William F. Clinger, Jr. (June 30, 1995).

³⁹¹ Letter from Rep. John Conyers et al. to Chairman Ben Erdreich, U.S. Merit Systems Protection Board (Aug. 3, 1993); Letter from Chairman Ben Erdreich, U.S. Merit Systems Protection Board, to Rep. Collin C. Peterson (Aug. 5, 1993).

³⁹² Letter from Rep. William F. Clinger, Jr., et al. to Acting Director Jonathan L. Fiechter, Office of Thrift Supervision (Sept. 20, 1994); Letter from Acting Director Jonathan L. Fiechter, Office of Thrift Supervision, to Rep. William F. Clinger, Jr. (Oct. 21, 1994).

³⁹³ Letter from Rep. William F. Clinger, Jr., et al. to Acting Chairman Andrew Hove, Federal Deposit Insurance Corporation (Apr. 22, 1994); Letter from Alice C. Goodman, Director,

The Bush Administration, however, has resisted providing members information under the Seven Member Rule, forcing Committee members to initiate litigation on two separate occasions to enforce their rights. The first case involved access to census records. On April 6, 2001, eighteen members of the Government Reform Committee used the Seven Member Rule to request the adjusted data for the 2000 Decennial Census from the Department of Commerce.³⁹⁷ The request was made because the Department had prepared both an unadjusted data set and a data set adjusted to correct for sampling errors, but had only released the unadjusted data. The Bush Administration rejected the request.³⁹⁸

In May 2001, sixteen members of the Committee on Government Reform filed suit to enforce their request for the census data under the Seven Member Rule. On January 18, 2002, the U.S. district court in Los Angeles ruled against the Bush Administration and granted summary judgment in favor of the members of Congress.³⁹⁹ In the first judicial ruling interpreting the Seven Member Rule, the court found that “the Seven Member Rule requires an executive agency to submit all information requested of it by the Committee relating to all matters within the Committee’s jurisdiction upon the Committee’s request.”⁴⁰⁰

Office of legislative Affairs, Federal Deposit Insurance Corporation, to Rep. William F. Clinger, Jr. (May 3, 1994).

³⁹⁴ Letter from Rep. Henry A. Waxman, et al. to Michael A. Friedman, Acting Commission, Food and Drug Administration, Dept. of Health and Human Services (Feb. 2, 1998). The letter requested a prehearing briefing, which FDA officials provided the following day.

³⁹⁵ Letter from Rep. Henry A. Waxman et al. to Secretary of State Colin L. Powell (Apr. 10, 2003); Letter from Assistant Secretary Paul V. Kelly, Office of Legislative Affairs, Department of State, to Rep. Henry A. Waxman (June 16, 2003); Letter from Rep. Henry A. Waxman et al. to Anne W. Patterson, Deputy Inspector General, Department of State (Apr. 6, 2004); Letter from Anne W. Patterson, Deputy Inspector General, Department of State, to Rep. Henry A. Waxman (Apr. 15, 2004).

³⁹⁶ Letter from Rep. Henry A. Waxman et al. to Secretary of Energy Spencer Abraham (Apr. 10, 2003); Letter from Assistant Secretary Vicky A. Bailey, Office of Policy and International Affairs, Department of Energy, to Rep. Henry A. Waxman (May 7, 2003).

³⁹⁷ Letter from Rep. Henry A. Waxman et al. to Secretary of Commerce Donald L. Evans (Apr. 6, 2001).

³⁹⁸ Letter from Secretary of Commerce Donald L. Evans to Rep. Henry A. Waxman (June 5, 2001). This letter was not written until after the lawsuit was filed.

³⁹⁹ *Waxman v. Evans*, 2002 U.S. Dist. LEXIS 25975 (C.D. Cal 2002), vacated as moot, 52 Fed. Appx. 84 (9th Cir. 2002), as amended by *Waxman v. Evans*, No. 02-55825 (9th Cir. Jan. 9, 2003) (order clarifying that the judgment of the district court was not reversed.)

⁴⁰⁰ *Id.*

The Administration appealed to the U.S. Court of Appeals for the Ninth Circuit, which consolidated the Seven Member case with a FOIA case brought by two state legislators for the same census data.⁴⁰¹ On October 8, 2002, the appeals court ruled in the FOIA case, holding that the Commerce Department had to release the adjusted census data.⁴⁰² Shortly thereafter, the Commerce Department released the adjusted census data to the 16 members of the Government Reform Committee, mooting the government's appeal.

Despite the outcome of the census case, the Administration continues to resist complying with the Seven Member Rule. As a result, the members have been forced to file a second case to enforce their rights.

