



# JUDICIAL WATCH

## DC Transparency Crisis Panel

Moderator

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Featuring:

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TOM FITTON: Okay, well, I think we're ready to begin. Are we ready to begin in the back? Thank you.

Good afternoon everyone. Welcome to our "D.C. Transparency Crisis" panel. I'm Tom Fitton, president of Judicial Watch. Judicial Watch is a conservative nonpartisan organization dedicated to promoting transparency, accountability and integrity in government politics and the law. Through our educational endeavors, Judicial Watch advocates high standards of ethics and morality in our nation's public life and seeks to ensure that political and judicial officials obey the law and do not abuse the powers entrusted to them by the American people.

And, as I said, our panel today takes a look at the D.C. transparency crisis. Our government is bigger than ever but also the most secretive in recent memory. President Obama promised the most transparent administration in history but its agencies are often black holes in terms of disclosure.

We know what we're talking about. Judicial Watch has filed over 2,500 Freedom of Information Act requests with the Obama administration and we had to sue over 140 times to enforce the open records laws. And just this week, in our own special way of celebrating sunshine week, we filed three lawsuits to get basic information about what the government is up to. Two are over, surprise, "Obamacare," and one was on behalf of the "Washington Examiner," which I'll let Mark Tapscott talk to you about.

Government transparency is a conservative issue. For years, FOIA was the left's playground, dare I say it, but Judicial Watch changed that and used FOIA in the service of limited, accountable government. Now we have an educated conservative movement that is willing to do the hard work of investigating government corruption and misconduct. And unlike the left, we, conservatives, understand that big government is the complete opposite of transparency.

You know, the founding fathers appreciated government transparency as well. As James Madison wrote, a popular government without popular information or the means of requiring it is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power which knowledge gives. Transparency is about self-government. If we don't know what the government is doing, how is that self-government? Frankly, how is that even a republic?

Congressional oversight is sorely lacking, lacking on all fronts. You know, Congress is like a fire department that shows up after your house burns down and shouts "fire." Even President Obama, flailing for an excuse over his IRS's massive oppression of his political opponents suggested that the government was too big and he had no way of effectively monitoring his own agencies. And, too often, the fifth estate acts as PR rep for big government and fails to do the hard work of keeping watch on government waste, fraud, and abuse. And even under FOIA law, the courts have deferred to the – (inaudible) – of the executive branch and

have made it more difficult for the American people to find out how their tax dollars are being used or misused.

Now, this has all led to the transparency crisis here in D.C. Never in our history has so much money been spent with so little accountability. We're happy if you here fight for transparency but we need more support and more organizations, more activists, more journalists and more politicians to take on the issue of secret government.

Now, let me introduce our panelists. To my left is Christopher C. Horner, who is a senior fellow with the Washington, D.C., think tank, the Competitive Enterprise Institute and director of litigation for the Free Market Environmental Law Institute. Chris works as a legal and – works on the legal and policy level with numerous think tanks and policy organizations around the world and serves on the executive committee of the Federalist Society's International Law Practice Group. He is a prolific author of books and articles. He has testified before state legislative bodies, the United States Senate Committees on Foreign Relations and Environment and Public Works and various other bodies in the House and Senate. And Politico called Horner a master of FOIA who bedevils the White House. And we're going to learn about that.

Mark Tapscott, to my right, is executive editor of the "Washington Examiner." He's previously served as editorial page editor and he appears regularly on Fox, and MSNBC, and talk radio. He was named conservative journalist of the year at the 2008 Conservative CPAC and was inducted into the – someone induced then to induct him into the First Amendment Center's Freedom of Information Act Hall of Fame in 2006. And he's a well-recognized expert on FOIA and has testified to Senate and House committees on government transparency issues.

And Dan Epstein is the executive director of Cause of Action, a nonpartisan organization that uses public advocacy and legal reform tools to ensure greater transparency in government, protect taxpayer interests and promote economic freedom. And he was on the other side of the – of the street, in Congress, because prior to joining Cause of Action, Epstein served at the U.S. House of Representatives for several years as a counsel for oversight investigation at the Committee on Oversight and Government Reform. He was the lead counsel on tax, labor, non-profit and federal grant spending investigations and oversight. So anyone who has complaints about those topics, you know where you – who to go to initially to complain.

But thank you all for joining us. And we have a lot to cover here. Our panelists will make a presentation. We'll talk among ourselves and then we'll try to get some audience participation as well. I remind you to keep your cell phones on buzz or off for the duration.

And I'll turn it over to Mr. Horner. Thank you, Chris.

CHRISTOPHER HORNER: Thank you, Tom. And, everyone, I was going to go big picture today with a lofty discourse on this, with this absurd vow to be the most transparency administration in history meant – which will, of course, go down with the administration's if you like your doctor, you can keep him period, the in history matching the period emphasis to really begged what in the world they were thinking when they made this claim over and over again. And in the case of this administration, not just as an obviously poll tested talking point that

people wanted to hear but after they were elected, and even immediately after the inauguration, what were they up to?

Well, briefly on that, what this meant was those Bush records are coming out, and they're coming out quickly, and in volume. And if you're a friend, as Christian Adams and I and others have shown, you'll get what you ask for if you want something. You'll get it sometimes overnight. If you're not, you're deemed inconvenient, we may not even acknowledge your request, as I've experienced on many occasions, as have others, including journalists viewed as too conservative but otherwise inconvenient.

