
Withhold and Control: Information in the Bush Administration

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The current Bush Administration has frequently been characterized as the most secretive in recent history. They are, undoubtedly, very focused on controlling the message and clearly appreciate that information is power. This Administration appears to understand even more clearly, moreover, that *lack* of information leads to *lack* of power. The tendency to control does not fit neatly under the usual attribution of *secrecy*, however. Rather, there are four different threads to the Bush Administration's approach to public access to government information. These are *secrecy*; a *resistance to accountability* to the public and, even more pointedly, to Congress; a belief in a *need-to-know* approach to information, in other words, that access should depend on who you are and whether the government considers you fit to receive the information; and, finally, what I characterize as *ideological purity*.

I. SECRECY

The Administration has responded to the events of September 11, 2001 with directives and actions aimed at closely controlling information about its campaign against terrorism—both domestically and internationally—and controlling information that it asserts could be used by terrorists. Some examination of the information openly disseminated by the federal government prior to September 11th was, doubtless, warranted. The response of the Administration, however, has been blanket withholding and removal.

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This article draws from and builds on the work of her colleagues in the library community and in the public interest community in D.C. who fight for openness every day.

A. Post-September 11th Immigration Cases

One of the most visible instances of keeping information related to its campaign against terrorism secret is found in the Administration's rounding up of individuals post September 11th. In late September 2001, Chief Immigration Judge Michael Creppy, at the direction of Attorney General Ashcroft, issued a memorandum to all Immigration Court judges and court administrators specifying additional security procedures for certain cases, in other words, more than 600 special interest immigration cases. These included a requirement that judges close the hearing to the public (no visitors, no family, no press), and avoid disclosing any information about the case to anyone outside the Immigration Court."¹ The memorandum also restricts immigration court officials from confirming or denying whether any particular case exists on the docket.²

Two different courts ruled the Creppy Memorandum unconstitutional (*North Jersey Media Group, Inc. v. Ashcroft*,³; and *Detroit Free Press v. Ashcroft*⁴). Both rulings were appealed. In the case of *Detroit Free Press v. Ashcroft*, the plaintiffs sued because they had been excluded from a deportation hearing, allegedly because of Judge Creppy's order to close the proceeding. On April 3, 2002, Judge Nancy G. Edmunds ruled that across-the-board closure was unconstitutional and that the proceedings should be open. On August 26, the Sixth Circuit issued an opinion strongly affirming the trial court ruling, finding that across-the-board closure of immigration proceedings was unconstitutional. The court noted that democracy requires openness: "The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty."⁵ In the opinion, Judge Damon Keith says:

Today, 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 the 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. When the government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.⁶

The *North Jersey Media* case ruling was overturned on the appeal. In that case, the Third Circuit Court of Appeals went along with the Administration's argument that rather than taking up this issue on a case-by-case basis, which they said immigration judges are not equipped to do, the courts should accept the government's word as a basis for closing deportation proceedings to the public.⁷

The Administration continues to strongly assert the right to keep both terrorism-related detainees and the procedures and proceedings surrounding them secret, even though no terrorism charges have been formally lodged against any of the post-September 11th domestic detainees and many of those held in Guantanamo Bay have also been found to have no terrorism relation.

B. Classification and Re-classification

The next example comes from the realm of officially secret information—and information that some appear to believe *should* be treated as officially secret even where it has been declared non-secret.

At a recent (September 2002) conference of the American Society of Access Professionals, the new director of the Information Security Oversight Office (ISOO)—the office with oversight authority over the classification/declassification system—predicted an increase in the number of documents classified after September 11, 2001. This would not, on its face, seem surprising. It is particularly not surprising given that three agencies—the Environmental Protection Agency, the Department of Health and Human Services and the Department of Agriculture—have been added to the 25 agencies (and more than 4,000 individuals) already possessing original classification authority.⁸ It is part of a trend, however, that has disturbing potential not only for accountability but also for the advancement of scientific and technical research.

In early 2002, publications that had been out and widely available to the public—some for many years—were withdrawn from online access. Even worse, the bibliographic information *about* them was also removed; not only can they not be obtained but their very existence is obscured (at least on the government sites). The Department of Energy decided to suppress approximately 9,000 documents from its Information Bridge Web service. Many of them are scientific research papers from national labs that contain keywords such as "nuclear" or "chemical" and "storage."

In another instance, the manager of Defense Technical Information Center (DTIC) thought he was going into a meeting with national security officials in the Administration to talk about the scope of the potential problem with documents that could conceivably be used by bio-terrorists and how to most effectively manage any problem. The DTIC manager found, however, that he was at the meeting to be told to remove thousands of documents from online public access. These are primarily old federal documents detailing the government's research on and production of biological weapons, generally between 1943 and 1969.⁹ While panels of scientific experts are planned to assess whether the documents should once again be made available to the public, the results are likely to be that documents that were never classified may be and ones that were de-classified may be reclassified. Current federal policy generally bars

McDermott

the reclassification of formerly secret documents. This could, however, be changed with a new Executive Order, which is in the works.

