Subcommittee on the Constitution
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Hearing on "Restoring the Rule of Law"

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Statement of Citizens for Responsibility and Ethics in Washington

During the past eight years we have witnessed some of the most flagrant abuses of executive power and privilege, carried out under the theme of a unitary executive and aided by an obsession with government secrecy. Citizens for Responsibility and Ethics in Washington ("CREW"), from its vantage point as a frequent user of and litigant under the Freedom of Information Act ("FOIA") and other information access statutes, has observed up close the administration's continued refusal to make public the bases for a wide variety of its policies and decisions, hiding behind secret Office of Legal Counsel ("OLC") opinions and contorting statutory loopholes beyond reason. CREW therefore offers some historical perspective, identifies some of the more pernicious examples of secrecy, and suggests specific actions for moving forward to restore the rule of law in our country. We focus most extensively on the FOIA in view of our particular expertise and experience with that statute.

Pattern of Secrecy

The tone for secrecy was set at the start of the Bush administration, when President George W. Bush established the National Energy Policy Development Group ("NEPDG"), chaired by Vice President Richard B. Cheney and tasked with formulating administration energy policy. Operating totally in secret, the White House rebuffed efforts by the General Accounting Office and private litigants to ascertain who was involved in making the NEPDG's recommendations and the specific roles played by top oil executives with known close links to Vice President Cheney.[1]

Quite apart from the dangerous legal precedents that emerged from this litigation,[2] the administration's handling of the task force and the related litigation showcase at least three themes that would be repeated for the next eight years. First, the administration has a sweepingly expansive view of executive power and secrecy and relies aggressively on privilege to prevent the public from knowing what goes on inside the administration. Second, the administration has a clear disdain for Congress' traditional legislative oversight role, a disdain that has stymied both the House and the Senate in their efforts to find out the truth behind such scandals as the forced resignations of eight U.S. Attorneys for partisan political reasons and the leak by top White House officials of Valerie Plame Wilson's covert CIA identity. And third, the

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[1] The three resulting lawsuits were Walker v. Cheney, 230 F.Supp.2d 51 (D.D.C. 2002) (suit by head of GAO); Judicial Watch v. Dep't of Energy, 412 F.3d 1108 (D.C. Cir. 2004) (FOIA suit for records created by agency heads participating as members of NEPDG); and Cheney v. U.S. District Court, 542 U.S. 367 (2004) (challenge to failure of the NEPDG to comply with the Federal Advisory Committee Act).

[2] For example, in Cheney, the Supreme Court equated the discovery burdens the plaintiffs sought to impose on the vice president as comparable to burdens the courts have refused to impose on the president, providing further support for the administration's unitary executive theory. 542 U.S. at 385-86. Similarly, in Judicial Watch v. Dep't of Energy, the U.S. Court of Appeals for the D.C. Circuit found that documents sought from agencies whose agency heads had participated in the NEPDG and that had been provided to the task force were protected by the deliberative process privilege under a unitary executive theory. 412 F.3d at 130.

vice president plays a key role in not only making policy, but in expanding the power of his office to match that of the president.

The executive's use of secrecy to expand its powers is evidenced in the secret legal opinions issued by the Department of Justice's Office of Legal Counsel. As a growing body of secret law on critical issues of national importance, the OLC opinions represent a dramatic and alarming departure from the openness that is the hallmark of our democratic form of government. OLC opinions are binding on the executive branch and have been used to justify everything from the torture of detainees to the government's warrantless electronic surveillance program. Through its reliance on secret OLC opinions, the administration has been able to circumvent congressional efforts to promote the publication of laws and regulations, such as the Administrative Procedure Act and the Freedom of Information Act.[3] The harm that flows from this lack of transparency is exacerbated by the OLC's continued willingness to rubber stamp even the most egregious administration policies.[4]

Secret OLC opinions are by no means the only information that the Bush administration has kept from the American public. In keeping with its belief that the unitary executive has the power to interpret the law before deciding how to enforce it, the administration has stretched the limits of the FOIA almost to the breaking point. At the beginning of the Bush presidency the administration adopted a default policy of non-disclosure under the FOIA that stands the law on its head. That policy, first announced by then-Attorney General John Ashcroft, favors non-disclosure by requiring agencies to engage in "full and deliberate consideration of the institutional, commercial, and personal privacy interests" before releasing any document under the FOIA and commits the Department of Justice to defending all agency withholding decisions "unless they lack a sound legal basis" or adversely affect other agencies.[5] But the FOIA's nine exemptions are generally permissive, not mandatory, to be invoked if information in the