But there was a spectacular lie in the press today, in the "Washington Times" front-page article by EPA, and it was a lie – I use the term advisedly. I only just saw in the train when I came in a little bit ago. I'm going to focus on debunking what they claim. The lie was this. This is from the text of the story.

EPA officials said they don't play favorites when it comes to handling requests and go beyond many other agencies in posting online the information they release in response to requests. The latter part is true. Quote, "We process all incoming FOIA requests with the same consideration regardless of affiliation, not-for-profit status, geography, et cetera."

Well, that's simply and brazenly untrue. In fact, I have not one but two correspondents from EPA, from two separate offices, one from the office of the administrator and one from the office of general counsel responding to me in regard to CEI requests. One of them said, we are dealing with requests from you and your affiliated organizations together, which is on its face improper. No, you are to deal – as the statement acknowledges, you're not to treat people – we'll deal with yours as a group and we'll deal with things that come from you in a certain way.

In fact, in response to one request regarding the false identity – no one has ever done this. The spin is just that – the false identity e-mail account Richard Windsor. In response to requests there, they said, we will satisfy this at a very slow rate of 100 records per month for 100 years, after which we will then get to the following list of your request. And they listed requests that not only weren't from me, weren't from CEI but weren't even from me but happened to be from groups for which I also work. They were treating anybody affiliated with me – in a way, they denied they treat people today, in the "Washington Times," but, obviously, disparately and with bias.

And, in fact, their bias has gotten so cartoonish that after a series of denying our fee waivers, EPA – possibly other agencies, but EPA is treating conservative or groups deemed unfriendly the way the IRS has been demonstrated to be treating conservative groups. They're placing financial hurdles in their way, wearing them down. They can say, well, we never actually sent you a bill. Well, that proves too much. You owe us a bill, A, if you're going to insist on fees, but, B, just in the case of groups I work for alone, they have cost us tens of thousands of dollars in staff and lawyer time through these administrative hurdles and now making a sue in response to their delectory tactics. And, in fact, that's no different than filing harassing litigation. The costs are the same, the delays are the same, the impediment – the problems they're seeking to cause us are just the same.

After they continued denying our fee waiver request that they routinely grant to green pressure groups, on the basis that we failed to expressly – to express an intention to broadly disseminate the information – and I suggest humbly that no one has more broadly disseminated more EPA related information in the past year and a half or two. That’s a facially absurd claim and we, by the way, stated it expressly in each request. I then put the image of a chalkboard on which I wrote, a la Bart Simpson, 10 times, we intend to broadly disseminate information in a request. And, sure enough, they promptly denied it on the grounds that we failed to express an intention to broadly disseminate. They don’t even read our requests. They just deny them to put us through the administrative wringer.

This is proved. They cannot demonstrate they do this with anyone else. They have now – once the inspector general moved passed the initial inquiry stage – Congress pressured the OIG to look into this – EPA then began denying our administrative appeals to making a sue on every one.

More on the OIG, it’s going to be a white wash. They’ve decided to randomly, they said, narrow their inquiry to make sure that EPA didn’t have to answer hard questions. That should sound familiar to EPA watchers and EPA OIG watchers. But EPA is quite plainly disparately treating parties they don’t believe deserve to have access to public information.

So I’ll give you just a brief lift of some of EPA’s greatest hits and some others we’ve gotten from this most transparent administration ever.

Worst tricks include, Treasury demanded several thousand dollars to photocopy a large number of e-mails seeking discussions about a carbon tax. I told them that I looked it up and E stands for electronic. I had asked for documents in electronic form if possible, therefore you don’t actually stand in front of a Xerox all day. You put it on a disc and don’t charge us. After that, the very large estimate of response of records plummeted. And no, they didn’t pursue that effort to charge us thousands of dollars.

EPA went to the length of photocopying e-mails I requested in electronic format from the private e-mail account used by – they’re all doing it there. We found 17 senior officials so far – used by their region two administrators Judith Enck, two-sided, affixing unrelated e-mail threads to the backs of others when they shouldn’t be bothering photocopying them at all. I’d asked for them in electronic format. They were electronic records. Just making a mess out of the production and making it very difficult to make heads or tails out of it.

EPA is refusing to turn over e-mails between Richard Windsor and Minion Moore (ph), who you may have heard of if you’ve been reading the newspapers lately, withholding everyone in their entirety, including two from a date – we only know from a Vaughn Index that this was Minion Moore, both as internal agency discussions. Ms. Moore doesn’t work for the agency, doesn’t work for government, and as attorney-client communications. Neither are lawyers. It’s pretty brazen the lengths to which they’ll go.

MR. FITTON: Who’s Richard Windsor?

MR. HORNER: Richard Windsor is Lisa Jackson's false identity never before created for an EPA administrator. Every secondary e-mail account ever created, and they have been created, identify the party – Administrator Whitman, Administration Johnson in the sent field. No one has ever had – and, by the way – and they had the title, address, telephone contact at the bottom. This was scrubbed of that and had a false identity.