People inside government say that the removals happened, or at least happened as drastically as they did, because of a January 13, 2002 New York Times article by William Broad: *AU.S. Selling Papers Showing How to Make Germ Weapons.*¹⁰ In it, Broad noted that over the decades hundreds of documents have been declassified as part of an effort to make public the inner workings of government and that federal agencies routinely sell the documents to historians and other researchers, mostly by Internet and telephone.¹¹ The bigger issue, as far as the Administration is concerned, is that "[m]ore sensitive but still unclassified reports are made available by mail under the Freedom of Information Act."¹² According to a senior scientist at a private group that studies germ defenses who was quoted in the article, "We can't get it [released information] back But we can prevent further leakage of this material to the general public."¹³ Indeed, a report on bio-terrorism (co-authored by this scientist) called for a group of experts to review the old literature and see which reports should be reclassified. A medical doctor previously at Fort Detrick (which coincidentally is under FBI scrutiny in relation to the anthrax attacks of fall 2001) added to this concern, stating, "My major concern is the number of unclassified documents that need to be protected against FOIA requests They're locked up, but it doesn't do any good if people can write or call in and get them because of the law."¹⁴

The government listened. Indeed, it has been reported that this article is the source of the Administration's renewed interest in an information designation known as Sensitive but unclassified.

C. Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Records Related to Homeland Security

On March 19, 2002, the White House issued joint Memoranda.¹⁵ The first, from White House Chief of Staff Andrew Card, said that departments and agencies have an obligation to safeguard and not disclose inappropriately government records regarding weapons of mass destruction, including chemical, biological, radiological, and nuclear weapons. All departments and agencies were directed to review their records management procedures and, where appropriate, their holdings of documents to ensure that they are acting in accordance with the attached guidance. They had 90 days to report their review. Those reports have not been made public, which is not unusual or surprising.

The attached guidance, from the Information Security Oversight Office and the Department of Justice Office of Information and Privacy, has caused a wave of concern, however. It directs all federal departments and agencies to consider the need

Information and the Bush Administration

to safeguard information regarding weapons of mass destruction, *as well as other information that could be misused to harm the security of our nation or threaten public safety*. The need for safeguarding such information should be considered on *An ongoing basis* and *also upon receipt of any request* for records containing such information that is made *under the Freedom of Information Act (FOIA)*, 5 U.S.C. ' 552 (2000).¹⁶ The memorandum notes that *Athe appropriate steps for safeguarding such information will vary according to the sensitivity of the information involved and whether the information currently is classified.* It notes three indicators of sensitivity: 1) Classified Information, 2) Previously Unclassified or Declassified Information, and 3) Sensitive But Unclassified Information.

Classified Information. The current Executive Order on classification generally requires declassification of documents after 10 years but provides for extensions of up to 25 years when there is a need to keep that information classified. The memorandum indicates that information currently classified and 25 years old or less, should remain classified. Information more than 25 years old that is still classified should remain classified if it would *Areveal information that would assist in the development or use of weapons of mass destruction.*¹⁷ While this is some retraction of a previous trend toward greater declassification, it primarily slows the existing process.

Previously Unclassified or Declassified Information. According to the memorandum, information, regardless of age, that *never was classified and never was disclosed* to the public under proper authority, but could reasonably be expected to assist in the development or use of weapons of mass destruction, should *be classified*. Moreover, *A[i]f such sensitive information, regardless of age, was classified and subsequently was declassified, but it never was disclosed to the public under proper authority, it should be reclassified.*¹⁸ Although this indicator refers to information never disclosed *Aunder proper authority,* (in other words, never leaked), it is a significant change—particularly for properly declassified information.

Sensitive But Unclassified Information The memorandum goes on to note that departments and agencies maintain and control *sensitive information related to AAmerica's homeland security@ that might not meet one or more of the standards for classification* in Executive Order 12,958. It states that the *Aneed to protect such sensitive information from inappropriate disclosure should be carefully considered, on a case-by-case basis, together with the benefits that result from the open and efficient exchange of scientific, technical, and like information.*¹⁹ The memorandum directs all departments and agencies to ensure that *Athey process any Freedom of Information Act request for records containing such information in accordance with the Attorney*

McDermott

General's FOIA Memorandum of October 12, 2001 [discussed below], by giving full and careful consideration to all applicable FOIA exemptions."²⁰ The memorandum does not, however, give any definition to this idea of "sensitive but unclassified" information. The possible expansive use of the concept has caused great consternation. The Office of Management and Budget is preparing guidelines as to what it means.

At a recent meeting in Washington, one of the co-authors of this second memorandum made the point that justice sees a distinction between "safeguarding" information and decisions about "disclosure."²¹ *Safeguarding* has to do with identifying information for special attention and treating it procedurally in a proper manner. In terms of *disclosure*, he referred to the Attorney General's October 12, 2001 memorandum and indicated—in an audience full of federal government FOIA officers—that if agencies get FOIA requests, they should apply existing law for possible non-disclosure. When pressed on what "safeguarding" meant in relation to Web availability of government information, the Justice official said that this is certainly an aspect of it, noting "heightened sensitivity in the current climate." Those present generally took this to mean that agencies should be very careful about affirmative disclosure (dissemination without waiting for a FOIA request) and it was clear that disclosure even with a FOIA request was not encouraged.

Recall that the information that William Broad discussed in his January article had to do with documents that detailed the government's research on and production of biological weapons.²² As Broad noted, this work was done between 1943 and 1969 and was later renounced as Washington pressed for a global ban on such weapons. We are seeing the first attempts to apply the sensitive-but-unclassified category to just such information.

