THE PRIVACY ACT AND THE PRESIDENCY

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE, DRUG POLICY, AND HUMAN RESOURCES

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

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THE PRIVACY ACT AND THE PRESIDENCY

FRIDAY, SEPTEMBER 8, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE, DRUG POLICY,
AND HUMAN RESOURCES,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2247, Rayburn House Office Building, Hon. John L. Mica (chairman of the subcommittee) presiding.

Present: Representatives Mica, Barr, Mink, Cummings, Kucinich, and Turner.

Staff present: Sharon Pinkerton, staff director and chief counsel; Steve Dillingham, special counsel; Ryan McKee, clerk; Jason Snyder, intern; Sara Despres, minority counsel; and Jean Gosa, minority assistant clerk.

Also present: Representative Burton.

Mr. MICA. Good morning. I'd like to call to order the Subcommittee on Criminal Justice, Drug Policy, and Human Resources. This morning, our hearing is entitled the Privacy Act and the Presidency. Today we are going to hear from two witness panels dealing with the Privacy Act. And also try to conclude promptly today. I know the House went out of session last evening and Members are trying to get back to their districts.

I do also want to apologize for the delay in this hearing. I did have a death in the family and we had to postpone this. It was scheduled before the recess and I do sincerely appreciate everyone's willingness to cooperate in changing the schedule of both the Members and also the witnesses.

I will begin today's proceeding with an opening statement in the regular order of business, and then yield to other Members as they arrive for their opening statements. And will also include them in the record accordingly.

So with that opening comment, I'd like to begin. Again, the title of this hearing is the Privacy Act that we are dealing with, the title of our hearing today is the Privacy Act and the Presidency. And the question we are asking is: Is the office of the President beyond the law?

Today's hearing before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources will examine the application of the Privacy Act to the White House. This has been the topic of substantial public attention and debate recently, and is also currently being examined by the courts.

It is regretful and unfortunate that the White House and this administration that their abuses of personal privacy have occurred a number of times in recent years. Congress has sought protection for personal privacy from government abuse by passing the Privacy Act over a quarter of a century ago. As a Congress, we are obligated to determine whether failures to safeguard individual privacy and prevent abuses, particularly by this White House, are products of either an imperfectly crafted law, or simply lax enforcement. To state this issue succinctly, we have to ask ourselves the question: Is the President above the law?

Issues of personal privacy protections and enforcement of the Privacy Act enforcement go to the very heart of our Democratic principles and practices, and should be of bipartisan concern. The passage of the Privacy Act, in fact, took place in 1974 and was intended to prevent the types of abuses that led to President Nixon's resignation and departure from the White House.

Past abuses that led to the passage of the Privacy Act included such actions as the creation of an enemies list by the White House and their involvement in collecting and using intelligence against political opponents and others.

Sadly enough, decades later, such privacy abuses have reoccurred. They have been demonstrated as we have seen, by incidents of Filegate, Travelgate, a host of other well-publicized abuses. As under the Nixon administration, the current White House and administration officials have—unfortunately have misused their powers and violated personal privacy interests to pursue perceived enemies and to achieve political ends.

In the early 1970's, this Nation was justifiably outraged by White House-sponsored secret investigations and illegal intelligence gathering activities aimed at the President's opponents. Today, we should be equally concerned that the issues of White House and administration involvement in hiring private investigators, conducting secret investigations, maintaining secret files, misusing government files, and selectively disclosing private information regarding political opponents and others with whom they disagree or choose to go after.

The fact that private and political intelligence can be illegally obtained through simple White House requests to the FBI or others without resorting to burglaries should provide us with little comfort. Instead, it should raise our greater concerns.

This hearing will not, and could not, address the litany of privacy abuses and violations that have occurred in recent years. Still, it is important that we understand that such violations and abuses result in a very real and tragic harm to people, to their families, to their friends, and also to their personal livelihoods.

Today, our aim is to understand why these abuses occur and whether they may reoccur despite Privacy Act protections, remedies and penalties.

The Privacy Act provides a number of personal protections, government requirements, and also restrictions. Among them are the following, and these are parts of the Privacy Act: First, citizens have a right to inspect and correct their records; second, agencies are required to provide notice of their records on individuals; third, agencies are required to maintain accurate and timely records;

fourth, agencies are restricted in how they use personal information; and fifth, violations may result in remedies and punishments, including criminal penalties.

To me, absent a compelling exception such as a national security reason, these protections and safeguards seem both reasonable and necessary, and should be adhered to by all who occupy the White House, the Office of the President, just the same as we impose on any other government agency.

Today, we will hear arguments over whether the term "agency," as used in the Privacy Act, however, covers the Office—whether or not it covers the Office of the President and actions by White House officials. We will hear arguments that the meaning of the term "agency" may hinge upon definitions, interpretations and court rulings applicable to the Freedom of Information Act, FOIA, which serves a quite different purpose. Without splitting legal hairs and recognizing past problems of the White House in defining words as simple as "is," we need to assess whether the law itself is in need of change or whether changes in enforcement practices are, in fact, required.

It is certainly my strong opinion that the President should not be considered above the law—especially laws that protect against abuses of collecting, maintaining, and disclosing private or false information. Our government was founded on principles that protect personal liberties and privacy, and I am unaware of an exception for that has been made for abuse by the White House.

If we find that there is a statutory deficiency, then I think we should fix it. But I am perturbed that the President can issue Executive orders almost weekly and the Justice Department is legal counsel for Federal agencies, yet there is no indication that the protection of personal privacy is, in fact, a priority. Instead, it seems that the priority is given to protecting the White House and the administration officials accused much privacy violations and abuses. Our Nation simply cannot allow such abuses to continue. Legal or enforcement changes must be made. We are either going to have to change the law or the process of enforcement, regardless of the upcoming election or whatever results that may have.

Today, we will hear the legal arguments from the Department of Justice that the White House is not subject to the same privacy laws and requirements that govern Federal agencies. We will hear from an individual who was on the receiving end of White House privacy abuses while serving in one of the White House offices. We will also hear from witnesses' legal representative who heads a public interest group that is engaged in fighting privacy abuses in court. Additionally, we will hear from an associate legal counsel who advised the President in a privacy administration, as well as from distinguished constitutional scholars.

I noticed in today's papers, a quick aside, that we are not the only ones interested in this. Senator Lieberman had requested last year a survey of on-line privacy protections of government Web sites and a study of that by the General Accounting Office. Today's paper reveals that the GAO found that 23 of 70 agencies surveyed have disclosed personal information gathered from Web sites to a third party, mostly other government agencies. But at least four agencies were found sharing information with private entities.

This whole application of the Privacy Act, while we are not going to deal with some of the electronic distribution and problems that we have with the Internet, but there are problems based on new technologies. Mark Rothenburg, executive director of the Electronic Privacy Information Center said the report clearly shows the White House isn't effectively enforcing Privacy Act provisions on executive branch agencies. And furthermore, this article says that Web sites run by the White House itself have been embroiled in privacy concerns.

In June, the Scripps-Howard News Service reported that Internet sites run by the White House drug czar's office, as we heard, were secretly putting cookie programs in the computers of visitors to track what they were doing. Of course, this practice was immediately stopped as our committee was told. But this whole area of application of the Privacy Act does raise new concerns.

Also, I might add many folks wonder what happens with some of the various investigations conducted by the Committee on Government Reform and some of our committees. I'm pleased to report that when we did look at the White House travel office and some of the problems that evolved from that particular incident, we were able to go back and change—we found that the Congressional Accountability Act that we passed making the Congress and other agencies comply with the law which they were not complying with, or be subject to, we were able to pass a White House and Executive Office Accountability Act which, in fact, now makes them accountable and subject to the same laws as the Congress and the people of the land.