We know that EPA – and they've acknowledged this in a case we filed – are wholesale. They are destroying wholesale, every single one of thousands of Lisa Jackson's text messages and Gina McCarthy's text messages. When we found out something about Gina McCarthy's text messaging – and, by the way, these are legally and distinct from e-mail. They're the same thing. But we noticed that no text transcript had ever been produced in response to a Hill oversight request for all records or all electronic records. We'd never received one. We asked around to other active FOIA parties. No one has ever received one. So we asked – we found out about Ms. McCarthy's texting. We found out about in a three-year period, 3,952 text messages, so texting like a teenager but no records. Why? Well, we've destroyed every one of them. Why? Well, Ms. McCarthy says through counsel they're personal. On your EPA phone? Yes. All of them, thousands, personal, yes. Then we got the metadata showing many to EPA, known EPA signed cell phones. Well, those were personal too. Okay.

At some point, we hope a court is going to say, we're going to have to look into this. This is not plausible. When we found out specific dates Lisa Jackson was texting, we asked for those, no records. They were being permitted and are being permitting, and this is a continuing problem. EPA has shown no intention to stop this practice. They're allowing a senior official to destroy the agency's sole copy of the equivalent of an e-mail. You know EPA could not and would not proceed with any of its rulemakings if they admitted to destroying all of their e-mails. And yet they're doing it with equivalent, a class of records. They're refusing to tell the national archives, as the law requires, about the possible loss or removal of records through these various practices and so on.

And I suppose I'll close by noting they're now forcing us to sue on everything. And none of the 28 requests noted in the "Washington Times" front-page story today did the – that would identify as Democratic organizations, in none of those were they forced to sue. And yet, now, EPA, every single time with us, now that the OIG has gone away and randomly narrowed its request, is forcing us to sue every time. It is costing us tens of thousands of dollars in staff and counsel time. Even if they never provide us a bill, which proves too much, they owe us a bill which even then they refuse to provide.

MR. FITTON: Well, thank you, Chris. Mr. Epstein, welcome to the party. Cause of Action is relatively new. It's not so new anymore but you have greatly expanded our capacity to get access to information. And we're happy to have other organizations out there doing this important work. So our personal thanks for joining the cause. But I turn it over to you.

DANIEL EPSTEIN: Well, thank you, Tom. You know, it's actually funny because when I started on the oversight committee, I worked at the Ford House Office building, which is the universal eyesore in this area. But within a month, being an oversight counsel, there's two

names, especially when you're working for the Republicans, which I did, which becomes apparent and almost worshipped by every lawyer there, and that's Judicial Watch and Chris Horner. So I'm greatly humbled to be here.

I kind of – on this whole thesis of the Obama administration being the most transparent in history, I think there is a ceiling and a floor for looking at that.

I think the floor is quite simply, in practice, you have FOIA officers and agencies that simply don't take FOIA seriously. One of the things that we included in the packet is a letter in response to a FOIA request we sent from the Department of Homeland Security. And that was dated March 11<sup>th</sup>, so it's relatively recent.

And we got two responses to the same request. The first response was a letter that had optional boiler plate language I guess that we could choose to determine what the response was. And then, the second was just a blank page. And I think that kind of reflects the mentality of this most transparent administration, which is quite simply whether it's because of who Cause of Action is or what we believe or it's just simply the way that FOIA is treated. It's not in the final analysis a very serious enterprise for this administration.

The second thing is, is that ceiling, which is how this administration I think has been very intelligent in how it's been opaque. And that is something that – I'm very grateful to Mark, who wrote a story about this yesterday, about something that my organization discovered, which was this memo on, quote, "White House equities."

Now, if you would ask me, what do White House equities are, I would have no idea, and that's largely because Congress never defined what this was, no agency has ever issued rules to define what this is, but nevertheless, this administration uses this term to review both requests and propose responses that come from Congress, the Government Accountability Office, judicial subpoenas and especially FOIA requesters.

We have investigated this policy, which is we want to understand how many agencies have used this, how many FOIA requesters have had their request or proposed responses sent to the White House for review, because, quite simply, the worry is is that this administration is not merely not being transparent but is in fact using FOIA as a political tool.

And of all of the requests that we have sent – and I think right now we have sent 20 requests on just trying to understand how agencies interpret the term "White House Equities" and what they afforded to the White House for review – virtually only four agencies have responded. One agency redacted everything and the three agencies that have responded so far have indicated to us at least that the White House is very much prepared to keep things from the public, to keep things, especially from Congress based off the political sensitivities involved.

We have already discovered that at least in the case of EPA, we saw that Darrell Issa and Senator Vitter's requests were – when a proposed production was made before our own Congress could get those records, lawyers in the White House got those records and got to review them and basically held them up, leading Congress to actually subpoena for those records, which is to

only say that the congressional function of conducting oversight over the executive branch is, of course, then destroyed at that point. It's really the president conducting oversight over his potential political enemies.

And one of the things that I think is really interesting for Cause of Action as we continue to look into this is when I was on the oversight committee, we were looking at how we could use the tools that someone like Henry Waxman used against the Bush administration and apply those to the Obama administration.

Well, Henry Waxman was very aggressive at looking at how the Bush administration had an Office of Political Affairs that he alleged had completely politicized the federal agencies. And yet, what's clear here is if you look at the White House Counsel's Office, it appears to us that counsels inside the White House are assigned for a certain set of agencies. Those agencies, while understand that if you get certain politically sensitive FOIA requests or congressional requests, you have a contact for whom to send those records and have them reviewed, which to us seems like Obama has, again, engaged in a charade. He got rid of the Office of Political Affairs but then he just politicized his White House Counsel's Office, which is all the more severe because the White House Counsel's Office can always claim privileged on the communications it has with agencies.