D. National Academies' "Security Hold" on Previously Public Information

On March 12, 2002, the Sunshine Project²³ requested 77 public, unclassified documents that had been deposited in the National Academies of Science's Public Access Records File between the dates of February 12 and July 27, 2001. These documents relate to a study on "An Assessment of Non-lethal Weapons Science and Technology,"²⁴ commissioned by the Joint Non-Lethal Weapons Program. The Sunshine Project requested these documents to examine them to assess their relationship to U.S. government compliance with international arms control commitments and federal law. As of March 12th, the documents were in the Public Access Records File and were available for public inspection and copying.

At some point between March 12th and April 29th, the National Academies of Science's Security Director placed a "security hold" on these documents, and he

declined a request from the Sunshine Project to divulge who requested this hold and on what basis. An e-mail from the Assistant Executive Officer of the National Research Council stated that the National Research Council "is in the process of determining if there are public release restrictions that would apply to these documents under one or more of the exemptions described in the Freedom of Information Act."²⁵ But the organizations that comprise the National Academies are not governmental organization. They are 501(c)3 non-profit organizations and, therefore, are not subject to the Freedom of Information Act, and they worked hard to get themselves excluded from a rule that extends FOIA access to government grantees. Moreover, under the Federal Advisory Committee Act, which is designed to provide the public a window into the deliberations of government advisory committees, NAS *is* required to provide the public access to documents it receives for studies, provided they are not exempt from disclosure under the Freedom of Information Act. The law does not require the public to file a FOIA request to inspect such documents.

In December, Marine Corps Colonel George Fenton (who retired October 9, 2002 as director of the Pentagon's Joint Non-Lethal Weapons Directorate and retired from the service January 1, 2003) told *Inside the Navy*, a military publication, that he asked for the public file to be withheld and reviewed in keeping with White House Chief of Staff Andrew Card's March 19 memorandum on safeguarding information regarding weapons of mass destruction and other sensitive documents related to homeland security:

Post 9/11, given I wanted to stay in the spirit of the guidance provided by the White House, and particularly in terms of national security, the prudent thing to do, the patriotic thing to do, was just to stop all [work] on everything and go [review] every single document and give it the critical eye. I owe that to you as an American citizen and to everybody else.²⁶

Fenton said he did not want to release documents that would give terrorists any ideas for weapons that could be used against the United States.

NAS spokesman Bill Skane said to ITN, "It was less important to us that the documents might have been delayed in the release than that we really didn't release something that potentially could be usable by somebody. And I think we did consciously make that tradeoff."²⁷

In an interesting twist, on October 18, 2002, the Presidents of the National Academies issued a "Statement on Science and Security in an Age of Terrorism" that says in part:

A successful balance between these two needs—security and openness—demands clarity in the distinctions between classified and unclassified research. We believe it to be essential that these distinctions not include poorly defined categories of >sensitive but unclassified= information that do not provide precise guidance on what information should be restricted from public access. Experience shows that vague criteria of this kind generate deep uncertainties among both scientists and officials responsible for enforcing regulations. The inevitable effect is to stifle scientific creativity and to weaken national security.²⁸

The worry of public interest advocates that this category will be applied broadly and used to hide inconvenient information has not been allayed. Indeed, the new Homeland Security Act instructs the President to "identify and safeguard homeland security information that is sensitive but unclassified."²⁹ As with the Department of Justice's and Information Security Oversight Office's memorandum, no formal definition of the word "sensitive" is provided, thus opening the door for this provision to be used to justify expansive new restrictions on the disclosure of unclassified information. Its inclusion in the Act is noteworthy in light of the March 19 memoranda and the fact that Awhile >sensitive= information has been referenced in a number of laws such as the Computer Security Act of 1987, this is apparently the first time that the problematic category of >sensitive but unclassified= information has appeared in a federal statute.³⁰

II. RESISTANCE TO ACCOUNTABILITY

This resistance can be seen not only in the changes set out in the Attorney General's October 12th memorandum but also in a number of attempts to stiff-arm the public and, especially, Congress.

A. The Ashcroft Memorandum on the Freedom of Information Act (October 12, 2001)³¹

The Freedom of Information Act (FOIA) was enacted on July 4, 1966. Before that, anyone wanting to get records from the federal government had to establish a right to examine those records, essentially a need to know. With the passage of FOIA, the burden of proof shifted to the government: agencies were required to disclose any requested documents unless they fell within nine limited statutory exemptions.³² Any decision by an agency to withhold a document could, moreover, be challenged in federal court.

In 1974, in reaction to the Nixon scandals, Congress moved to strengthen the FOIA. The change allowed courts to order the release of documents even when the President said they should not be released. The Ford Administration resisted. President Ford's chief of staff at the time was Donald Rumsfeld; Rumsfeld's deputy was Dick Cheney. Rumsfeld and Cheney advised Ford to veto the legislation. As one author says, "President Ford vetoed the Freedom of Information Act as we know it today. And he vetoed it because he and Rumsfeld and Cheney believed that it took away too much presidential power."³³ Recently, Vice-President Cheney has indicated that this White House is determined to take back some of the executive's control over information that had been ceded to Congress and has eroded over the last 30 years.

Attorneys General over the years have issued memoranda setting out policy on FOIA requests. During the Clinton Administration, Attorney General Reno's memorandum indicated that the Department of Justice would only defend an agency's refusal to disclose information when it could be argued that releasing the information would result in foreseeable harm.³⁴ The presumption was disclosure and agencies were encouraged (at least rhetorically) to release information.