So some positive changes have come from some of those investigations and committee oversight responsibilities. It's my hope that we can do the same with the Privacy Act if it needs fixing, or if we need to see that we should take some other enforcement measures.

With those opening comments, I'm pleased to yield to the gentleman from Maryland, Mr. Cummings, for an opening statement.

[The prepared statement of Hon. John L. Mica follows:]

THE WHITE HOUSE

WASHINGTON

September 22, 2000

HAND-DELIVERED

James C. Wilson, Esq.
Chief Counsel
Committee on Government Reform
U.S. House of Representatives
2157 Rayburn House Office Bldg.
Washington, DC 20515

Dear Mr. Wilson:

As you know, since earlier this summer the FBI, under the direction of the Office of Independent Counsel Ray and the Department of Justice Campaign Financing Task Force, has been assisting the EOP to restore e-mail contained on certain EOP and OVP computer backup tapes. Enclosed with this letter are e-mails that have been restored as part of that process which are responsive to various Committee requests to the White House and have not previously been produced to the Committee. Some of the documents have been redacted on grounds of non-responsiveness and to protect confidentiality, all in accordance with our prior understandings with the Committee. Finally, for reasons of continuity, and to avoid confusion, we have replaced the control numbers applied by the OIC/DOJ during the restoration process with the "E" series of control numbers that the EOP has used in its prior productions to the Committee. The enclosed documents bear control numbers E 8694-E 8863.

You will no doubt recognize that a substantial number of these documents, or the information contained in them, previously have been produced to the Committee in slightly different formats.

Please feel free to contact me if you have any further questions.

Sincerely,

Steven F. Reich
Senior Associate Counsel to the President

Enclosures
cc: Paul Weinberger, Esq..
Minority Staff

Jackie A Dycke
07/20/95 07:38 PM

To: All Staff
cc:

Subject: VP SCHEDULE FOR FRIDAY, JULY 21, 1995

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Mr. CUMMINGS. First of all I want to thank you, Mr. Chairman, for this hearing. I have always been one who was concerned about privacy. Sometimes I do believe that government reaches too far into the private lives of too many Americans. And so we meet today to discuss the Privacy Act as it applies to the Executive Office of the President and the intent of the act to protect citizen privacy.

Webster's Dictionary defines privacy as the freedom from unauthorized intrusion. I believe this is a freedom entitled to all Americans. And the Privacy Act is intended to provide individuals with safeguards against the loss of their privacy through the misuse of their records by Federal agencies. The act and the Freedom of Information Act are the two major statutes that control information disclosure practices within the government.

Just as it is important that we protect the privacy of individuals, I think we have to also make sure that we set the record straight. Because I think when we put out information that is not accurate to the public, and don't give both sides of it, I think we do just as much injustice as we do when we invade one's privacy.

Serious allegations have been made with regard to the White House in your opening. Specifically, allegations have been made that the White House illegally acquired and misused FBI files. It is critical that the record be complete on this issue. Independent Counsel Robert Ray issued his report on this matter in March 2000. I'm not talking about you, Mr. Chairman, I'm just talking in general that these allegations have been made.

In that report, he concluded that no, "No senior White House official or the First Lady Hillary Rodham Clinton engaged in criminal conduct to obtain, through fraudulent means, derogatory information about former White House staff." Those are his words, not mine.

Independent Counsel Ray also concluded, "No senior White House official or Mrs. Clinton was involved in requesting FBI background reports for improper partisan advantage."

Again, those are his words, not mine.

Allegations have also been made that information from IRS files have been misused against perceived adversaries of Bill and Hillary Clinton and Al Gore. It is important to point out that the Joint Committee on Taxation conducted a 3-year—and I emphasize that, 3-year bipartisan investigation of allegations that the Clinton administration was abusing its power by using the IRS to retaliate against, quote, political enemies, specifically, tax exempt organizations. That bipartisan report found that there was, quote: No credible evidence of intervention by the Clinton administration officials in the selection of tax exempt organizations for examination. Again, that's the report that comes from a bipartisan panel.

On another note, I've often said that we should not hold hearings, endless hearings just to hold them and not reach conclusions. And not make a difference. One of the most moving statements that has ever been made before this committee since I have been here was one by former White House counsel Cheryl Mills, when she talked about what government reform ought to be about. It ought to be about making a difference in people's lives. It ought to be about addressing the things that people have to deal with every day. And don't get me wrong, I think that the questions that we

raise here are important questions and we should deal with them, but when I look at my 4½ years with regard to this subcommittee, there are so many questions that we have not addressed at all.

And so the question we must ask ourselves is what will be the outcome of this hearing? We have 1 month left before the House is scheduled to recess. There are numerous issues that Congress and this committee should address like prescription drug coverage for our seniors, and I can't help but think about the seniors that I was with a few days ago who literally are cutting pills in half and trying to figure out what is government doing about that. Access to affordable health care, education, drug use by our youth and targeted tax relief for all Americans before October.

On the note of drugs, Mr. Chairman, I want to thank you for your assistance as you said a little bit earlier in our private conversation, Baltimore has made some great strides, but on that subject, it is because this committee tried to address that issue with regard to drug abuse in Baltimore and we are seeing a difference being made, but we need to see those things done in other matters. And the reason I point out that is, as I said before, we have 1 month left and that is it.

So hopefully we can move forward to address other issues that current American people, the people who look at us today and who depend upon us to make a difference in their lives, we will address the privacy issue. And as you said, we will address it in a way where, if it needs—the act needs to be amended, I'm sure we will take appropriate action to do that. But the fact still remains that there is so much more to be done. So many issues to be addressed. So many people who still are suffering.

And so with that, Mr. Chairman, I again thank you for this hearing, and I look forward to hearing from our witnesses and in advance, I thank the witnesses for taking time out of your busy schedules to make our government the very best that it can be.

[The prepared statement of Hon. Elijah E. Cummings follows:]

SCHEDULE FOR VICE PRESIDENT AL GORE
TUESDAY, JULY 11, 1995
FINAL

SCHEDULER: **NANCY OZEAS**
PHONE: **DEPT OF ED PHONE:**

PAGER:
EVENT COORDINATOR: **ROD O'CONNOR**
PHONE:

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Mr. MICA. I thank the gentleman from Maryland, and now pleased to yield to the gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. Just taking a moment, Mr. Chairman, to read the memo that went to all members of the subcommittee with regard to the hearing today, because I thought, listening to the prior speaker, that I was at the wrong hearing. I don't think we are here today to talk about prescription drugs, although that may be part of the agenda to constantly talk about those issues, no matter how incongruous with the subject matter at hand. We are not here today to relieve the suffering of the world. We are here today, Mr. Chairman, to discuss a very specific aspect of Federal law that applies to this subcommittee.

I appreciate the efforts by the other side to continue the deification of Ms. Mills, but that is not the subject matter of the hearing today. The subject matter of the hearing today is to discuss a very specific legal aspect of a very specific Federal statute that needs clarification. And I think it would help all of us if Members would stick to the issue at hand.

The fact of the matter is, Mr. Chairman, this is an important issue. This is an important Federal statute, the Privacy Act. Yes, it has nothing to do with feeding the hungry. It has nothing to do with solving problems in the world. But it does have quite a bit to do with the rule of law in this country and whether or not we are going to have a single standard for the protection of the privacy rights, as the other side states so eloquently from time to time that they support, or whether we are going to continue to allow certain Federal agencies, certain Federal employees, certain elected officials to operate under a different standard.