So we think that this whole White House equities policy very much is a stark example of how Obama has not just not been transparent but deeply harmed transparency.

And, you know, I would just close with kind of one insight that I think we can gather from this, which is we have seen – if you just Google the term White House equities, it's been something that's been in the language of federal agencies for some time, at least in terms of equities, right, as a privilege or as an exemption agencies can claim that certain things are inter-agency and that would be a FOIA exemption.

What the analysis is, is that there are equities in other agencies and that means they either have to search for those records or they can potentially claim an exemption. But one thing that's interesting here is the extent to which, if you look back in 2009, Congressman Jason Chaffetz, when he was conducting a hearing over the Department of Homeland Security, which many of you might remember had demoted a FOIA officer because she wouldn't send documents to review by the politicals at the agency. And he asked the chief FOIA officer, Mary Ellen Callahan, what were White House equities? And back in 2009, we didn't seem to get it.

And the reality is, is that this policy, which was smack in the middle of – actually followed the president's own memo on transparency and Eric Holder's own memo on transparency where he said, when in doubt, we will not force requesters like Chris Horner and others to bring lawsuits. But it's very clear that this memo that has had such an enormous impact in the way that agencies interpret FOIA and apply FOIA ultimately was something that was never produced publicly by this administration.

And so I think what's rather clear is that so much worse than just being opaque, this administration has actually been deleterious to transparency and ultimately that will have long-term effects. Thanks.

MR. FITTON: Thank you, Dan. Mark Tapscott.

MARK TAPSCOTT: Thank you, sir. It's really a great pleasure to be here today because I feel like, you know, the little kid standing with Mantle and Maris and Lou Gehrig here of Freedom of Information Act gang. What these three gentlemen have achieved in a very relatively short period of time I think, in the last five, six years, is really remarkable in terms of changing the game, if you will, about how the Freedom of Information Act is administered in government.

I was reminded yesterday – when I first saw the Cause of Action report on White House equities, I instantly thought of the Bush administration's invention out of whole cloth of a new exemption in the form of sensitive but unclassified. It's the exact same thing. It's a very vague sort of reasonable sounding invention of a term that really puts everybody who is seeking to increase information at the disadvantage because the only person who can – or the only agency that can define what is as equity in the final analysis, really is the White House, or what is sensitive but unclassified is, of course, the Department of Defense.

So it leaves government in a position of having the choice of whether or not to make something public. And that, of course, is exactly the opposite of the intent to the Freedom of Information Act, which says all documents are public unless they satisfy some very strictly defined exemptions.

And that's the problem I think, the fundamental problem on the public's right to know, transparency, accountability, all of these issues that all of us, regardless of the political views that we happen to have – and I look out in the audience and I know there's folks here who are very conservative and I see some folks that I think are very liberal. Transparency is one of the few things that unites people I believe of good will regardless of their political perspective, because if you don't have transparency, you don't have accountability, and if you don't have accountability, you don't have democracy. And that's – in the fundamental analysis, that's what we're all about.

So it's vital that all of us, regardless of where we come from politically, be concerned about these issues and be working on them. I happen to come at it both from the perspective before my journalism career – I was a Reagan political appointee, so I came predisposed I guess with an idea of what government should be in terms of accountability. But then, when I became a journalist, it really began to register with me that, you know, the founders were not – they didn't just as an afterthought do this thing called the First Amendment. They understood you have to have an independent agency, an independent institution to hold people accountable and government accountable, something that doesn't depend upon an election cycle in order to make that accountability effective.

And that's why we have a new media. I just have tremendous respect for Tom Fitton and Judicial Watch and Chris and Dan and what they do, enforcing standards of accountability. I

have the same respect of Danni O'Brien (sp) at Pogo (ph). I think she does tremendous work that's very much as important as what these guys do.

All of us have a fundamental understanding I think of the critical importance of maintaining accountability and transparency because if we ever lose that, then we are really going to be in trouble in this country. And when I say that, I say that not as someone who is looking at black helicopters but as somebody that said, wow, I wonder if the NSA heard that phone call that I just made, you know. It's not just fantasy anymore. So, on that happy note, I'm going to turn it back over to Tom.

MR. FITTON: Well, talk about your lawsuit that you filed. That was your first "Washington Examiner" lawsuit or not?

MR. TAPSCOTT: You filed a lawsuit? It really is – it's pretty simple. The Congress set up the Consumer Financial Protection Bureau, a laudable purpose to help protect consumers from financial fraud. It's a great idea. There's 13 other federal agencies already doing that but put that aside. But Congress did something that is unusual when they set up CFPB. They exempted it from congressional oversight, all but from congressional oversight. And that makes CFPB a little different, I think.

So one of my reporters, being the obnoxious type that he is, started asking questions about why are you spending so much money on this renovation of your headquarters? And they wouldn't say. So we filed an FOI and they still wouldn't say. So we appealed the FOI and they still wouldn't say. And after, you know, eight months of this runaround, which certainly wasn't new to any of us – we've all experienced it – I called Tom, and I said, Tom, take them to court.