Attorney General Ashcroft's memorandum,³⁵ however, encourages presumptive non-disclosure. The memorandum changes the standard under which the Department of Justice will defend a challenged refusal of release. Under the new standard the department will defend an agency as long as the decision rests on a sound legal basis, clearly a much lower standard than foreseeable harm. Although the memorandum acknowledges the importance of government accountability, it also actively encourages federal agencies to fully consider all potential reasons for non-disclosure and emphasizes national security considerations, effective law enforcement, and the protection of sensitive business information.

B. Cheney and the GAO

On April 19, 2001, Representatives John Dingell and Henry Waxman launched joint requests to both the Vice President and the General Accounting Office (GAO) concerning the Vice President's Energy Task Force, its members, and its proceedings. In response to the request by Representatives Dingell and Waxman, the GAO issued the first demand letter ever to a sitting Vice President. Counsel to the Vice President David Addington responded to the Congressional request, explaining that the Energy Group was not subject to the Federal Advisory Committee Act. As a matter of comity, though, he would provide some answers about the Energy Group's members, staff and activities. Addington declared that GAO was seeking "to intrude into the heart of Executive deliberations, including deliberations among the President, the Vice

McDermott

President, members of the President's Cabinet, and the President's immediate assistants, which the law protects to ensure the candor in Executive deliberation necessary to effective government."³⁶ The GAO argued that even assuming this claim was accurate, it still had the authority to make the requests it had made. On Sept. 27, 2001, for the first time in the 81-year history of the agency, the Comptroller General of the United States went to Federal court to ask a judge to order a member of the executive branch to turn over records to Congress.

Clearly, this is an issue of central importance to the Administration. In an article for FindLaw, John Dean wrote:

[N]ot since Richard Nixon stiffed the Congress during Watergate has a White House so openly, and arrogantly, defied Congress's investigative authority Cheney has not claimed 'Executive Privilege,' for the Vice President has no such power. Rather, Cheney has claimed—and Bush has backed up his claim—that GAO (and therefore the Congress, too) has no authority to seek the information they have requested.³⁷

Dean also noted the special attention, unique in the history of the Department of Justice, given this case: the Vice President is represented by a newly created special unit under the direction of Deputy Solicitor General Paul Clement. Moreover, no less than the Solicitor General himself, Theodore Olson, was seated at the trial table in the Judge Bates's courtroom during the recent argument. Typically, the Solicitor General only appears before the U.S. Supreme Court.³⁸

On December 9, 2002, U.S. District Judge John Bates, a Bush appointee and former Kenneth Starr deputy, ruled against the GAO in *Walker v. Cheney*.³⁹ The opinion reads:

The parties agree that no court has ever before granted what the Comptroller General seeks—an order that the President (or Vice-President) must produce information to Congress (or the Comptroller General). Because the Comptroller General does not have the personal, concrete, and particularized injury required under Article III standing doctrine, either himself or as the agent of Congress, his complaint must be dismissed. Historically, the Article III courts have not stepped in to resolve disputes between the political branches over their respective Article I and Article II powers; this case, in which neither a House of Congress nor any congressional committee has issued a subpoena for the disputed information or authorized this suit, is not the setting for such unprecedented judicial action.⁴⁰

This decision, in essence, secures the Bush Administration's position that it has the right to withhold from the public—and Congress—any and all details of its policy-development meetings with non-governmental people. It also chills any attempt by Congress to use the GAO to monitor the executive branch.

C. The Homeland Security Office and Accountability to Congress

Indeed, President Bush has structured the White House homeland security operation (the Office of Homeland Security, which remains in operation in addition to the Department of Homeland Security) so that all the decision and policymaking is undertaken at the level of the White House staff—where it is immune from Congressional oversight. As a result, the government is being run in secrecy more typical of a big corporation than an open, democratic society. Says one author, "The Bush administration sure looks to me like they found an old Nixon presidency playbook down in the basement of the White House, since they have borrowed more than one page. Why it's being done remains inexplicable."⁴¹

D. Executive Order on Presidential Records Act

The Presidential Records Act of 1978, declaring that the official records of a former President belong to the American people, was passed by Congress to insure that the official records of the President are preserved and made publicly accessible.⁴² Under the Act, as amended in 1989, the U.S. government asserts complete "ownership, possession, and control" of all Presidential and Vice-Presidential records.⁴³ When the President's term in office is complete, the Archivist of the U.S. is required to assume custody of the records and to make them available to the public "as rapidly and completely as possible." An out-going president may withhold records from public release for up to 12 years, if the records contain national security classification, information relating to appointments to federal office, confidential communications between the president and his advisers, confidential financial or commercial information, or other records constituting a privacy concern. At the end of the 12-year period, members of the public can submit a FOIA request to view any previously embargoed papers. Access can be denied after expiration of 12-year embargo only if a former or incumbent president claims an exemption based on a "constitutionally based" executive privilege or continuing national security concern. The first presidential records to come under the Act are those of former President Ronald Reagan.

Those records should have become publicly available in February 2001. For much of that year, their release was delayed by the current Administration. On

McDermott

November 1, 2001, President Bush issued an Executive Order to govern the review of former President's records for possible executive privilege claims.⁴⁴ The Executive Order asserts an extremely expansive view of the scope of that privilege, stating that it includes not only the privilege for confidential communications with his advisers that has been recognized by the Supreme Court, but also the state secrets privilege, the attorney-client and attorney work product privileges, and the deliberative process privilege. However, the attorney-client and attorney-work-product privileges are common-law, not constitutional privileges—as is the deliberative process privilege (to the extent it would go beyond the privilege for confidential communications between the President and his advisors). Moreover, there is no precedent for the invocation of the state secrets privilege by a *former* president (as opposed to the incumbent).⁴⁵ The executive order also extends the constitutional privilege to the vice-president, for which there is also no precedent.