I would think that all of us would agree that there ought to be one standard. Yet today with regard to different interpretations of the Privacy Act on some specific legal issues, there is not that consensus. And, Mr. Chairman, you have assembled a very distinguished group of individuals here today from the government and from the legal profession to answer some questions that we have with regard to the consistent applicability and interpretation of the Privacy Act and to help guide us in this Congress and perhaps into the next Congress, to decide whether or not changes need to be made to the statute in light of the differing interpretations, or whether the statute serves the American people well and the way it was intended to. I think changes are necessary.

We had another hearing that I participated in with a different subcommittee just 2 days ago, Mr. Chairman, and it had to do with another aspect of privacy. It had to do with privacy on the Internet. And I know you have alluded to that with regard to the article that I too saw in today's paper. But the hearing that we had in the Constitution Subcommittee of the Judiciary Committee 2 days ago had to do with another important aspect of privacy, and that is, efforts by the administration to stretch existing statutes as they relate to electronic surveillance beyond the intent of the Congress. And the question there was what is the legitimate expectation of privacy on the part of American citizens when they engage in the Internet or e-mail transactions? And should the government have essentially an unfettered and plenary right to violate that privacy and to monitor these?

And we heard from administration witnesses who would not even concede that American citizens have some reasonable expectation of privacy when they use forms of electronic communication such as the Internet, such as e-mails, such as telephones, such as cell phones. And we spent several hours listening to administration witnesses take different pieces of different court decisions over the years and apply them, as broadly as the magnificent ability of the Clinton administration to stretch language, allows it to cover whatever it is that the administration wants to do in terms of electronic surveillance and invasion of privacy.

And I suspect today that we will hear in this context the same modus operandi. The administration coming in and using the very broadest legal reasoning, stretching precedents just as broadly as possible to allow it to do whatever it is that it wants to do.

And that is really in essence, Mr. Chairman, the heart of what you are trying to get at here. Should we be a party to allow an administration to do whatever it wants to do to say, despite the clear intent of the Privacy Act, to provide an affirmative right to an American citizen to ensure that the government is not misusing information, should the administration be allowed to hide behind a very, very pinched definition from another statute, to avoid answering legitimate questions?

Now, despite the incongruity of an administration, which I think self-styled itself as the most ethical in history as well as constantly tried to remind people that it was concerned about privacy, the record, and I suspect that we will hear today something quite different. We will hear today yet more explanations as to why the laws don't apply to the White House, don't apply to individuals there, and that the rights that American citizens legitimately do have an expectation, whether it is privacy in collection of government data or interception of their private communications does actually mean something. And I appreciate, Mr. Chairman, your efforts to keep us focused on a very specific issue that is clearly within the jurisdiction of this subcommittee, and I hope that we listen to these witnesses carefully, ask questions that will allow us to come to grips with an important issue of the applicability of the Privacy Act to the White House and to persons employed and operating out of or in the White House. And I appreciate this hearing and appreciate the witnesses here and appreciate your leadership on this issue, Mr. Chairman. Thank you.

Mr. MICA. Thank the gentleman from Georgia. Pleased now to recognize the gentlewoman from Hawaii, Mrs. Mink.

Mrs. MINK. I thank the chairman for allowing me this opportunity to make a statement. We are having a hearing on the protections of the Privacy Act, whether they apply to the Executive Office of the President. It is a technical legal issue with a series of statutory interpretations currently being litigated. Two district court judges in the District of Columbia have had the occasion to rule on this issue in the last several years, and these two judges have reached different conclusions.

Unfortunately, some Members on the other side are trying to use this issue for partisan purposes. They claim that the President committed a criminal act by releasing certain information, and as proof, they cite one of these district court opinions which the Court

of Appeals harshly criticized as gratuitously sweeping in its pronouncements. This issue is not simple. It has been a longstanding position of the Department of Justice that the Privacy Act does not apply to certain elements of the White House. That position dates back to 1974 and spans both Democratic and Republican administrations.

In 1975, Antonin Scalia, now a Supreme Court Justice, was an assistant Attorney General in the Ford administration. He considered whether the Freedom of Information Act's definition of "agency" extended to all units of the Executive Office of the President. Assistant Attorney General Scalia wrote that it does not extend to all portions of the executive office. He also said that because the Privacy Act explicitly borrowed the definition from the Freedom of Information Act, it's essential, he said, quote, of course, that we apply the same conclusion to both Freedom of Information Act and the Privacy Act.

The more recent District Court decision held that the Privacy Act did not apply to the White House Office. On August 9th of this year, Judge June Green granted summary judgment to the White House in a case brought by Representative Barr. In that case, Mr. Barr alleged that the White House violated the Privacy Act. The court disagreed, instead adopting the White House's position and the position of every administration since the enactment of the statute that the Privacy Act does not apply to the President's immediate staff.

It's worthwhile for the Congress to explore this, but certainly I do not believe that we could make a case that the interpretation given by every administration since its enactment is incorrect. Thank you, Mr. Chairman.

[The prepared statement of Hon. Patsy T. Mink follows:]

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NOTE: The President has a DNC Council Dinner at 8:00 pm at the Hay Adams.

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Ashley Adams
09/12/95 07:30 PM

To: Cheryl D. CDM [redacted]
cc: Michael A. Gill/OVP

Subject: Question re: private meetings

Cheryl -

I am currently working on trip summaries and need some clarification on the policies of "private meetings". It was my understanding that if a meeting or event is over 15 minutes long it needs to be included in the trip summary. There are times when these private meetings run up to 30 minutes long. Is there ever a time that these private meetings are included in the trip summary and/or the hard time formula?

The vice president took a trip recently, the costs of which were split between an outside source and the DNC. On this trip there was a private meeting. I recently billed the outside source and a woman from that organization called me the other day because she questioned the amount her organization was being billed for. She said she knew for a fact that the vice president spent more time with the political group than at her event, yet the percentage she owed was greater. She brought up a second political meeting the vice president attended and explained it as a small meeting that only people who'd paid a lot of money could attend. She was referring to the private meeting, which was not included in the hard time formula. She seemed angry and questioned me several times, as though I was not being truthful. In order to avoid such confusion in the future, I would like a clear understanding of the policy. Thanks.

Mr. MICA. I thank the gentlewoman for her opening statement.

And the gentlewoman from Hawaii moves that the record be left open for a period of 2 weeks.

Mrs. MINK. Do I? So be it.

Mr. MICA. I am willing to entertain that motion for additional opening statements or information to be added to the record of the hearing. Without objection, so ordered.

At this time, we will turn to our first panel. We have two panels this morning. And this consists of one individual, William Treanor. And he is the Deputy Assistant Attorney General and the Office of Legal Counsel. Welcome, sir. You have that large table, come and join us.

As possibly a new witness to our subcommittee, I'm not sure if you have testified before Congress before or our committee, this is an investigation and oversight subcommittee of the House of Representatives, and particular, the full Committee on Government Reform. We do swear in our witnesses. And if you would please stand to be sworn at this time.

[Witness sworn.]

Mr. MICA. The witness answered in the affirmative. We will let the record reflect that.

I would like to welcome you. Since you are the only panelist, we're not going to run the clock on you and we are anxious to hear your side of the issue from the administration and from the Department of Justice. So with those opening comments, welcome, sir, and you are recognized.

STATEMENT OF WILLIAM M. TREANOR, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. TREANOR. Thank you very much, Mr. Chairman.

Mr. MICA. You might pull the mic up as close as you can.

Mr. TREANOR. Thank you very much, Mr. Chairman. Good morning, Mr. Chairman, and members of the subcommittee. I am pleased to be here today to testify regarding the Department's longstanding position that the Privacy Act does not apply to the White House Office, which is also known as the Office of the President. The Department's legal position that the Privacy Act does not apply to the White House Office was first stated in an Office of Legal Counsel opinion in April 1975, less than 4 months after the Privacy Act was enacted, by then Assistant Attorney General Antonin Scalia, and has been reiterated in subsequent Office of Legal Counsel opinions and briefs filed by the Department of Litigation.