So that's what we've done. We're just asking the Consumer Financial Protection Bureau to tell the American people what are you doing with your money, the taxpayers' money, that requires an increase in the cost of this renovation. In less than two years, it's gone from 55 million (dollars) to 139 (million). Actually, it's a lot more than that but that's what we know of so far. Just tell us what's going on. That's all we ask. And we have to go to court to get an answer.

MR. FITTON: And this from an agency that is compiling data, credit card, credit report data on millions of Americans. You know, it makes the NSA seem like pikers in terms of the real privacy type protected material that this agency is gathering on Americans, your credit card data, what's in your credit report. And they don't want to tell us how much they're spending on renovating their headquarters.

You know, this is the age of Obama transparency. You know, we fought the Bush administration to the chagrin of some conservatives and Republicans on transparency issues, sent them all the way up to the Supreme Court. And President Obama came in and in part won the election based on the bad taste people had in their mouths over President Bush's untoward secrecy. Now, he came in and he's worse than Bush because not only is he taking more far out legal positions than President Bush's people did, who I think fundamentally opposed Freedom of

Information Act law, administratively, as Chris has talked about and Dan is talking about with the White House involvement in FOIAs, they played many more games.

So to just even get basic information that you would normally get from any other administration, including the Bush administration, they don't even want to turn that over. I mean, I can't tell you – we have – we just need to sue just to get an answer. That's crazy under law. And the Department of Justice, which is charged with enforcing the FOIA law and representing all these agencies in court are the worst. So the lawyers charged with enforcing the law are the biggest violators of the law, it can be argued, when you ask the Justice Department for Freedom of Information Act material. So this is a real problem.

And, as I say, Congress isn't really doing its – doing the work that it needs to do. You know, they ask for records. And it's a political process. And even if they wanted to do the work, it's still a political process. So the records that come to Congress are not always publicly available. And sometimes, you know, Congress is busy. They don't know what to do. I mean, President Obama set a lot of fires on the horizon. It's hard to tell which one to run to if you're someone like Darrell Issa.

And that's why it's essential that there be a vibrant civil society outside of government to kind of do this policing that Judicial Watch, Cause of Action, Chris Horner, CEI, and others are doing. And the media has to get back on the ball again. It's not all about the NSA. I mean, the EPA has more control over our day-to-day lives than anything the NSA could dream of. But there's no skeptical – the media doesn't have enough skeptical reporters asking questions about what regulations are being promoted.

“Obamacare” – the secrets of “Obamacare” – we still don't know how many people purchase insurance under “Obamacare.” We still don't know that. And yet, reporters unblinkingly cite figures presented by the administration about people who signed up for “Obamacare” under the website, which is a meaningless term. It's that sort of basic information that we don't know. And Congress isn't asking the questions either. And it's, frankly, up to us. And that's why there's a crisis because it is up to us, because if we didn't do it, I fear no one would be doing it.

So let me – with that all being said, I want to talk about the EPA a little bit more and the fight that's going on here because this is – this is – this is a serious transparency issue. Chris, I mean, describe what the EPA is into now and why it is the most egregious of the violators, because the agencies all play their games, but, you know, the EPA doesn't seem to be used to be operating under a Democratic system of checks and balances. Are they used to getting Freedom of Information Act requests or is it just incompetence or they changed their tune under Obama and they decided they're just going to shut down?

MR. HORNER: I think they're very used to getting these requests and they're very – they have exceptions, as I supposed we all do as fallible human beings. They have – they have their moments where they lapse but otherwise they're very well schooled in obstruction too.

But sometimes it's – sometimes the lies aren't kept straight, and, as I noted, there are occasional times where they're just stating outright falsehoods. And then, sometimes, they're just sloppy and lazy, for example, deciding this is all we have to delay them for now, and that is to claim they didn't say something they actually said in the course of 600 words, including expressly, we intend to broadly disseminate this, even putting on the mock chalk board and so on and they just – they obviously don't even read it anymore.

But I will say it's a matter of degree. Now, I'm going to circle back to something you said. The oversight component is extremely important, but I view this as public oversight. You can view yourselves as a force multiplier of your elected representatives and their legitimate oversight capacity because Congress gave the taxpayer – it's one of these rare instances where standing is really never an issue. You make your request, you challenge the sufficiency of the processing and you can sue. Consider a few examples.

So we've got with the Department of Energy and the program that Solyndra made infamous, we found out that's being executed on 14 separate private e-mail accounts, one of them by the guy running it, Jonathan Silver and his eponymous account, and then various others, and Congress wants them. And DOE – and they go to the former employees. And DOE throws itself in between the former employees and the oversight body and says, wait a minute, he can't give those to you. He must give them to us because these are all presumptively agency records.

Okay, that's very important to want to remember. It becomes very inconvenient when you deal with other agencies like the White House Office of Science and Technology Policy, whose director came from a green pressure group, whose board of directors is a who's who of that movement. And guess what? Since he's been an adviser to the president, he's still been using their computer server for select correspondence, the one that he severed relationships with, John Holdren, he didn't. So he's still using, we find out in the Richard Windsor case, his Woods Hole Research Center e-mail account.

So we ask OSTP, as we have EPA with various other senior officials, we'd like the work-related e-mail from this. And the OSTP says, well, I'm afraid that's not a FOIA request because, you know, you're asking for records that aren't on a White House server. They're – they're over there at the Woods Hole Research Center, which he has been unlawfully using throughout.