The order also creates a new barrier to access by requiring that researchers must assert a "demonstrated, specific need" for presidential records, even after the end of the 12-year embargo period (as opposed to FOIA process specified under the Act); provides both a former president and the incumbent president an unlimited amount of time to review records to determine whether to object to their release to the public; and empowers the incumbent president to order the archivist to withhold access to the former president's records on grounds of privilege even if the former president does not object to their being made public, and even in the absence of any claim that national security would be affected by public release. On November 28, 2001, Public Citizen, a non-profit public interest group, filed suit against the National Archives and Records Administration and U.S. Archivist John Carlin to overturn Executive Order 13,233 and "to compel the release of presidential materials of former President Ronald Reagan that are in the custody of NARA [National Archives and Records Administration] and are being withheld in violation of the PRA [Presidential Records Act]."⁴⁶

In March 2002, the Administration released 59,850 of the 68,000 pages from the Reagan papers originally identified by the Archivist. A remaining 155 pages were released in July. During the discovery process, however, approximately 1,500 additional pages of the Reagan papers were identified. These are still under administration review and have not yet been released. The suit is awaiting court action.

In October 2002, the House Committee on Government Reform unanimously approved legislation first introduced by Representative Stephen Horn and co-sponsored by 44 other legislators (37 Democrats, one Independent, and six Republicans, including House Government Reform Committee Chairman Dan Burton) that reinforces implementation of the Presidential Records Act of 1978.⁴⁷ In a letter to the Committee, the White House attacked the bill as "unnecessary and inappropriate, and,


Information and the Bush Administration

more importantly, unconstitutional."⁴⁸ The Administration claimed that the Reagan Presidential records have been released, showing the bill is not needed.

While the Administration is correct about the Reagan-era records, the records of the first Bush Administration are scheduled to be released in two years. Policy papers and "confidential advice" offered to the president by a number of high-profile public officials in the current Administration, including Vice President Dick Cheney, Deputy Defense Secretary Paul Wolfowitz, and Secretary of State Colin Powell will be subject to release.

E. Implementation of the USA PATRIOT Act

On June 13, 2002, the Chairman and the Ranking Member of the House Judiciary Committee sent a letter to AG Ashcroft with fifty questions probing the government's implementation of the USA PATRIOT Act.⁴⁹ The questions, submitted by the House Judiciary Committee, were in advance of an anticipated congressional hearing on the Justice Department's use of the "new investigative tools" granted by the USA PATRIOT Act. The questions concerned "roving" surveillance; lists of calls to and from telephone numbers; demands for bookstore, library and newspaper records; and subpoenas under the amended Foreign Intelligence Surveillance Act served on Americans or permanent residents.⁵⁰ Answers were provided to Representatives Sensenbrenner and Conyers on some simpler questions, e.g., about Immigration and Naturalization Service employees along the Canadian border.

Curiously, though, the responses⁵¹  question twelve⁵² (about public libraries, bookstores, and newspapers) and five other questions were classified. The responses were sent to the House Permanent Select Committee on Intelligence. Mr. Conyers complained in a New York Times comment that the letter was "yet another shot in this administration's ongoing war against open and accountable government."⁵³ Mr. Ashcroft was telling Congress that "his activities are not to be oversighted." "Congress, butt out," Mr. Conyers said.

The DOJ response on question twelve is especially strange; the *number* of Foreign Intelligence Surveillance Act (FISA) court orders for search and surveillance of suspected foreign spies or terrorists is not classified. Conversations with staffers both on the House Judiciary Committee and the Intelligence Committee have yielded only the response that they have received information from the Department of Justice and that the information is classified.

F. Joseph Salvati and the FBI



Finally, the case of Joseph Salvati, whom the FBI knowingly allowed to be

McDermott


wrongly convicted for murder to protect Mafia murderers who were FBI informants, is one of the most egregious examples of this stiff-arming. James Wilson, chief legal counsel for Representative Dan Burton=s House Committee on Government Reform, received FBI documents showing that the Bureau=s knowledge of Salvati=s innocence led up the chain of command, right to Hoover. Burton subpoenaed more FBI documents, but Attorney General John Ashcroft has refused to supply them, and President Bush has backed Ashcroft up with an order of executive privilege. The White House maintains that airing the documents Awould be contrary to the national interest.@⁵⁴

III. NEED TO KNOW

Do *you* have what it takes to be allowed to obtain information created or collected by the federal government in the course of its responsibilities for carrying out the laws? Can you be trusted to handle the truth? That may become a very salient question if this Administration has its way.