The position rests on three premises. First, the Privacy Act by its terms applies only to "agencies." Second, the Privacy Act defines the term "agency" to mean the same thing as the term means in Freedom of Information Act, and third, the Supreme Court has concluded that the White House Office is not an "agency" within the meaning of FOIA.

The Privacy Act governs the collection, maintenance, use and disclosure of information concerning individuals by Federal agencies. The requirements of the act by their terms apply only to Federal agencies. In defining the term "agency" in the Privacy Act, Con-

gress incorporated by reference the definition of "agency" set forth in FOIA. It provided that the term "agency" means "agency" as defined in section 552(e) of FOIA. Therefore, the applicability of the Privacy Act to the White House Office turns on whether the White House Office is an agency as defined in FOIA.

Congress enacted the FOIA definition of agency in 1974, just 40 days before the Privacy Act was enacted. That definition provides that, "the term 'agency' includes any establishment in the executive branch of the government, including the Executive Office of the President."

The conference report to the 1974 FOIA amendments provides that the term "Executive Office of the President is not to be interpreted as including the President's immediate personal staff or units in the executive office whose sole function is to advise and assist the President." The Supreme Court relied on this legislative history when it held in 1980 in *Kissinger* v. *Reporters Committee for Freedom of the Press* that the FOIA definition of agency doesn't include the Office of the President. The court stated that, "the legislative history is unambiguous in explaining that the 'Executive Office' does not include the Office of the President."

Adhering to the tests set forth in *Kissinger,* the D.C. Circuit Court of Appeals has consistently concluded that the President's immediate personal staff and units in the Executive Office of the President whose sole function is to advise and assist the President are not considered "agencies" for purposes of FOIA. And like the Supreme Court in *Kissinger,* the D.C. Circuit has made clear that the White House Office is among the components of the EOP that are exempt from the FOIA definition of "agency."

The district court decision in *Alexander* v. *Federal Bureau of Investigation,* which rejected the Department's position is, in our opinion, incorrectly decided. In that case, Judge Royce Lamberth took the view that the FOIA definition does not govern whether the Privacy Act applies to the immediate staff of the President. In his view, "agency" means one thing for the Privacy Act, and another for FOIA, because the purposes of the two statutes are, in his view, different. Congress precluded this interpretive move, however, when it affirmatively stated that the term should have the same meaning in both statutes. The text of the Privacy Act is straightforward. It provides that, "the term 'agency' means agency as defined in FOIA."

As the D.C. Circuit observed in *Dong* v. *Smithsonian Institution,* the Privacy Act, "borrows the definition of agency found in FOIA." And as then-assistant Attorney General Scalia stated in his 1975 OLC opinion addressing which units of the Executive Office of the President are covered by the Privacy Act, "it is essential, of course, that we apply the same conclusion to both the Freedom of Information Act and the Privacy Act."

Judge Lamberth's decision stands in marked contrast to the D.C. Circuit's analysis in *Rushforth* v. *Council of Economic Advisers,* in which the court addressed the question of whether the President's Council of Economic Advisers is an agency for purposes of the Government in the Sunshine Act. That statute, like the Privacy Act, incorporates the FOIA's definition of agency. The court reasoned that "inasmuch as the CEA is an agency for FOIA purposes, it fol-

lows of necessity that the CEA, is under the terms of the Sunshine Act, not subject to that statute either."

Moreover last month, District Judge June Green issued an opinion in the separate case of *Barr* v. *Executive Office of the President* in which she did not follow Judge Lamberth's analysis, but applied the FOIA definition of agency and held that the Privacy Act does not apply to the White House Office.

Consistent with *Dong* and *Rushforth,* Judge Green reasoned that "as the Privacy Act borrows the FOIA definition, it fairly borrows the exceptions thereto as provided in legislative history and by judicial interpretation."

In light of our disagreement with Judge Lamberth's analysis in the *Alexander* decision, the Department does not believe that the decision requires that the White House modify its records management practices to come into compliance with the Privacy Act. The D.C. Circuit agreed with this view in its recent appellate decision in *Alexander* stating that notwithstanding Judge Lamberth's decision, "in activities unrelated to the Alexander case, the White House, as it has done for many years on the advice and counsel of the Department of Justice, remains free to adhere to the position that the Privacy Act does not cover members of the White House Office."

I am free to answer any questions that you may have about this longstanding Department of Justice legal position.

Mr. MICA. Well, thank you, Mr. Treanor. We appreciate your testimony.

[The prepared statement of Mr. Treanor follows:]

Joel Velasco
02/22/96 11:43 AM

To: Albert Gore/[redacted]
cc:

Subject: Carter Eskew Request

Carter wants to be able to e-mail you from his office. We have some options:

1. Give Carter your special e-mail address that Michael Gill had set-up earlier;

2. Give Carter my e-mail (or Heather/Liz) and we would forward all e-mail from Carter to you. You would have to do the same to send him e-mail;

Reminder: All internet e-mails are recorded on the White House computers. According to Michael, the only way not to have your e-mails backed up on government computers would be to get a Clinton/Gore computer in your office , and set it up for private e-mails.

QUESTION: How would you like to proceed on this?

LI_G@A1 on 01/25/96 02:39:00 PM

To: Ansley Jones/[redacted]E,

cc:

Subject: 4:30 DNC coffee today

FYI:

There is a revised coffee list on your fax machine.

Ansley Jones
02/05/96 08:19 AM

To: schedules
cc:

Subject: final 2/05 for VP

SCHEDULE FOR VICE PRESIDENT AL GORE
MONDAY, FEBRUARY 5, 1996
FINAL

SCHEDULER: ANSLEY JONES
WORK PHONE:
WHCA PAGER:

NON-RESPONSIVE
MATERIAL
REDACTED

NON-RESPONSIVE
MATERIAL
REDACTED

NON-RESPONSIVE
MATERIAL
REDACTED

NOTE: 5:15 - 6:15 pm The President has a COFFEE in the Map Room

NON-RESPONSIVE
MATERIAL
REDACTED

Ansley Jones
02/02/96 06:09 PM

To: Elizabeth J. Cotham/[redacted], Heather M. Marabeti/[redacted]
cc:

Subject: MONDAY DRAFT

SCHEDULE FOR VICE PRESIDENT AL GORE
MONDAY, FEBRUARY 5, 1996
DRAFT 8

SCHEDULER: ANSLEY JONES

NON-RESPONSIVE
MATERIAL
REDACTED

NON-RESPONSIVE
MATERIAL
REDACTED

Mr. MICA. And I do have some questions. I'm not an attorney, but I've tried to sort through this problem and we have a serious problem before us. I guess Judge Royce C. Lamberth of the Federal District Court has found that President Clinton had committed a criminal violation of the Privacy Act in his estimation. I guess this was in releasing the Kathleen Willey letters in March 1998. And we have a dispute in the courts about whether the President is subject to the Privacy Act. And I think some of that is going to play out in the courts in different court cases.

This subcommittee has to decide whether, in fact, the law needs to be changed and whether, in fact, we need to have the President subject to the Privacy Act. I think that's a major question that the Congress is going to ask. The courts will have to sort out, I guess, whether the President is guilty as this Federal judge has indicated, and I think that is going to sort itself out.

Has the Department of Justice made any recommendation for any changes in this law?

Mr. TREANOR. The Department doesn't have any position on changes in the law.

Mr. MICA. As I understand it, there are a couple of parts to this. I guess in the Filegate case there was—first of all, you said that agencies must comply, there is no question that agencies must comply with the Privacy Act; is that correct?

Mr. TREANOR. That's correct.