On February 2, 2004, the media reported information indicating that the Bush Administration had withheld from Congress estimates showing that the Medicare prescription drug legislation would cost \$100 billion more than the Administration had represented.⁴⁰³ On February 3, 2004, the ranking members of three House committees of jurisdiction requested that the Department of Health and Human Services provide copies of the withheld cost estimates and other analyses prepared by the HHS Office of the Actuary during congressional consideration of the Medicare prescription drug legislation.⁴⁰⁴ The Administration, however, refused to respond to the February 3, 2004, letter from the ranking members.

On March 2, 2004, nineteen members of the Government Reform Committee requested the withheld cost information pursuant to the Seven Member Rule. On April 16, 2004, the Administration responded by releasing four already public documents and otherwise refusing to provide the requested information. On April 26, 2004, the 19 members of the Government Reform Committee wrote again to the Department, stating that the HHS response did not satisfy the request and reiterating the request. When the Administration continued to refuse to comply, the 19 members of the Government Reform Committee filed suit in federal district court on May 17, 2004, to enforce their request.⁴⁰⁵

⁴⁰¹ See *Carter v. U. S. Dept. of Commerce*, 307 F.3d 1084 (9th Cir. 2002).

⁴⁰² *Id.*

⁴⁰³ *White House Says Congressional Estimate of New Medicare Costs Was Too Low*, New York Times (Feb. 2, 2004).

⁴⁰⁴ Letter from Rep. Henry A. Waxman, Rep. John D. Dingell, and Rep. Charles B. Rangel to Secretary of Health and Human Services Tommy G. Thompson (Feb. 3, 2004).

⁴⁰⁵ Complaint for Declaratory and Injunctive Relief, U.S. District Ct., Central District of CA (May 17, 2004).

III. Information Requests from Ranking Members of Congressional Committees

Since the beginning of the Bush Administration, the ranking member of the Government Reform Committee, Rep. Henry A. Waxman, has attempted to conduct basic oversight of the Administration. Yet these efforts have repeatedly been frustrated by the Administration's refusal to cooperate with congressional requests for information. In over 100 instances in which Rep. Waxman attempted to conduct oversight on important issues, the Bush Administration ignored requests for information, refused to provide information, or provided incomplete and inadequate responses. In addition, where the Administration provided responses, whether complete or incomplete, they were usually substantially delayed, commonly missing the deadlines for responding by several months or more.

The information that the Bush Administration failed to provide spanned numerous subjects. The requests were directed to a wide range of executive branch agencies and the White House. They commonly sought specific factual information and documents relating to good government issues and matters of great public interest. For example:

- On June 13, 2004, Rep. Waxman wrote to Vice President Cheney regarding contacts between the Vice President's office and the Department of Defense involving the award of a task order and sole-source contract worth up to \$7 billion to Halliburton to work on Iraqi oil infrastructure.⁴⁰⁶ For over a year, Vice President Cheney had consistently maintained that there were no contacts between his office and the government officials responsible for the awards. However, Rep. Waxman revealed in the letter that the Vice President's chief of staff, I. Lewis "Scooter" Libby, had been briefed on a proposal to award the task order to Halliburton. To clarify the nature of the Vice President's involvement in these contract awards to Halliburton, Rep. Waxman requested that Vice President Cheney provide copies of his staff's communications on this topic. The Administration has not responded to this request.
- On June 3, 2004, the ranking members of eight House committees wrote to President Bush announcing their determination to investigate the prison abuses at Abu Ghraib and elsewhere.⁴⁰⁷ The ranking members requested that

⁴⁰⁶ Letter from Rep. Henry A. Waxman to Vice President Richard B. Cheney (June 13, 2004).

⁴⁰⁷ Letter from Rep. Henry A. Waxman et al. to President George W. Bush (June 3, 2004).

the Administration provide documents necessary for the ranking members to conduct their investigation. The President has not responded to this request.

- In October 2003, Rep. Waxman wrote to the Department of Health and Human Services regarding the politicization of science in the Bush Administration.⁴⁰⁸ In particular, Rep. Waxman criticized a “hit list” identifying more than 150 NIH-funded scientists researching HIV/AIDs, human sexuality, and risk-taking behaviors. Officials from the National Institutes of Health officials were contacting researchers identified on the list, raising fears that their research might be defunded, even though the grants had been awarded based on a rigorous peer review. Rep. Waxman’s letter asked for copies of any communications between HHS and the Traditional Values Coalition, a conservative group that claimed responsibility for developing the list. The Administration never provided information about any such contacts.
- Between March and July 2003, Rep. Waxman wrote a series of letters to President Bush and National Security Advisor Condoleezza Rice seeking information and documents that would explain why the President falsely asserted in the State of the Union address that Iraq was seeking to import uranium from Africa.⁴⁰⁹ One letter, for example, sought copies of October 2003 memoranda from the CIA to the White House warning the President not to cite the evidence.⁴¹⁰ President Bush and Ms. Rice did not respond to these requests.
- In June and July 2001, Rep. Waxman wrote to Karl Rove, Senior Advisor to the President, and Alberto Gonzales, Counsel to the President, requesting information about Mr. Rove’s meetings and phone conversations with

⁴⁰⁸ Letter from Rep. Henry A. Waxman to Secretary of Health and Human Services Tommy G. Thompson (Oct. 27, 2003); Letter from Rep. Henry A. Waxman to Secretary of Health and Human Services Tommy G. Thompson (Oct. 28, 2003).