A. FERC

On September 5, 2002, the Federal Energy Regulatory Commission (FERC) announced plans to aggressively restrict public access to government information it deems sensitive. Shortly after the September 11th attacks FERC limited access to huge amounts of information that it controls and released an initial policy statement addressing this issue in October 2001. On January 16, 2002, FERC announced a Notice of Inquiry (NOI) seeking public input on possible regulatory changes that would allow the agency to restrict unfettered general public access to what it termed Critical Energy Infrastructure Information (CEII).⁵⁵

This rule would be the first permanent action by a federal agency restricting access to information previously publicly available. Under this rulemaking proposal, any information emed potentially useful to a person planning an attack on "production, generation, transportation, transmission or distribution of energy" would be made exempt from the Freedom of Information Act's (FOIA) mandatory disclosure requirement and overseen by a "critical energy infrastructure coordinator" who would process Anon-FOIA@ requests.⁵⁶

The Federal Register notice on the rule says, AThe commission=s objective is to protect critical energy infrastructure information while still permitting those *with a need for the information* the opportunity to obtain it in an efficient manner."⁵⁷ In effect, FERC is proposing a tiered system of public access to its energy information. Anyone can request anything under the Freedom of Information Act, but FERC would

withhold certain previously public information that it says is exempt from mandatory disclosure under the FOIA and would only make such information available to requesters who are deemed to have a legitimate need for it.⁵⁸

B. Homeland Security Information

In a September presentation to the Industry Advisory Council, Steve Cooper (Chief Information Officer of the Homeland Security Office) said that the proposed Homeland Security Department should rapidly deploy a homeland security portal that would provide "the right information to the right people all the time."⁵⁹ Cooper stated that the level of information access provided to users should depend on what the needed information is for shifting the distribution of security knowledge from an "emphasis on the people receiving the information to the role of the information itself."⁶⁰

C. Envirofacts

The Environmental Protection Agency (EPA) maintains an online informational database called Envirofacts. On March 14, 2002 the EPA e-mailed an announcement to Envirofacts users explaining that it will no longer allow direct access to the Envirofacts databases. In the email to Direct Connect Users, the EPA stated that, "As part of our continuing efforts to respond to Homeland Security issues . . . starting April 1, 2002, Direct Connect access will no longer be available to the general public. Direct Connect access to Envirofacts will only be available to U.S. EPA employees, U.S. EPA Contractors, the Military, Federal Government, and State Agency employees."

However, as OMB Watch reported, even on this short list of approved users there is a clear shift from "right-to-know" to "need-to-know." On the new registration form all applicants are required to explain the reason they need direct access to Envirofacts. Additionally, all State Agency employees and EPA Contractors must obtain "sponsorship" from a U.S. EPA manager (branch chief or higher).⁶¹

III. IDEOLOGICAL PURITY

And finally, information, and advisors who do not toe the party line, are being removed in a growing trend.

A. Department of Health and Human Services

On October 21, 2002, twelve Members of the House of Representatives (11

McDermott

Democrats and one Independent) wrote to Secretary of the Department of Health and Human Services Tommy Thompson expressing concern about a pattern of events at the Department of Health and Human Services suggesting that scientific decision-making is being subverted by ideology and that scientific information that does not fit the Administration's political agenda is being suppressed."⁶² In the letter, they detail a growing number of cases providing evidence that actions directly affecting public health are being driven by ideology rather than by science. Among these are: expert appointments to scientific advisory boards going to individuals with specific ideological viewpoints rather than scientific credentials; organizations that provide science-based programs to prevent pregnancy and sexually-transmitted diseases, but that disagree with the Administration's abstinence-only position, being singled out for discriminatory audits; and scientific information on both the National Institutes of Health and the Center for Disease Control websites being removed, apparently because it does not fit with the Administration's ideological agenda. The letter spells out the concerns in detail and asks for specific information in response by October 30, 2002.⁶³ As of the end of 2002, no response has been received.⁶⁴

B. Department of Education

A May 31, 2002 Department of Education memorandum entitled "Criteria and Process for Removing Old Content from www.ed.gov" says that "[t]he purpose of www.ed.gov is to inform the public of the President and Secretary's education goals . . ."⁶⁵ Among "Current Challenges," it lists that "[c]ontent is either outdated or does not reflect the priorities, philosophies, or goals of the present administration." The "Criteria for Keeping Information on the Web" include that it must be "useful or valuable to parents, students, or educators *and* is consistent with the Administration's philosophy." The Department has responded to concerns raised about the redesign with assurances that files will not be deleted or removed, but rather simply moved to that particular section's archive.⁶⁶

C. EPA and Global Warming

In June 2002, President Bush referred dismissively to a report prepared by the Environmental Protection Agency and submitted to the United Nations that said that human activities are mostly to blame for recent trends in global warming as "put out by the bureaucracy."⁶⁷ The White House maintains that there is still "considerable uncertainty" on the causes of global warming.

In September 2002, the annual federal report on air pollution trends was the first in six years to contain no section on global warming. The decision to delete the



chapter on climate change was made by top officials at the Environmental Protection Agency with White House approval according to White House officials.⁶⁸

D. The National Academies Research on Bioterrorism

It was reported in October 2002 that the National Academies had recently had a run-in with the Bush administration over publishing sensitive information. According to a National Academies spokesman, the Department of Agriculture "tried to suppress" a National Academies research report on the vulnerability of U.S. agriculture to bioterrorism.⁶⁹ Researchers found that harmful foreign pests and pathogens are "widely available and pose a major threat to U.S. agriculture" and that the department has failed to plan a defense against a biological attack. USDA officials wanted the unclassified report withheld.

Some at the National Academies believe the agency really wanted to suppress the report's criticism. The National Academies published the report anyway; even after the National Academies removed details from the report, USDA officials continued to object, saying the report would endanger national security.⁷⁰ Which brings us back, in an ever-widening circle, to the beginning.

IV. CONCLUSION

This overview of the Bush Administration's policies and actions (up through December 2002) clearly demonstrates several tendencies. First, the Administration is committed to controlling the flow and content of information. This commitment is not solely related to the campaign against terrorism—including those individuals swept up in that campaign—and information that could conceivably be of use to terrorists. Rather, it is part of a larger ideological stance about the power of the executive, particularly vis a vis the Congress.