Mr. MICA. OK. But if an agency say in the Filegate case has a request for private information an agency, gets that information and then discloses that, would the White House be in violation of the law?

Mr. TREANOR. I'm sorry; could you——

Mr. MICA. Yes, we'll say a private agency, the FBI has files. OK? And the White House requests that information that an agency couldn't give out but they request it from the FBI. They get that information and then give that out, would that be a violation of the law?

Mr. TREANOR. Well, let me just——

Mr. MICA. I view this as a couple of problems, because if the White House isn't subject to the Privacy Act in your interpretation, but they could go to another agency, get that information and then disclose that information, is that something that we need to be concerned about? Would you estimate under the law—I'm not an attorney, but is the White House allowed to get private information from an agency, an agency now that you clearly state, or Department of Justice states, cannot disclose that information, and then take that information as the White House and use it?

Mr. TREANOR. As a legal matter, the position that we've taken——

Mr. MICA. Well, is that something that we should—I mean, today, with this incredible amount of personal information, you try to make certain—and you know, I bring these issues up—others have brought them up. I pointed out Senator Joseph Lieberman asked for a study on this as far as other aspects. Mr. Barr referred to, I guess, the Judiciary hearing that is also looking at other aspects of this. But what I'm trying to do today is find out if the law needs to be fixed and if the President should be subject to this law.

And then there are ways around this as I just described. If the Office of the President gets private information from an agency then releases it, you're not able to tell me whether that is a current—would be a current violation of the law?

Mr. TREANOR. The position that we've taken for 25 years since Justice Scalia——

Mr. MICA. They can release it?

Mr. TREANOR. They're not, as a legal matter, covered by the Privacy Act because they're not an agency.

Mr. MICA. OK.

Mr. BURTON. Will the gentleman yield?

Mr. MICA. Yes. We have been joined by the chairman of the full committee, Mr. Burton, and I'm pleased to yield to him.

Mr. BURTON. Along that same line, Chuck Colson went to jail for disclosing information back during the Watergate debacle. Do you remember under what statute he went to jail? Because as I understand it, he was supposed to have given FBI information on one individual out to some kind of a newsman.

Mr. TREANOR. I'm not familiar with that. It would be—since the Privacy Act was passed during the Ford administration, it would not have been the Privacy Act. But I'm not familiar with the Colson case.

Mr. BURTON. Would you yield to Mr. Barr?

Mr. MICA. Yes, go ahead.

Mr. BARR. I think, Mr. Chairman, part of that answer was very revealing. Part of the problem here is this administration either doesn't know why people go to jail for certain things or is being very disingenuous and coming up here and telling us they are not familiar with this.

You are telling us, Mr. Treanor, as a top official at the Department of Justice, you are not familiar with the Colson case and the statute under which he was sent to prison?

Mr. TREANOR. I don't know which statute——

Mr. BARR. Do you know who Mr. Colson was?

Mr. TREANOR. I do.

Mr. BARR. Do you know what Watergate was?

Mr. TREANOR. I do.

Mr. BARR. But you don't know anything about the specifics of it as these cases relate to the Department of Justice and the White House's behavior?

Mr. TREANOR. I don't know which statute——

Mr. BARR. Maybe that's the real problem here, Mr. Chairman. Thank you.

Mr. MICA. Reclaiming my time. Again, I'm not an attorney and I see two parts of this as a layperson. One, should the President be subject to the law or above the law? And I think that's a question that we have to decide and possibly change it. Then the other thing, the other part of this is can the President take information, private information from an agency and distribute that?

You're not willing to tell me whether you think that the President or the Office of President can take information from an agency which is clearly prohibited from doing that under the testimony you have given today?

Mr. TREANOR. What I'm here to talk about is whether the White House Office and whether the President are covered by the Privacy Act, and they're not. Whether there is some—whether there is a separate violation outside of the White House Office is not something that I've considered in preparation for today's testimony. But the White House Office would not be covered.

Mr. MICA. Do you see a problem there? Again, the White House—there's an incredible array of private information in agencies, not just the FBI, but today agencies have an incredible amount of personal information about people throughout the land. The question is, is there a deficit in the law that allows the White House, who we are saying is above the law, the President is not subject to this law, they can get information from that agency and then, in fact, disclose it for their own whatever? You're not prepared to—to state that——

Mr. TREANOR. As far as the policy question, whether or not the law should be changed, the Department doesn't have a position on that. And a policy question like that is one on which DOJ would defer to the Office of Management and Budget, which has the lead on Privacy Act policy questions.

Mr. MICA. The other question I would have is I'm not sure who is defending the White House at this point. Is that the White House legal counsel or are resources of the Department of Justice also being combined with the White House to defend this position in the courts on this issue?

Mr. TREANOR. In the litigation, the Department of Justice has been——

Mr. MICA. Have you taken the lead or worked with the White House counsel on this?

Mr. TREANOR. We represent the United States in the litigation. I'm not involved in the litigation, so as far as the facts of individual cases, I'm not in a position to comment. But we represent the United States in litigation.

Mr. MICA. So the Department of Justice is taking the lead in defending the White House position that they're not subject to the law?

Mr. TREANOR. And it's our position. It's our position. Again, it goes back for a quarter of a century. It goes back to Justice Scalia when he was Assistant Attorney General. So it's a consistent Department of Justice position for a very long period of time.

Mr. MICA. Well, I appreciate your testimony. Let me yield now to ranking member of our subcommittee, Mrs. Mink.

Mrs. MINK. Thank you very much. The point that I think is relevant here for our purposes is whether the position which you now take with reference to the applicability of the Privacy Act to the White House Office is a position that has been sustained by every single administration, every single Department of Justice, since the Privacy Act was enacted.

Mr. TREANOR. That's correct.

Mrs. MINK. Has there been any change or difference in position in the years since 1974 through all the Republican administrations up to the current one?

Mr. TREANOR. The Department of Justice has consistently taken the position that the White House Office is not covered by the Privacy Act.

Mrs. MINK. Now, has there been occasion for this particular position to be tested or questioned other than the current administration, say, during the Republican administrations? Were there contests? Were there issues? Was there litigation which required that this matter be analyzed and scrutinized by those Republican administrations?

Mr. TREANOR. Well, there were.

Mrs. MINK. Could you cite those instances?

Mr. TREANOR. Sure. In terms of my office, the Office of Legal Counsel, there are three fundamental opinions that the office has issued in which we've stated the position that the Privacy Act doesn't cover the White House Office. The first was during the Ford administration when Justice Scalia was Assistant Attorney General. The second was during the Carter administration. The third was during the Reagan administration in 1982.

There has been subsequent litigation, for example, *Meyer* v. *Bush,* which was an attempt to extend the Freedom of Information Act to the President's Task Force on Regulatory Reform that was headed by then-Vice President George Bush. And the Department took the position that it was not subject to FOIA because its role was to advise the President. And the D.C. Circuit Court of Appeals found in favor of the Department.

So there are—the *Rushforth* decision, which is 1985, is another D.C. Circuit opinion, also involving FOIA. That's a Reagan—President Reagan administration case. And that involved the question of whether the Council of Economic Advisers was covered by FOIA. Again, the Department of Justice took the position that it wasn't, and again, the Department prevailed in litigation.

Mrs. MINK. Has there been any specific cases involving the Privacy Act? Both that you cited had to do with the Freedom of Information Act.

Mr. TREANOR. Well, involving the Privacy Act, there is case law on the Privacy Act from the D.C. Circuit; there's *Dong* v. *Smithsonian,* which is a decision in which the D.C. Circuit said that the Privacy Act definition of "agency" is borrowed from FOIA.

In terms of litigation involving the Privacy Act, the two principal decisions are the ones that I believe you mentioned in your opening statement. Judge Lamberth's decision and more recently, Judge Green's decision.