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[3] For example, Senator Whitehouse has identified one secret OLC opinion that upholds the president's ability to unilaterally abrogate an executive order without public notice. See Statement of Sen. Whitehouse, Dec. 7, 2007, Congressional Record, pp. S15011-15012, available at http://www.fas.org/irp/congress/2007_cr/fisa120707.html.

[4] CREW's experience with secret OLC opinions demonstrates their self-serving nature. When CREW sought copies under the FOIA of White House visitor records that the Secret Service creates and maintains, the White House claimed the records are actually presidential and therefore not available to the public, relying in part on an OLC opinion that it refused to produce. Similarly, when CREW sought records from the Office of Administration ("OA") -- an EOP component that had operated as an agency since its inception -- relating to the mysterious disappearance of millions of emails from White House servers, the White House suddenly claimed OA was no longer an agency, relying on yet another secret OLC opinion.

[5] Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies re: The Freedom of Information Act (Oct. 12, 2001), available at http://www.usdoj.gov/foiapost/2001foiapost19.htm.

requested records requires protection.[6] Moreover, the numbers tell the true story; the Bush administration's implementation of the FOIA has resulted in longer response times, bigger request backlogs, more denials of requests and fewer reversals of administrative appeals challenging an agency's denial of access to requested records.[7]

The administration's response to CREW's request for White House visitor logs that the Secret Service creates and maintains as part of its statutory mandate to protect the president and vice president is a case in point, as it reveals the disdain this administration has for the rule of law, specifically the FOIA. The administration attempted to reclassify the agency's documents as presidential documents under the exclusive control of the White House after entering into a secret memorandum of understanding with the Secret Service in the midst of litigation over the records' status. U.S. District Court Judge Royce C. Lamberth rejected the administration's efforts, ruling that the visitor logs are agency records of the Secret Service and ordered the agency to complete its processing of CREW's request.[8] The D.C. Circuit dismissed the government's subsequent appeal on the ground that the district court order was non-final, specifically rejecting the notion that processing the request would impose an unconstitutional burden on the vice president that justified immediate appellate review.[9]

The theory behind the executive's efforts to transform agency records, left unchecked, has no limits. There is nothing to stop the president or vice president from claiming as their own the records of any other agency based on nothing more than their interest in the records and a concern that disclosure would reveal something the White House seeks to conceal. In this way, the White House can effectively place those records beyond the reach of the courts, Congress and -- for the foreseeable future -- the public.[10]

The White House has played similar games with the FOIA in its treatment of the records of the Office of Administration. First characterized as an agency by President Jimmy Carter's White House -- the very White House that created OA in the first place -- OA has functioned as an agency subject to the FOIA until very recently. When faced with a FOIA request from CREW that would reveal the extent to which OA has known about, but done nothing to address,

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[6] A Citizen's Guide On Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records, H. Rep. 107-371, 107th Cong., 2d Sess. (2002).

[7] Minjeong Kim, Numbers Tell Part of the Story: A Comparison of FOIA Implementation Under the Clinton and Bush Administrations, 12 Comm. L & Policy 313.

[8] See CREW v. U.S. Dep't of Homeland Security, 552 F.Supp.2d 76 (D.D.C. 2007).

[9] CREW v. U.S. Dep't of Homeland Security, 532 F.3d 860, 865-66 (D.C. Cir. 2008).

[10] That is because under the Presidential Records Act, the president and vice president have virtually unchecked control over their records while in office and once they leave office, the records are not generally available to the public for up to 12 years. See 44 U.S.C. § 2204.

the disappearance of millions of emails from White House servers during a critical two and one-half year period, OA abruptly changed course and declared itself to be a non-agency.[11]

Pattern of Expanding Executive Privilege

One way the Bush administration has advanced its theory of a unitary executive and enhanced the power of the executive is through its unprecedented use of signing statements. As of July 27, 2008, President Bush had used signing statements to challenge 1,172 provisions within 164 bills while signing them into law.[12] Not only has the president issued more signing statements than any previous president, but he has also raised more constitutional objections in his signing statements (85%) than any other president.[13] Through these statements President Bush has announced either that he will decline to enforce a particular provision of a law or will enforce it in a manner inconsistent with congressional intent.