The Administration clearly—and openly—is determined to assert its prerogatives over against Congress. As Representative John Conyers, Jr. put it, they are not to be overlooked and they are not going to be made to respond to congressional demands for information. So far, Congress is losing this battle.

Indeed, in a separate venue, Bush's Office of Management and Budget (OMB) is confronting Congress directly. The Administration is not only refusing to enforce a statute but actually proposing a change to an acquisition regulation in order to allow agencies to flaunt the law (44 U.S.C. '501) that requires that the printing of their publications be done by the Government Printing Office.⁷¹

The fight with Congress is, in its turn, part of a position that takes the public back toward a pre-FOIA situation, where they have to *establish* a right to information.

McDermott

And the burden is on us to prove a negative, that the information won't ever even possibly be of use to Aterrorists.@ In the meantime, information about the Administration=s actions—and inactions—in terms of protecting public health and safety (including, for example, the environment) and even its compliance with law and treaty is withdrawn, withheld, restricted and controlled.

This situation is unlikely to improve and could quite possibly get much worse: the first casualty of war is truth.

Notes

1. Memorandum from Chief Immigration Judge Michael Creppy, to Immigration Court judges and court administrators, *available at* http://archive.aclu.org/court/creppy_memo.pdf.
2. *Id.*
3. 195 F.Supp. 2d 937 (2002).
4. 303 F.3d 681 (6th Cir. 2002).
5. *Id.* at 683.
6. *Id.*
7. *North Jersey Media Group, Inc.*, 308 F.3d at 219-21.
8. Information Security Oversight Office's (ISOO) 2001 Report to the President, *available at* http://www.archives.gov/isoo/annual_reports/2001_annual_report.html.
9. William J. Broad, *Domestic Security; U.S. Tightening Rules on Keeping Scientific Secrets*, N.Y. TIMES, Feb. 17, 2002.
10. William J. Broad, *The Biological Threat; U.S. is Still Selling Reports on Making Biological Weapons*, N.Y. TIMES, Jan. 13, 2002, at 1.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Memoranda from Andrew Card, Assistant to the President and Chief of Staff, to Heads of Executive Departments and Agencies; and Laura Kimberly, Acting Director, Information Security Oversight Office, Richard Huff and Daniel Metcalfe, Co-Directors, Office of Information and Privacy, Department of Justice, to Executive Departments and Agencies (Mar. 19, 2002), *available at* <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm> [hereinafter Card Memorandum].
16. (Emphasis added).
17. *See* Exec. Order No. 12,958 § 3.4(b)(2), 60 Fed. Reg. 19825 (Apr. 20, 1995), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1995_register&docid=fr20ap95-135.pdf.
18. Card Memorandum, *supra* note 15 (emphasis added).
19. *Id.*
20. *Id.*
21. American Society of Access Professionals Annual Symposium, September 2002.
22. *See* text accompanying notes 12-13.

23. The Sunshine Project is an international non-governmental organization that works on biological weapons issues, including treaty compliance. See THE SUNSHINE PROJECT, available at <http://www.sunshine-project.org/>.
24. National Academies of Science Identification Number NSBX-L-00-05-A (2003).
25. Posting of Edward Hammond, [Hammond&sunshine-project.org](http://www.sunshine-project.org), to www.sunshine-project.org (Apr. 29, 2003) (copy on file with author).
26. Christopher Castelli, *NAS Study Shows Messy Reality Tied to Balancing Security, Openness*, INSIDE THE NAVY, Dec. 2, 2002, available at <http://www.fas.org/sgp/news/2002/12/itn120202.html>.
27. *Id.*
28. Bruce Alberts, William A. Wulf, and Harvey Fineberg, Presidents of the National Academies of Science, *Statement on Science and Security in the Age of Terrorism* (Oct. 18, 2002), available at <http://www4.nationalacademies.org/news.nsf/isbn/s10182002b?OpenDocument>.
29. Homeland Security Act of 2002, Pub. L. No. 107-296, § 892, 116 Stat. 2135 (2002).
30. Steven Aftergood, “Sensitive But Unclassified” Becomes Law, 2002 SECRECY NEWS 118, Nov. 27, 2002, available at <http://www.fas.org/sgp/news/secretcy/2002/11/112702.html>.
31. Memorandum from Attorney General John Ashcroft, to Heads of All Federal Departments and Agencies (Oct. 12, 2001), available at <http://www.usdoj.gov/04foia/011012.htm>.
32. See The Freedom of Information Act, 5 U.S.C. § 552(b) (West 2000).
33. Shelly Strom, *Freedom of Info Attack Directed From the Top*, THE BUSINESS J. – PORTLAND (May 10, 2002) (quoting Thomas Blanton of the National Security Archive), available at <http://portland.bizjournals.com/portland/stories/2002/05/13/newscolumn2.html>.
34. *Presidential Memorandum for Heads of Departments and Agencies Regarding the FOIA (October 4, 1993)* available at http://www.usdoj.gov/foia/93_clntmem.htm
35. See Ashcroft Memorandum, *supra* note 31.
36. John W. Dean, *GAO v. Cheney Is Big-time Stalling: The Vice President Can Win Only If We Have Another Bush v. Gore -like Ruling*, WRIT, Feb. 01, 2002, available at <http://writ.news.findlaw.com/dean/20020201.html>
37. *Id.*
38. John W. Dean, *The Ongoing Fight Between the Supreme Court And Congress, As Illustrated by the GAO/Cheney Suit: Part Two Of A Series On Shrinking Congressional Powers*, WRIT, Oct. 25, 2002, available at <http://writ.news.findlaw.com/dean/20021025.html>.
39. *Walker v. Cheney*, 230 F.Supp.2d 51 (D. D.C. 2002).
40. *Id.* at 53.
41. John W. Dean, *FindLaw Forum: Tom Ridge's Appearance Before Congress is Another Nixon-style Move by the Bush Administration* (Apr. 12, 2002), available at <http://www.cnn.com/2002/LAW/04/columns/fl.dean.ridge.04.12/>
42. See Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. 2201 *et seq.*).
43. *Id.* at § 2202
44. Exec. Order No. 13,233, 66 F.R. 56,025, reprinted in 2001 WL 1349195.
45. For an analysis of the provisions of the Executive Order, see the American Libraries Association website at <http://www.ala.org/washoff/lessaccess.html#admin>.
46. Complaint for Plaintiff Public Citizen, Inc., American Historical Association et al. v. National