Mrs. MINK. Other than those two, the question of the Privacy Act's applicability to the White House Office has not come into question?

Mr. TREANOR. There are a number of other suits that are currently before the courts in which that issue has been presented. The only ones in which there have been decisions on point are the two that I mentioned.

Mrs. MINK. Now, is it a normal practice in the Department of Justice, when there is a standing opinion as Mr. Scalia's opinion on this issue was filed, is there a standing routine in the Department of Justice to take a look at these opinions and to review them and to incorporate them as the current policy when the administra-

tion changes? Or is it simply made reference to and never looked at? In other words, the Scalia opinion, has that been under review and subject to discussions in the Department of Justice since it was written or simply accepted as the rule of law that the Department of Justice is to apply when—when any question relative to privacy is raised?

Mr. TREANOR. When we have an opinion of the Office of Legal Counsel like Justice Scalia's opinion from 1975, it has precedential weight within the Department of Justice. In other words, we take it seriously. But when new issues come up, it's also reconsidered and revisited. If it was our decision that it was an inappropriate decision, then it certainly would have been revisited and changed when the issue came up.

But, again, it has been an issue—it has been a position the Department has stayed with for this point 25 years.

Mrs. MINK. Has there been any time in the history of the Department since the Scalia opinion was written, any major discussion as to its pertinence or its relevance or that it needed to be changed? Has there ever been any question as to its standing as good law?

Mr. TREANOR. Of Justice deliberations over the past 25 years, I haven't seen anything that suggests any hesitancy in that position, as we have revisited it in a number of contexts.

Mrs. MINK. Did Judge Green's decision alter the validity of Judge Scalia's opinion in any way?

Mr. TREANOR. No. His opinion was that the Privacy Act didn't cover the Office of the President, and that is the position that Judge Green reached as well. So it is consistent with the Department's position since 1975.

Mrs. MINK. Thank you, Mr. Chairman.

Mr. MICA. We have been joined by the chairman of the full committee, Mr. Burton, and so I would like to recognize the gentleman from Indiana both for the purposes of an opening statement and also for questions that he would like to ask at this time.

Mr. BURTON. Thank you, Mr. Chairman. I have a couple of questions. I don't know that I want to make an opening statement. I do have a couple of questions.

There was a decision rendered on March 29 of this year, and I think you have alluded to that already, but it says, according to the information that I have, that the definition of agency as used in the Freedom of Information Act has been held to specifically apply to the Executive Office of the President. The Clinton administration responded to this suit by arguing that the Office of Personnel Security and the Office of Records Management, both units of the Executive Office of the President, were not subject to the Privacy Act. On March 29 this year, the Federal District Court hearing the case rejected the administration's argument and held that under the Privacy Act, the word "agency" includes the Executive Office of the President.

And yet even though that decision has been rendered, the Department of Justice continues to argue that the Privacy Act does not apply to the President and the White House, and one of the problems that our committee has had is the appearance has been dramatic over the past 4 years that I have been chairman of this committee, that the Department of Justice has been blocking every

effort, every single effort by every organization and every committee of the Congress to give information or to apply the laws fairly and equitably to everybody.

And we have sent subpoenas over to the White House. We have had Chuck Ruff, the President's chief counsel and other chief counsels, Mr. Nolan and others, use all kinds of dilatory tactics to block us from getting information. We have had to fight and fight and fight the Department of Justice. We have sent criminal referrals over there. Nothing has happened. We have had 122 people take the fifth amendment and flee the country. Nothing has happened. Some underlings, some lower level people have been brought to trial and justice, but people in the Executive Office of the President where there has been allegations of wrongdoing, nothing has happened.

Most recently, the head of the task Air Force just appointed by Janet Reno, Mr. Conrad said there should be a special prosecutor appointed to investigate Mr. Gore. Others have said that to her on other occasions about other individuals, including other people in the White House.

The attorney general once again declined, even though the second or third in a row head of the task force suggested that there should be an independent counsel. We had Louis Freeh, Mr. LaBella, Mr. DeSarno, all back when we had the independent counsel statute, and Mr. Freeh and Mr. LaBella said that there should be an independent counsel to investigate the entire campaign finance scandal. She turned that down.

Now the latest thing, and the FBI has said there were misrepresentations made by the Vice President to the FBI and Mr.—the latest counsel, Mr. Conrad, appointed by Ms. Reno, said there should be a special prosecutor appointed. Once again, she rejected that even though the FBI said there were some inconsistencies in what the Vice President said. Even though it was recommended by Mr. Conrad, nothing happened.

So here today we are having this hearing on this and a court, a court here in Washington, I believe it is in Washington, the Federal District Court in Washington on March 29 said—they rejected the administration's argument that held under the Privacy Act the word "agency" includes the Executive Office of the President. And I presume that the reason that the Executive Office of the President and the Justice Department are working hand in glove on this is because when you go back to the Marsisa case, and he just admitted that he lied on the Filegate case, I presume that the Executive Office of the President wants to continue to protect itself, and the Justice Department is continuing to try to protect the President so there is no further investigation into this or any other issue regarding that.

I wish the American people across the country can see the consistency that we have seen over the past 4 years, is that the Justice Department under Janet Reno has blocked, and they have gone so far as to fight this in the courts, and now they have been rejected by the courts, and I understand that they are going to appeal. Don't you find that unusual that this consistent pattern has gone on for the past 4, 5, 6 years?

Mr. TREANOR. Let me focus on this specific case because we did appeal and the D.C. Circuit said that the activities related to the *Alexander* case, the White House as it has done for many years on the advice and counsel of the Department of Justice remains free to adhere to the position that the Privacy Act does not cover members of the White House Office.

Mr. BURTON. How does that square with what the court just decided?

Mr. TREANOR. Congressman Burton, I think you are referring to Judge Lamberth's decision, but we did appeal that and what I was reading you from was the D.C. Circuit's decision.

Mr. BURTON. Who is the judge on D.C. Circuit?

Mrs. MINK. In the appeal, Green, Judge Green.

Mr. BURTON. Who appointed Judge Green to the Federal bench?

Mr. TREANOR. Judge Green—there are two District court decisions.

Mr. BURTON. Who appointed Judge Green to the bench, do you know?

I would like to find that out.

In any event, and I won't belabor this anymore, the frustration level that we have in our committee, Mr. Barr and Mr. Mica, who have been in these hearings, we have had people take the fifth amendment. One of the top advisors to the President took the fifth amendment before our committee 25 or 30 times. What was his name?

Mr. MICA. There are a number of them.

Mr. BURTON. There are a number of them. There have been so many. We have had so many problems like this and we have a very high level of frustration, so when we see the Justice Department going to bat trying to protect the Office of the President from laws that apply to every person in this country and every other person in this government, once again we are holding the President out as something special, and the laws don't apply equally to him like they do everybody else, that really frustrates us because we believe that the laws of this Nation were made to apply to everybody, regardless of their station in life and position in government. If we say one organization is above the laws passed for everybody else, then the foundations of the Nation start to crack and it bothers me a great deal.

Mr. MICA. I thank the gentleman from Indiana and I am pleased to recognize the gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Thank you very much. A little earlier, Mr. Barr said we were dealing with a specific issue and that there had been more than one interpretation with regard to how this whole privacy issue should be resolved, and so I have some specific questions.

Tell me how the Freedom of Information Act plays into these decisions, decisions that you talked about, there is a relationship with the Privacy Act and the Freedom of Information Act, and I want to know how they play together?

Mr. TREANOR. The agency definition of FOIA was passed in 1974.

Mr. CUMMINGS. Right.