The president's repeated use of signing statements to raise constitutional challenges to legislation has served to entrench his theory of a unitary executive and to undermine congressional checks on his use of executive power. For example, 28 U.S.C. § 530D(a)(1)(A)(I) requires the attorney general to notify Congress when any formal or informal policy calls for the Department of Justice to refrain from enforcing a federal statute. But through his use of ambiguous signing statements, the president has been able to bypass this requirement.

The Bush administration's belief in a near limitless executive has also conflicted with the traditional powers of the legislative branch. Congress plays the pivotal role of acting as a check on abuses by other branches of government,[14] but has been unable to assume that role effectively because of the administration's refusal to comply with legitimate congressional requests for information. For example, Congress' efforts to investigate the forced resignations of eight U.S. attorneys seemingly for partisan political reasons have been blocked by the White House's refusal to provide documents and testimony, even in the face of congressional subpoenas from the House Committee on the Judiciary. When both former White House Counsel Harriet Miers

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[11] Although the district court agreed with OA, that ruling is now on appeal and the district court has stayed its order pending resolution of the appeal. CREW v. Office of Administration, 249 F.R.D. 2 (D.D.C. 2008), *stay granted in part and denied in part*, 2008 U.S. Dist. LEXIS (July 8, 2008).

[12] See http://www.users.muohio.edu/kelleycs/ (website of Dr. Christopher Kelley) (last visited Sept. 3, 2008).

[13] OpenTheGovernment.org, Secrecy Report Card 2007, available at http://www.openthegovernment.org/otg/SRC2007.pdf.

[14] H. Comm. on Gov't Reform - Minority Staff Special Investigations Division, Congressional Oversight of the Bush Administration, Jan. 17, 2006, available at http://oversight.house.gov/documents/20060117103554-62207.pdf.

and former Chief of Staff Joshua Bolton refused to comply with congressional subpoenas for testimony and related documents, the Judiciary Committee sued to enforce the subpoenas. The executive, arguing that the Committee lacks standing and a proper cause of action, that the dispute is non-justiciable, that the court should decline to exercise jurisdiction, and that both Ms. Miers and Mr. Bolton enjoy absolute immunity and need not even produce a privilege log, moved to dismiss the complaint. In a lengthy opinion U.S. District Court Judge John D. Bates rejected all of these arguments and refused to stay his opinion pending the government's appeal, reasoning in part that the executive has failed to raise a serious and substantial question on the merits.[15] Notably, Judge Bates was quick to reject the unprecedented argument that Ms. Miers and Mr. Bolton are entitled to absolute immunity, an argument that flies in the face of Supreme Court precedent to the contrary.[16]

This is by no means the first instance where the Bush administration has refused to comply with congressional requests for information.[17] But the administration's unyielding refusal to comply with the congressional subpoenas issued to Ms. Miers and Mr. Bolton best reveals the depth of its contempt for the investigative functions of Congress. Without the check of the judiciary, the executive would be able to expand its powers under a theory of a unitary executive in a manner that eclipses the constitutionally assigned roles of the other two branches of government.

The views of the vice president on the power of his office and where it fits into our system of government present one of the most egregious examples of abuse of power by the executive. Not only has Vice President Cheney indicated his belief that he enjoys the same constitutional protections and immunities as the president,[18] but he has redefined his office as belonging to neither the executive nor the legislative branches, but "attached by the Constitution to the latter."[19]

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[15] Comm. on the Judiciary v. Miers, 558 F.Supp.2d 53 (D.D.C. 2008), *stay denied*, 2008 U.S. Dist. LEXIS 65852 (Aug. 26, 2008).