⁴⁰⁹ Letter from Rep. Henry A. Waxman to President George W. Bush (Mar. 17, 2003); Letter from Rep. Henry A. Waxman to Condoleezza Rice, Assistant to the President for National Security Affairs (June 10, 2003); Letter from Rep. Henry A. Waxman to Condoleezza Rice, Assistant to the President National Security Affairs (July 29, 2003). The State Department replied to the March 17, 2003 letter, but did not provide most of the information requested in that letter, and did not respond to the subsequent letters. See Letter from Paul V. Kelly, Assistant Secretary for Legislative Affairs, Department of State to Rep. Henry A. Waxman (Apr. 29, 2003).

⁴¹⁰ Letter from Rep. Henry A. Waxman to Condoleezza Rice, Assistant to the President for National Security Affairs (July 29, 2003).

executives of companies in which he owned stock.⁴¹¹ The White House refused to provide the requested information.⁴¹²

Other ranking members have encountered similar problems. For example, on November 7, 2003, the director of the White House Office of Administration informed the House and Senate Appropriations Committees that in the future, the White House would only respond to requests for information signed by the chairman of the committee.⁴¹³

In the Senate, Senator Jeffords, the Ranking Member of the Environment and Public Works Committee, was driven to place holds on several EPA nominees on April 7, 2004, in an attempt to force the Administration to address 12 separate outstanding information requests, dating from May 2001 through January 2004.⁴¹⁴ In announcing the holds, Senator Jeffords stated: “This attempt by the Bush Administration to prevent Congress from fulfilling its oversight duties is unprecedented, shameful and flies in the face of our Constitutional responsibilities.”⁴¹⁵

IV. Investigative Commissions

Upon occasion, rather than conducting oversight through GAO or committee or member investigations, Congress establishes an independent commission to investigate major issues of national significance. One of the most prominent examples of such a commission is the Warren Commission, which Congress established to investigate the assassination of President Kennedy.

Congress took this step in November 2002, when it created by statute the National Commission on Terrorist Attacks upon the United States (commonly

⁴¹¹ Letter from Rep. Henry A. Waxman to Karl Rove, Senior Advisor to the President (June 15, 2001); Letter from Rep. Henry A. Waxman to Alberto R. Gonzales, Counsel to the President (June 25, 2001); Letter from Rep. Henry A. Waxman to Alberto R. Gonzales, Counsel to the President (July 17, 2001).

⁴¹² Letter from Alberto R. Gonzales, Counsel to the President, to Rep. Henry A. Waxman (June 29, 2001); Letter from Alberto R. Gonzales, Counsel to the President, to Rep. Henry A. Waxman (Aug. 10, 2001).

⁴¹³ *White House Puts Limits on Queries from Democrats*, Washington Post (Nov. 7, 2003).

⁴¹⁴ Senator Jim Jeffords, *Statement of Senator Jim Jeffords, EPW Business Meeting* (Apr. 7, 2004); Senator Jim Jeffords, U.S. Senate Committee on Environment and Public Works, *Outstanding Document and Information Requests to EPA as of March 25, 2004* (Apr. 7, 2004).

⁴¹⁵ Senator Jim Jeffords, *Statement of Senator Jim Jeffords, EPW Business Meeting* (Apr. 7, 2004).

called the 9/11 Commission).⁴¹⁶ Congress gave the 9/11 Commission the responsibility to examine the “facts and causes relating to the terrorist attacks,” “make a full and complete accounting of the circumstances surrounding the attacks,” and “report to the President and Congress on its findings, conclusions, and recommendations for corrective measures that can be taken to prevent acts of terrorism.”