Well, I referred them to DOE because DOE threw itself in between the oversight body, essentially the public, and the former employee to say, wait a second. These all have to go through us. We'll decide what is and isn't. And OSTP said – well, I think what happened is the OSTP Director Holdren told them to go pound sand. You're not going to search my account.

By the way, he's the guy who wrote something called the Holdren memo, which was when one of his – one of ours fell short, he famously said to their employees, chastising them about doing something we later found out he was doing all along, using a private e-mail account to conduct work-related correspondence.

It depends upon the agency and how brazen they want to be. And I believe they all – and, Dan, you can speak to this – since “Fast and Furious,” they've decided that they'll challenge

oversight, the use of the gavel and the subpoena power, and they're willing to call your what they assume is a bluff. They can't do that as easily with the private citizen but then, again, we have very finite resources.

So what you have is the magic – I think the magic two words. In between the subpoena and nothing is the request for a transcribed interview. When that was done with the regional administrator who had filed an affidavit saying at EPA he wasn't using a private e-mail account, and then he filed a second affidavit saying, I stand by my first affidavit, I rarely used a private e-mail account. And then he said – when they said, okay, we'd like a transcribed interview to talk about this, he quit, got a lawyer and began turning over a lot of documents that previously didn't exit.

We've had a regional administrator lie to the Office of Inspector General and so on. You ask them to come in for a transcribed interview and you start to get recovered memory or closer to the truth. So the oversight function is a great – that's the third leg of the stool, I think.

MR. FITTON: Yeah. Dan, talk a little bit about congressional oversight since you have some experience there. And I guess, you know, you had an easier time getting documents I presume when you were in Congress. But, you know, now that you're relying on the FOIA law, what additional tools would you recommend the federal legislature give Americans to make FOIA work better and allow the executive branch less rocks to hide underneath and behind?

MR. EPSTEIN: Yeah. Absolutely. I think, you know, one very clear thing is to empower FOIA so we have all of these exemptions, which, at least my organization has found can often be vague in terms of their application. Even if you get into litigation and can get a privilege log or anything like that, it's still unclear on what grounds these agencies can claim exemption. So I think Congress can definitely do a legislative fix there.

I think the other thing is, is that it's often I think the role of government accountability groups and watchdog groups to really educate Congress and empower them. I think it's very clear that if you look at the Environment and Public Works on the Senate, if you look at the House Oversight Committee, they are very responsive to what Chris Horner is doing, to what CEI is doing, what folks like Mark Tapscott and his reporters are doing. I think they follow their lead. So that is something where it's definitely on us to be doing a lot of legwork. And even if it means that Congress is kind of acting as a secondary or a footnote to that, because there's no question that if someone like Issa subpoenas, that puts the agencies in a very defensive position.

And I would say, the last thing is also – you know, as much as we can educate Congress on ways that they can make their own legislation that touches on transparency more muscular and effective.

One thing I would just point to is there's the GRANT Act, which is – had left committee, hasn't gone to the floor yet but this is something where, you know, already I think the thought behind the GRANT Act was we want to make federal discretionary spending more transparent. But it's also something where for FOIA advocates and transparency groups, Congress can always put in the teeth to give groups like us standing to bring challenges.

So if you look at federal discretionary spending right now, and this is a way in which you look at the stimulus, you look at other types of programs, especially “Obamacare,” Obama is using this to very much help his political allies, whether you call it executive branch earmarks or presidential quirk, that is a big issue. And, ultimately, having citizen watchdog groups have the ability to comment meaningfully on those things and then hold the agencies accountable under either a theory of the Administrative Procedures Act or some other theory, I think could be very useful.

I’m very much a believer in fire alarm oversight versus police patrol oversight, to use the political science terms, but we are the ones who understand how to do this and we’re the ones who can empower Congress to be better.

MR. FITTON: Mark, you reinvigorated the “Examiner” with an investigative unit that, you know, I think is – many other much larger publications and national known news organizations would do well to emulate. Why don’t you boast a little bit about that and talk about what separates your skeptical group of reporters from the rest here in Washington?

MR. TAPSCOTT: That’s quite a question you’ve asked. Before I answer that, let me just say one thing about what Daniel and Chris were just saying on oversight. If you go into Government Oversight Committee room, one of the portraits, one of the most prominent portraits up there is a white-haired gentleman with a cigar in his hand. That’s Jack Brooks. He was an irascible, old, southern Democrat who ran that committee with an iron fist and he had three of the best investigators that I’ve ever known that worked for him. And bureaucrats in this town were scared to death to be summoned to appear before Jack Brooks. That’s when congressional oversight meant something. Look at the Freedom of Information Act today. Nobody has ever gone to jail for violating the FOI, at least not that I know of. They were scared to death of Jack Brooks; they’re not scared of the FOI. There’s some importance to that fact.

We just do what journalists are supposed to do. And that’s to ask questions that people in politics and government don’t want to answer. That sounds perhaps a little simplistic but it really is exactly what we do. There is an ongoing debate in journalism circles about, well, what is investigative reporting?

All journalists are supposed to be investigative reporters. And that’s true. You know, it’s just as much an important public obligation for the rookie journalists covering a police beat in a small town in the Midwest to get the facts right as it is for, you know, any reporter for the “Washington Examiner” or the “Washington Post” or the “New York Times” to get the facts right. That’s what we’re paid to do. That’s what we’re supposed to do is to ask questions that people don’t want to answer and report what they say, and if there is evidence to suggest that what they said is not the whole story, to fill it out and report the rest of the story.