[16] See Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[17] For example, in 2001, the House Committee on Government Reform had to file suit to compel the administration to release 2000 adjusted census data. Waxman v. Evans, 2002 U.S. Dist. LEXIS 25975 (Jan. 18, 2002). In 2002, the administration refused to provide the Senate Governmental Affairs Committee with records of White House communications with Enron until threatened with a subpoena. Richard A. Oppel, Jr., Senate Democrats Escalate Efforts to Get White House to Disclose Enron Contacts, *The New York Times*, May 18, 2002.

[18] See, e.g., Wilson v. Libby, 498 F.Supp.2d 174 (D.D.C. 2008), wherein the vice president argued that like the president, he is entitled to absolute immunity from suit.

[19] See, e.g., U.S. Government Policy and Supporting Positions, 2008 ed. ("Plum Book"); congressional testimony of Chief of Staff David Addington before the House Judiciary

Consistent with this view, since 2003 the vice president and the Office of the Vice President ("OVP") have refused to file with the Information Security Oversight Office of the National Archives and Records Administration any reports about what data they have classified or declassified in accordance with Executive Order 12,958, as amended by Executive Order 13,292. On similar grounds, the vice president and the OVP have refused to comply with the requirement of the Ethics Reform Act of 1989 to file a semi-annual report of payments accepted from non-federal sources, 31 U.S.C. § 1353. And the OVP refused to submit its staff list to Congress as part of a recent report the White House submitted on its office staff. Thus, while seeking the protection of executive privilege, the vice president refuses to comply with the obligations that executive status imposes.

These actions have taken the vice president in a direction neither contemplated nor sanctioned by our Constitution, which establishes three co-equal branches of government, each acting as a check and balance on the other. Left unchecked, the vice president would establish his office as a fourth branch of government, immune from any accountability.

Recommendations

As this brief snapshot illustrates, the Bush administration has succeeded on multiple fronts in upsetting the careful balance of powers that the Framers intended, often by flouting some of the very laws that were enacted in the wake of the abuses of Watergate to ensure government accountability. The time is long overdue to restore the rule of law, and the incoming administration provides an opportunity to reverse the administration's abuses of the last eight years.

Toward that end, Congress should amend the FOIA so that it is uniformly implemented consistent with its underlying purpose to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[20] The radical policy shifts that occurred between the Clinton Administration, with its "Reno policy" of presumed disclosure,[21] and the Bush Administration with its non-disclosure-biased Ashcroft policy demonstrate that fulfilling these purposes should not be at the whim and discretion of each incoming administration. Accordingly, Congress should make express in the FOIA a presumption of disclosure and codify the policy that information can only be withheld where the agency "reasonably foresees that disclosure would

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Committee.

[20] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

[21] See Memorandum from Janet Reno, Attorney General, to Heads of All Federal Departments and Agencies re: The Freedom of Information Act (Oct. 4, 1993), available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm. ("Reno Policy").

be harmful to an interest protected" by a specific exemption.[22]

In addition, to further a more open society, Congress should amend the FOIA to require that any statute intended to specifically exempt records from disclosure under Exemption 3 of the FOIA must so provide explicitly and must explain the rationale behind the statute's requirement of non-disclosure.[23] Amendments to the FOIA should also address the disclosure of OLC opinions, making clear that as final opinions on questions of law for the executive branch they are protected by neither the deliberative process nor the attorney-client privilege.

To further promote open and transparent government, Congress should amend the FOIA to make clear that both the Office of Administration and the National Security Council, two EOP components deemed by the courts to be non-agencies, are agencies for purposes of the FOIA. Such an amendment would reconcile the FOIA with congressional intent in amending the FOIA in 1974 to include the EOP within the definition of agency. CREW also supports the Open and Transparent Smithsonian Act of 2008, which restores agency status to the Smithsonian Institution for purposes of the FOIA and the Federal Advisory Committee Act. The numerous scandals and embarrassments that followed at the institution after it was deemed a non-agency and therefore not subject to the FOIA demonstrate all too vividly the need to restore its transparency through legislation.

To give the fullest meaning to the principles that prompted the enactment of the FOIA, Congress should also amend the Federal Records Act, 44 U.S.C. §§ 2101, et seq., ("FRA"), to ensure that government agencies are taking the best advantage of technological advances in making their records accessible to the public. The proposed Electronic Communications Preservation Act, H.R. 5811, is a first step, but more is needed. Legislation needs to carry effective enforcement mechanisms for non-compliance and to set forth sufficiently comprehensive benchmarks for agencies to meet, especially with respect to training, education and compliance. Moreover, the provision of four years for agencies to fully implement electronic record keeping proposed in H.R. 5811 is unnecessarily long and does not take into account that records management software already is available. Amendments to the FRA should also mandate an active role for NARA in ensuring government-wide compliance, including the requirement that the archivist conduct regular inspections.