- Archives and Records Administration et al., *available at* <http://www.citizen.org/litigation/briefs/FOIAGovtSec/PresRecords/articles.cfm?ID=6515>.
47. John Hammer and Jessica Jones, *House Committee Reaffirms Presidential Records Act of 1978*, NATIONAL HUMANITIES ALLIANCE, Oct. 16, 2002, *available at* <http://www.nhalliance.org/news/101602.html>.
 48. Adam Clymer, *House Panel Seeks Release of Presidential Papers*, N.Y. TIMES, Oct. 10, 2002.
 49. Letter from James Sensenbrenner, Chairman of the Committee on the Judiciary, U.S. House of Representatives, and John Conyers, Ranking Minority Member of the Committee on the Judiciary, U.S. House of Representatives, to John Ashcroft, Attorney General, Department of Justice, (June 13, 2002), *available at* <http://www.house.gov/judiciary/ashcroft061302.htm> [hereinafter Sensenbrenner Letter].
 50. *Id.*
 51. Response from Daniel J. Bryant, Assistant Attorney General, Department of Justice, to John Conyers, Ranking Minority Member of the Committee on the Judiciary, U.S. House of Representatives, (July 26, 2002), *available at* <http://www.fas.org/irp/news/2002/08/doj072602.pdf>.
 52. Question 12 reads:

Has Section 215 been used to obtain records from a public library, bookstore, or newspaper? If so, how many times has Section 215 been used in this way? How many times have the records sought related to named individuals? How many times have the records sought been entire databases? Is the decision to seek orders for bookstore, library, or newspaper records subject to any special policies or procedures such as requiring supervisory approval or requiring a determination that the information is essential to an investigation and could not be obtained through any other means?

Sensenbrenner Letter, *supra* note 49.
 53. Adam Clymer, *Justice Dept. Balks at Effort to Study Anti-terror Powers*, N.Y. TIMES, Aug. 15, 2002.
 54. *Burton Vows FBI Probe*, 60 MINUTES, Jan. 25, 2002, *available at* <http://www.cbsnews.com/stories/2002/01/25/60minutes/main325595.shtml>.
 55. Published in the Federal Register on January 23, 2002.
 56. *Id.*
 57. Critical Energy Infrastructure Information, 18 C.F.R. pts 375 and 388, Docket Nos. RM02-4-000-000 and PL02-1-000-000, Order No. 630, Final Rule (Issued February 21, 2003), *available at* <http://www.ferc.gov/home/RM02-4-02-21-03.pdf>.
 58. *Id.*
 59. Wilson P. Dizard III, *Homeland Security Department Must Hit the Ground Running, Cooper Says*, GOVERNMENT COMPUTER NEWS, Sept. 19, 2002, *available at* <http://www.gcn.com>.
 60. *Id.*
 61. *EPA Announces Plans to Restrict Access to Envirofacts*, OMB WATCHER, Mar. 18, 2002, *available at* <http://www.ombwatch.org/article/articleview/608/1/108/>.
 62. Letter from Twelve Members of the U.S. House of Representatives to Tommy Thompson, Secretary, U.S. Department of Health and Human Services (Oct. 21, 2002), *available at* http://www.house.gov/reform/min/pdfs/pdf_inves/pdf_admin_hhs_africa_hiv_aids_policy.pdf.
 63. *Id.*

Information and the Bush Administration

64. Correspondence to the author from a professional staff member of the Committee on Government Reform.
65. Internal memorandum on file with author.
66. Letter from Secretary Rod Paige, December 26, 2002 (copy on file with author).
67. *See Bush Dismisses Global Warming Report*, CBSNEWS.COM, June 4, 2002, *available at* <http://www.cbsnews.com>.
68. Andrew C. Revkin, *With White House Approval, E.P.A. Pollution Report Omits Global Warming Section*, N.Y. Times, Sept. 15, 2002.
69. William Matthews, *'Sensitive' Label Strikes Nerve*, FED. COMPUTER WK., Oct. 31, 2002, *available at* <http://www.fcw.com/fcw/articles/2002/1111/pol-sense-11-11-02.asp>
70. *Id.*
71. American Library Association, Washington Office Newsline, (Dec. 4, 2002), *available at* <http://www.ala.org/washoff/governmentinfo.html>; and <http://www.ala.org/washoff/alawon/alwn1198.html>.