And that’s what we do. And, very frankly, I don’t know the political views of my reporters. I frankly don’t care. What I do care about is, are they asking the questions? Are they asking the follow-up questions, which is often the most important one, and are they insisting on an answer?

And I've got one guy who tackled Eric Shinseki almost last week on Capitol Hill and, my God, you would think that he had violated some kind of civilizational (sp) norm. He actually insisted on the secretary of Veterans Affairs answer a question. We've got to get beyond that. So that's what the "Examiner's" investigative reporters do. We ask questions.

MR. FITTON: Well, thank you. Well, I'll turn it over to the audience if anyone has questions or comments. You identify yourself and wait for the mic if there's a mic. Yes. Sir. Go ahead. Stand up. I don't see a mic so you can go ahead. I'll repeat the question if people can't hear.

Q: I'm a – (inaudible) – myself. I'm wondering, is there any – do you guys have any sense of the composition of these policy offices? Are they mainly career staffers or are they political appointees? Can you see a difference in the composition of different policy – I retired from federal service and our privacy office was all staff people and they gave – you know, eventually, I think you sued my old – one of those – one of those three-letter places up the river. And I always thought they – because they had all the exemptions so they claim all sorts of great exemptions to give stuff away.

MR. FITTON: So the question was about, for those of you who didn't hear initially because the mic wasn't there, who works in these FOIA offices? Are they career civil servants? Are they political appointees? Dan, why don't you answer the question if you can?

MR. EPSTEIN: So I think it's a mixture of both. You typically have – I mean, at least from what we've seen, the assumption is that most FOIA officers are staff so they're not political. But often the case is, is that general counsels, who are kind of the chief compliance officers at these agencies, are political (sp). And if you look in the case of at least the Department of Homeland Security, when they came up before the House Oversight Committee, it was very clear that their certain request just before productions were made had to reviewed by those political appointees to often lawyers high up in the agencies who were sophisticated enough to know which exemptions to claim. That may be a standard FOIA officer who produces a blank page when it be a sophisticated detail.

MR. FITTON: And just because they're civil servants doesn't mean they're not as politically attuned as anyone else, you know. We asked for – I was reminded – Nancy Pelosi's travel records and, you know, the apolitical bureaucrats that the Department of Defense were giving our heads up on the request. So, you know, that's about a political a move as you can get.

MR. HORNER: When I was writing "The Liberal War on Transparency," which was about FOIA and has a how to in the back, I stayed on the phone a little longer with the people – the FOIA officers, just probing. When they felt like talking, I wanted to learn more about precisely this.

And one gentleman at an agency that has been mentioned today was discussing how in recent years, during the current administration, they now have weekly meetings to inform the general counsel of every request that came in and let him know about everything they wanted to

respond to, giving everybody a head's up to know what they had to manage publicly I suppose. Or in the case, as I suppose what I'm about to say, may indicate to sit on something.

For example, with one request that we're still in court now with EPA over for some Sierra Club e-mails that have gotten some play lately, after a while, I spoke to the career FOIA officer and she let out what's called an excited utterance. She gasped and said, oh, dear, this is bad. What is that? Well, Larry told me – and I forget her colleague's name – I think it's in the record – to not do anymore work on these and to give them to him. He'd take care of them. He took care of them. He sat on them. And they made a sue, and they've been producing quite a lot since, no fees, no nothing. And she had – she had said, this is odd. This is still technically mine, but this is very bad. He told us not to do anymore work on these. Well, he's a career – he's their national FOIA officer.

Being a career doesn't mean – it doesn't tell you anything. You can surmise from someone being a career or the career – what agency they're in. But it doesn't tell you so it doesn't – it doesn't insulate you from somebody saying, I don't think this is the kind of information that the public or at least that these people, to paraphrase the “Washington Post” about one of our requests to the University of Virginia, should be asking – or should be receiving.

MR. FITTON: Any questions or comments, additional comments?

Q: Yes. Thank you. Myron Ebell, CEI. I wish you'd spell this out just a little bit more. I think you've said this, but it seems to me that the administration is succeeding in its strategy through delay. They ignore time limits. They say you have to pay, then they make you appeal, then they make you file suit. If you get subpoenaed – it used to be previous administrations were scared just with the threat of a subpoena. They'd at least pretend to comply. Now they don't even reply to subpoenas from Congress. So it just seems to me that their strategy to act in secret is working. For example, if the – if the Richard Windsor e-mails had come out in a timely way, Lisa Jackson would have been in deep trouble.

MR. TAPSCOTT: Why? There's no penalty for it.

Q: Because public opinion would have forced – her actions were – she got a free ride for years and years because people didn't know the way she was actually conducting her office.

MR. TAPSCOTT: Myron, I understand what you're saying and I'm empathetic to it. But as long as there is no penalty for any federal official for violating the Freedom of Information Act or any of the other statutes that require public access to documents, there is not much that you can hope for other than aggressive exposure by the media to raise the stakes, if you will, about the political calculation that then has to be made if it gets exposed. And thank God for all of the groups in this town that systematically and consistently try to do that.