Congress should also amend the Presidential Records Act, 44 U.S.C. §§ 2201, et seq. ("PRA"), which has been sorely tested during this administration. Despite the PRA's requirement that the president preserve the records of his administration, millions of emails

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[22] Reno Policy.

[23] The OPEN FOIA Act, S. 2746, which is pending in the Senate, would likewise ensure transparency by requiring that every statutory carve-out to the FOIA expressly reference section 552(b)(3) of that Act. CREW supports the OPEN FOIA Act, but also supports more comprehensive amendments to the FOIA that would address all of the issues raised herein.

covering critical events from the decision to go to war in Iraq to the disclosure by top White House officials of Valerie Wilson's covert CIA identity are missing from White House servers. The White House has refused to implement an electronic record keeping system, leaving all of its electronic records vulnerable to destruction, loss, or alteration. Further, the White House has dragged its heels for years, refusing to take any steps to restore the missing emails despite a statutory requirement that it do so.

This abysmal record of non-compliance with the White House's record keeping obligations was facilitated by the lack of any oversight in the PRA, which has been interpreted to give the courts the ability to review only a president's guidelines as to which materials will be treated as presidential records in the first place. Armstrong v. Nat'l Sec. Archive, 1 F.3d 1274, 1294 (D.C. Cir. 1993). But a president's specific disposal decisions and practices are not subject to judicial review under the current statutory scheme. Armstrong v. Bush, 924 F.2d 282, 291 (D.C. Cir. 1991). Legislative amendments to the PRA should reverse this course, making clear that a president's failure to comply with the PRA is subject to challenge by both the archivist and the public. An amended PRA should include effective enforcement mechanisms as well as penalties for noncompliance and create a direct oversight role for the archivist to ensure compliance by the White House. And Congress should amend the PRA to expressly define vice presidential records as including records that the vice president and his office create and receive in fulfillment of their constitutional, statutory, and other official and ceremonial duties.[24]

Finally, the litigation that has ensued over Congress' efforts to enforce its subpoenas against Ms. Miers and Mr. Bolton highlights the need to create a mechanism by which Congress can more easily enforce its subpoenas. Specifically, Congress should pass a statute granting federal courts jurisdiction to hear cases involving the enforcement of congressional subpoenas issued to the executive branch.[25] Such legislation should also provide for direct review to the

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[24] The PRA now provides that the vice president's records are to be treated the same as the president's records, 44 U.S.C. § 2207, and the definition of vice presidential records in NARA's implementing regulations mirrors the definition of presidential records in the PRA. See 36 C.F.R. § 1270.14(d). Nevertheless, through Executive Order 13,233 President Bush unlawfully narrowed the definition of vice presidential records by specifying that the PRA applies only to "*the executive records of the Vice President*." Executive Order 13,233, section 11(a) (emphasis added). Vice President Cheney in turn has taken an unduly restricted view on when, if ever, he functions in an executive capacity, raising the substantial likelihood that he will treat the vast majority of his records as personal records falling outside the scope of the PRA.

[25] There is precedent for this approach. In 1973, the Senate Select Committee on Presidential Campaign Finance sought civil enforcement of its subpoena for Watergate tapes and documents. After a lower court refused to hear the matter, Congress passed legislation authorizing jurisdiction over just this specific suit. Pub. L. 93-190, Dec. 18, 1973. While the Select Committee did not ultimately prevail in its lawsuit because the House Judiciary Committee already had the tapes, it had its day in court.

Supreme Court to ensure that the case is heard while a president is still in office and the result is still relevant.

The upcoming presidential transition presents an opportunity for Congress to reverse the course of the past eight years and restore our democracy to a rule of law. Congress should exercise its legislative and oversight powers to ensure that the abuses of executive power committed by the Bush administration and its replacement of transparency in government with secrecy and non-accountability are never again repeated.