Mr. TREANOR. The same Congress 40 days later passed the Privacy Act. What the Privacy Act does is for its definition of "agency" it says—it is the definition of "agency" under FOIA. So it looks

back, it incorporates directly the FOIA definition of agency. So as the FOIA definition of "agency" is interpreted by the courts, that is also the Privacy Act definition of "agency." .

When FOIA was passed, the committee, the conference report, said that it doesn't cover as an agency those whose sole function is to advise and assist the President.

Mr. CUMMINGS. So that was part of the conference report?

Mr. TREANOR. That was part of the conference report on FOIA.

Mr. CUMMINGS. So if one were looking for the legislative intent, one would go to the conference report, along with other documents that were available; is that right?

Mr. TREANOR. That's correct. So in 1980 when then-Justice Rehnquist in the *Kissinger* case was confronted with the question of was Henry Kissinger subject to FOIA disclosure, he said well, we look at the legislative history and the legislative history is unambiguous that those whose sole function to advise and assist the President are not agencies within the meaning of FOIA and therefore, FOIA doesn't apply.

But even before then in 1975, 4 months after the Privacy Act was passed, Justice Scalia said in his opinion for the Office of Legal Counsel, the FOIA definition of "agency" is borrowed by the Privacy Act, and therefore the two have to be construed in tandem.

Mr. CUMMINGS. Now, one of the things that we hear—let's go back to something that Mr. Burton said—Mr. Burton was talking about the rules being applied to everyone, and I think he was talking about privacy and all people in this country who come under our constitution have the same rights of privacy. But there seems to be something that is parallel to that same argument, and on that note I agree with him, that we should all have the same rights of privacy no matter who we are, but there is something else that goes along with that, and he complained vigorously about how the Justice Department consistently stood in the way of requests by Congress to have certain documents. But as I listen to your testimony, there is something called the Office of the President, and no matter who the President has been, either Republican or Democrat, either Carter or Reagan or whoever, that this has been a consistent posture of the various Presidents? In other words, when this issue comes up, it is addressed this way by the Justice Department; is that correct?

Mr. TREANOR. That's right. This has been a consistent position of the Department for a quarter century.

Mr. CUMMINGS. I remember when we had the impeachment hearings, there was a question that came up with regard to the Secret Service and whether or not they could testify. And the arguments were made then that there were certain things that go along with the Office of the President, there are certain defenses that would be raised irrespective of who the President was, and so for you all to do this, for the Justice Department to do what you are doing here is nothing unusual; is that correct?

Mr. TREANOR. This is a well established, longstanding Department of Justice position.

Mr. CUMMINGS. Now, do you know, going back now to that legislative intent, and I want to go backward, when you talked about the conference report in the original legislation I think you said

back in 1974, was there any basis for why the Office of the President would not be included under FOIA and therefore under the Privacy Act? In other words, were there Congressmen, legislators that stood up and said these are the reasons why the Office of the President should not be included? Or just said they are not part of the definition?

Mr. TREANOR. I think there was—prior to 1974 there was a D.C. Circuit decision, *Soucie* v. *David,* which concerned the Office of Science and Technology in the Executive Office of the President, and the question was whether that was covered by FOIA. The D.C. Circuit in that decision created the test of whether the sole function of the entity or the individual was to advise and assist the President. So that is the test that the FOIA committee was codifying. They make reference to *Soucie* v. *David* in the conference report.

Mr. CUMMINGS. I think Mr. Mica asked a very crucial question, and it does concern me and maybe you can help us with it. I think whenever we on this side of the aisle draft legislation, one of our major concerns is that the legislation actually carries out what our purpose is, and we would hate to think that there are loopholes in the very legislation that we passed.

The question that Mr. Mica asked that concerns me, too, as I listen to all of this, is if an agency gives the information, and I know the agency is subject, but if the agency gives the information to the President, is there anything that controls that? In other words, is the agency in violation of anything or is the matter of just presenting it to the President enough? Has that issue, that exact issue arisen in the courts? Has there been—I mean, if there was an opinion that you have to give to—let's say an agency came to you and said look, our concern is if we turn over this information, it may be released. What would your opinion be—and we don't want to get in trouble. So what is your opinion as to what our—how vulnerable we might be?

Mr. TREANOR. Again, as I said to the chairman, this isn't something that I have thought through in anticipation of this meeting so I don't have an answer to that question.

Mr. CUMMINGS. So you don't know whether that narrow issue that I just stated, has arisen? I take it that you have not had to render an opinion on that; is that a fair statement?

Mr. TREANOR. Off the top of my head I can't think of any decision that addresses that. Again, that is just off the top of my head.

Mr. CUMMINGS. Last question. Is that because it is almost a moot point, because once it comes within the Office of the President, the agency is sort of taken out of the mix?

Mr. TREANOR. Again, it may be the case that in the various litigations that have involved the Privacy Act that there are challenges to the agency's activity. But again, that is not something that I have focused on.

Mr. MICA. Will the gentleman yield?

Mr. CUMMINGS. Yes.

Mr. MICA. There are a couple of parts to that. The part that you and I raised are very troubling. You had in Filegate, I believe it was, where someone from the Executive Office of the President as a security guy asked for the FBI files. Well, if he took those and

then disbursed them, the White House has the right, according to what the Department of Justice is saying in some of these court opinions, to release information. You cited the Ray investigation of that and said there weren't any violations. I am concerned that there may be a gap in the law.

I am also concerned, should the President of the United States or the Executive Office of the President, and we will have a different one in a few months here, be able to release any information about individuals? I think this is a very serious problem, and you have got the President charged with a criminal violation by another Federal judge. It is something that we have got to address to say what the White House can do and then can an agency or the White House request this through an agency which is subject to the law now which they are saying and disburse that information. So we have got a situation that isn't clear. A law that isn't well defined and that is my concern. We may have to come back and make some changes with this. I yield.

Mr. CUMMINGS. Reclaiming my time, just one comment. I think what concerns me as I listen to Mr. Burton who I have tremendous respect for, I think we have to be very careful with this whole idea of the Office of the President. We are talking—and the testimony that we have heard is that this has been a consistent defense and not just because Mr. Burton is the chairman of the committee or Republicans are in control of the Congress, and then we have a President who is a Democrat, but that Republican Presidents have asserted the same kinds of defenses and presented it—it has been consistent.

So I think, Mr. Chairman, when we are talking about clarification, I think it would be good to know whether the issue—this particular issue has arisen and how it has been resolved, if at all, and at the same time, protect the Office of the President no matter who is in there, be it a Republican or Democrat. That is one of my concerns. With that I yield back the balance of my time.

Mr. MICA. I appreciate that. I just want to say that—interject here that—the law was enacted because of the abuses of a Republican President, and I thought it would apply to the Office of the President. Obviously from these mixed court decisions, it doesn't or it is in question. That is part of the reason for this hearing. Then we have this other point of the agencies clearly being prohibited, according to the testimony, the court decisions and FOIA is a different kind of animal. FOIA is someone from the outside requesting information as opposed to the White House or an agency just giving out personal private information. That is the reason for this hearing today.

Mr. CUMMINGS. Would the gentleman yield?

Mr. MICA. Yes.

Mr. CUMMINGS. I just want to say that one of the things that we have to be concerned about, sometimes if there is anything good resulting from what you are talking about, Mr. Chairman, sometimes it is good to have clarification of the law so that we don't have Presidents that come into office who then have to go through a process which—where they are constantly defending themselves when the law is not clear. That might be a good thing to have some kind of clarification.

Mr. MICA. I appreciate that.

Mr. Barr has been waiting patiently. I recognize Mr. Barr at this time.

Mr. BARR. Thank you, Mr. Chairman.

Mr. Treanor, we have two laws here; is that correct? The Freedom of Information Act and the Privacy Act?

Mr. TREANOR. That's correct.

Mr. BARR. They are different laws and different provisions of the Federal code?