But, I mean, just look at all of the things that – the Committee on Natural Resources has sent over I think 25 or 26 subpoenas. Every one of them had been ignored, you know. You guys

– you know, on oversight, it's the same thing. It really comes down to the attitude that we in the press have experienced for a long time. You don't like it, sue me. That's the problem.

MR. FITTON: Yeah. With the Air Force, they've just – you know, we have been instrumental uncovering documents about how much it costs for the Obamas to go on their unnecessary luxury vacations. And, you know, got a lot of press from us. So the Air Force just stopped answering our questions. We've had to sue like almost half a dozen times just the last few months just to get them to give us information they were giving us a year ago.

And today, it's announced – (inaudible) – the headline that there's going to be no press on Mrs. Obama's plane when she goes on an unnecessary luxury vacation, educational one, to China with her family. There's going to be no press on the plane with her because, quote, she's not giving any interviews so we don't need the media there. And, of course, they're not answering how much it costs.

But let me just say, you know, part of this is Congress' fault, unsurprisingly. I mean, back when Jack Brooks was a congressman, you had appropriations bills and it was a real funding issue at stake if Congress didn't get what it was asking.

All Congress does now is they fund these massive appropriation bills, you don't have these individual appropriations going forward where there's more accountability, there's a budget put out there, and there's an understanding that certain funding won't happen if certain things aren't done. Nowadays, everything gets funded in one lump sum, our entire government practically speaking or keep – massive portions of it are funded sight unseen, sight unseen. And when Congress gives up the power of the purse, after-the-fact subpoenas are going to be treated as they're now being treated by the president – by President Obama and his attorney general.

Any other questions? You know, let me just say, you know, this is – the problem with Obama though is that it's – he's not doing anything new. He's doing it in a greater way. You know, back during the Clinton years, the Clinton White House was monitoring Freedom of Information Act requests. And, you know, during the Bush years, the White House was heavily involved in Freedom of Information Act requests.

And I think with Dan's, you know, exposing the actual – putting it in the memo shows is that, you know, the problems that folks have been complaining about in terms of transparency in many ways related to government activity in Washington, D.C., have metastasized under President Obama. And that's why in my opening remarks I talk about us losing our ability to govern ourselves.

You know, and part of transparency as well it seems to me is telling the truth. And if your government officials are lying to you, you know, that's not transparent. And they're unwilling to tell you the truth about what they're doing.

And in the case of President Obama's most famous lie, if you like your doctor, you can keep it, period, they discussed that internally in the White House and they knew it was not true,

but they thought, politically, it would not appropriate for their point of view to put any copy out today.

So the Benghazi lie, that's not transparent. Forget about not turning over any documents but that's – lying is not transparent. And so, you know, when they – the double standard the media has towards – you know, you would think that President Nixon is still a threat, even though he's dead, you know, 20 years, towards this administration's lies. Forget about not turning over documents; the lies is as much a threat to transparent government and on the unlawful secret government as any refusal to not turn over documents.

MR. HORNER: To respond to that, it's – let's say even if it were only a matter of degree, what a degree. Okay, let's say that in the Bush administration they were using private e-mail accounts, false identities and destroying all their text messages, moving over to text for their sultry discussions, their more candid discussions because they knew no one was searching them because they could destroy them. Right now, that's just a talking point because I get to see that anybody else ever did what everybody supposedly does.

But this was an invitation. This was not an offhand remark. It was scripted. It was clearly poll tested. But it came after the election. It came after the inauguration. It led to memo to the heads of all agencies, to attorney general memos. It was like the invitation to look at what's going on in Spain. If you want to see what he had in store for the economy. And when some Spanish academic said, oh (in Spanish), he sent his Department of Energy – Cathy Zoi by the way, was using her Al Gore pressure group e-mail account while she was in government apparently – he sent them through her office after the Spanish academics who responded to his invitation to tell us how Spain was going.

He invited us to look further, to look more. We took him up on it. So did you. We all did. And it wasn't just that they were – and then they were worse, as the numbers show. They invited us, come see what there is. They didn't just say, you, not you, you and come ask for Bush documents but not things that embarrass us or our – the places where we move government offline. It was the numbers show materially substantially worse. So I – even if it's just degree, what a degree.

MR. FITTON: Don't believe us. Believe the Associated Press, who has a major analysis piece out this week highlighting that the president's agencies are asserting record numbers of secrecy exemptions in response to requests for information about what the government is up to. So, as I said, never before has so much money been spent with so little oversight.

Dan, do you have any closing remarks?

MR. EPSTEIN: No – (off mic) – everything.

MR. FITTON: How is it folks find out more about Cause of Action?

MR. EPSTEIN: Check us out at [CauseofAction.org](http://CauseofAction.org). We posted a report, our second – (off mic) – government report on just how transparent this administration is on our website.

MR. FITTON: Thank you. And Mark Tapscott?

MR. TAPSCOTT: WashingtonExaminer.com and especially the watchdog landing page. And please tell us how wonderful you think all of our reporting is.

MR. FITTON: Thank you. And Mr. Horner, they can find you all over the place but where is the best place to find you?

MR. HORNER: CEI.org or chrishorneronline.com.

MR. FITTON: And, of course, it's JudicialWatch.org. I appreciate everyone coming out today and those of you on the Internet viewing as well. And, eventually, we'll put this all up on YouTube and transcripts will be available. So we appreciate your attendance here today. Thank you. (Applause.)

(END)