Despite Congress’ direction that the Commission should have full access to necessary information, the Bush Administration resisted cooperating with the Commission’s inquiry. In a number of instances the Administration was slow to respond to requests, and in others it obstructed access to Administration officials and documents. For example:

- In July 2003, the Commission’s Republican chairman Thomas Kean and Democratic chairman Lee Hamilton issued a joint statement that the executive branch, and in particular the Departments of Defense and Justice, were hampering the inquiry by failing to provide requested information. They also objected to the Administration’s insistence that “minders” from the Administration be present at all interviews with intelligence officials.⁴¹⁷
- In October 2003, the Commission was forced to subpoena records about air traffic on September 11, 2001, from the Federal Aviation Administration.
- In November 2003, the Commission had to issue a second subpoena for similar information from the Defense Department.⁴¹⁸ The Commission stated that it “has encountered some serious delays in obtaining needed documents from the Department of Defense” and that “records of importance to our investigation had not been produced.”⁴¹⁹
- From the fall of 2003 until April 2004, the White House blocked repeated attempts by the Commission to obtain access to key presidential intelligence briefing documents, including the August 6, 2001, President’s Daily Brief, which had warned of the al-Qaeda threat in August 2001. After the Commission threatened to subpoena the documents, the White House agreed in November 2003 to allow a few members of the Commission to review the documents and prepare a summary for the other commission members.⁴²⁰ In January 2004, the White House refused to allow the commissioners who

⁴¹⁶ Title VI of the Intelligence Authorization Act for Fiscal Year 2003 (P.L. 107-306).

⁴¹⁷ *9/11 Commission Says US Agencies Slow Its Inquiry*, New York Times (July 9, 2003).

⁴¹⁸ *9/11 White House Subpoena Omits Classified Briefings*, Washington Post (Nov. 8, 2003)

⁴¹⁹ *Id.*

⁴²⁰ *9/11 Panel Issues Third Subpoena*, Washington Post (Nov. 21, 2003).

reviewed the documents access to their own notes, prompting another subpoena threat from the Commission.⁴²¹ In February 2004, the White House allowed the full Commission access to a summary prepared by the commissioners who had been granted access, but continued to refuse to allow the full Commission to read the August 6 President's Daily Brief.⁴²² Finally, after the contents of the document became a matter of widespread public debate, the White House allowed the full Commission to view the document, and then declassified and released it to the public on April 10, 2004.⁴²³

- In the winter and spring of 2004, the White House repeatedly refused to allow national security advisor Condoleezza Rice to testify publicly and under oath before the Commission.⁴²⁴ The White House finally reversed itself on March 30, 2004, under continued pressure from the Commission and adverse publicity.⁴²⁵
- In March 2004, the White House attempted to limit the Commission's meeting with President Bush and Vice President Cheney to one hour.⁴²⁶ After objections from the Commission, the White House backed down and agreed to allow more time.⁴²⁷

Ongoing delays in obtaining information from the Administration throughout the investigation ultimately forced the Administration and Congress to agree to extend the Commission's deadline for issuing its report.⁴²⁸ In March 2004, Congress approved an extension of the deadline for the Commission to complete its investigation from May 27, 2004, to July 27, 2004.⁴²⁹

⁴²¹ *White House Holding Notes Taken by 9/11 Commission*, Washington Post (Jan. 31, 2004).

⁴²² *9/11 Panel to Accept Summary of Briefings*, Washington Post (Feb. 11, 2004).

⁴²³ Central Intelligence Agency, *The President's Daily Brief: Bin Ladin Determined To Strike in US* (Aug. 6, 2001) (declassified and approved for release Apr. 10, 2004).

⁴²⁴ See e.g., *Extension of 9/11 Probe Backed*, Washington Post (Feb. 5, 2004); *White House vs. 9/11 Panel: Resistance, Resolution*, Washington Post (Mar. 9, 2004); *GOP Officials Press Rice to Testify on 9/11*, Baltimore Sun (Mar. 29, 2004).

⁴²⁵ *Bush Allows Rice to Testify on 9/11 in a Public Session*, New York Times (Mar. 31, 2004).

⁴²⁶ *White House vs. 9/11 Panel: Resistance, Resolution*, New York Times (Mar. 9, 2004).

⁴²⁷ *Bush Vows to Answer All Questions Posed by 9/11 Panel*, Washington Post (Mar. 10, 2004).

⁴²⁸ *White House vs. 9/11 Panel*, *supra* note 426.

⁴²⁹ Pub. Law 108-207 (108th Cong.).

CONCLUSION

This review of the nation's open government laws reveals that the Bush Administration has systematically sought to limit disclosure of government records while expanding its authority to operate in secret. Through legislative changes, implementing regulations, and administrative practices, the Administration has undermined the laws that make the federal government more transparent to its citizens, including the Freedom of Information Act, the Presidential Records Act, and the Federal Advisory Committee Act. At the same time, the Administration has expanded the reach of the laws authorizing the Administration to classify documents and to act without public or congressional oversight. Individually, some of the changes implemented by the Bush Administration may have limited impact. Taken together, however, the Administration's actions represent an unparalleled assault on the principle of open and accountable government.