Mr. TREANOR. That's right.

Mr. BARR. They, therefore, serve different purposes, otherwise we wouldn't have two distinct laws; is that correct? Or in your mind, do they serve identical purposes?

Mr. TREANOR. They don't serve identical purposes.

Mr. BARR. OK. They serve somewhat different purposes, correct?

Mr. TREANOR. I think that is right.

Mr. BARR. The Freedom of Information Act is what might be termed a passive statute. It simply provides access to government information? It doesn't provide any criminal penalties, does it?

Mr. TREANOR. I am not aware whether it does or doesn't.

Mr. BARR. You are not aware whether it does or doesn't?

Mr. TREANOR. I'm not.

Mr. BARR. Are you aware of the fact that the Privacy Act does provide criminal penalties for violations?

Mr. TREANOR. It does.

Mr. BARR. We are making some progress here. The fact that the Privacy Act provides criminal penalties means that there is a purpose to be served by those criminal penalties?

Mr. TREANOR. That's correct.

Mr. BARR. And that is a check on misuse of information against individuals by government officials, correct?

Mr. TREANOR. That's correct.

Mr. BARR. Why, then, is it the position of the Department of Justice that it is OK for an individual in one office within the executive branch to release that information and not be subject to those criminal penalties, and yet one block away a different individual, simply because that person happens to work in a different office in the executive branch, would be subject to criminal prosecution? What is the rationale, and I am not interested in you just relying on prior decisions by prior Departments of Justice, what is the justification for the Department of Justice saying it is OK for one member of the executive branch to disclose private information, yet somebody else, simply because they happen to be in a different physical location or work for a different agency within the executive branch, that they would be subject to criminal prosecution? What is the distinction? Why is that proper?

Mr. TREANOR. It is a question of what the statute reaches.

Mr. BARR. The statute makes it criminal. If you look at the statute itself, you want to talk about the statute, the statute is very clear on its face. The Executive Office of the President is included within the parameters of the Privacy Act, including the criminal provisions. So don't tell me that the statute doesn't provide for it. The statute does. What you are doing is looking to another statute that serves, as you've conceded, a different purpose for justification

for saying the Privacy Act criminal provisions apply to one agency but not to another, but the language of the statute supports our position, not yours. We are looking to legislative history in a different statute.

Mr. TREANOR. The language of FOIA is explicitly referenced in the Privacy Act. The Privacy Act says agency under the Privacy Act means agency under FOIA.

Mr. BARR. Which includes the Executive Office of the President, if you agree with that. You can't disagree with it.

Mr. TREANOR. The text of FOIA says that agency under FOIA includes the Executive Office of the President.

Mr. BARR. Which is the language adopted for the Privacy Act. So on the face of it the Privacy Act, including its criminal provisions, apply to the Executive Office of the President, correct?

Mr. TREANOR. It applies to the Executive Office of the President, subject to the same limitation that the Freedom of Information Act——

Mr. BARR. That is your interpretation. That is your excuse for saying that it doesn't.

Are you saying that as a matter of law, general law, that every single time one statute picks up a definition from another statute or a provision from another statute, it picks up all of the legislative history that applied to consideration of that other statute, regardless of the purpose? Is that your position?

Mr. TREANOR. This is a case in which the two statutes are 40 days apart in enactment. It is the same Congress. Congressman Moorhead——

Mr. BARR. I would prefer if you answer the question that I posed.

Mr. TREANOR. Could you please restate the question.

Mr. BARR. See, that is the problem when you don't answer questions.

The fact of the matter is, the clear language of the Privacy Act applies in its criminal provision to the Executive Office of the President. You are saying, because there is legislative history in another statute that serves a different purpose, namely, the Freedom of Information Act, that limits the applicability of the Privacy Act to the Executive Office of the President, that simply, because it brings in the definition, it brings in all of that other baggage, and I am asking you whether that is the position of the Department of Justice that, as a matter of general law and legislative interpretation, that in every instance where a statute by reference picks up a definition or another provision from a different statute, that it necessarily is limited by all of the legislative history of that other statute, even though that other statute deals with something different? Is that your proposition? Is that the position of the Department of Justice?

Mr. TREANOR. I don't know that we have ever taken a position on whether it is, in effect, the case.

Mr. BARR. You are taking the position in this case, and unless the Department is saying that we are taking the position in this case and not something else, then you have to agree with me.

Mr. TREANOR. First of all, there is a general presumption that when two statutes have the same language, that they are to be interpreted the same. There is substantial case law on that.

Mr. BARR. There is not substantial case law for the proposition that you are putting forward here. All of the cases that have been discussed so far, with the exception of the *Alexander* case, don't apply to the Privacy Act. Those are FOIA cases.

Mr. TREANOR. The *Rushforth* case, which is a 1985 D.C. Circuit decision involving the Sunshine Act, which does the same thing——

Mr. BARR. This isn't the Sunshine Act. What we are talking about here is the Privacy Act and whether its criminal provisions should apply to all government officials. You are saying no. It shouldn't apply to the President and it shouldn't apply to Ms. Mills and Charles Ruff, but that, if somebody else does the exact same thing that they did, it would be—they would be subject to criminal penalties, and I think that is a very strange and improper position for the Department of Justice to take. And I think what you would be coming up here and saying is that in order to protect the public, we ought to have one standard here. That is what all prior Departments of Justice have always said.

Given the fact that there is confusion here, make your case, either for the confusion to be clarified by saying clearly that the President is not subject to the Privacy Act and its criminal provisions and can do whatever he wants and his advisors can, or come in here and say yes, we recognize that there are some interpretations of case law that support a restrictive definition. But we think in the public interest that it ought to be clarified, and that the Privacy Act provisions that purport to provide a remedy for violations ought to apply to everybody. That would be the right thing to do.

That is not what you are doing. You are coming in here and trying to say because there is some legislative history that applies to this other statute that serves a different purpose, that fits our purpose of defending the President and his advisors against improperly releasing information on individuals, they are exempt. And that is the frustration that I think the chairman, both chairmen, exhibit with this Department of Justice. That is not the type of position that a Department of Justice traditionally has taken. You are right, you may be strictly interpreting, consistent with prior internal memoranda and arguments regarding the applicability of the Freedom of Information Act by prior administrations, but that doesn't make it right, does it? That doesn't make right the argument that this group of individuals, because they are located here, can violate someone's privacy rights, but these over here can't? That is not right, is it?

Mr. TREANOR. I have been talking about our interpretation of the statute.

Mr. BARR. Is it right?

Mr. TREANOR. Again, the question of whether the Privacy Act should be amended is one that the Department doesn't have a position on.

Mr. BARR. Is my question right? See, there you go again. I asked a very simple question, and now I have to repeat it.

Is it right to say that this group of individuals can violate somebody's privacy rights and not be subject to criminal sanctions, this group over here, also government employees can do exactly the

same thing, but because they are clothed with being in a slightly different office, they are subject to criminal penalties; is that right?

Mr. TREANOR. I think—I understand the fairness and——

Mr. BARR. Do you understand the question?

Mr. TREANOR. I do understand the question.

Mr. BARR. Then answer it yes or no.

Mr. TREANOR. It is not something that I have a position on.

Mr. BARR. The Department of Justice doesn't have a position on whether laws ought to be applied equally?

Mr. TREANOR. The Department of Justice, in the context of this statute, does not have a position on whether it should be amended to cover the White House Office.

Mr. BARR. So the answer to my question is that you think that it is OK for somebody's privacy to be violated by this person but not this person, simply because of what office they serve in? That the Privacy Act does not apply uniformly—should not?

Mr. TREANOR. Again, we don't have a position.

Mr. BARR. And that is your position, isn't it?

Mr. TREANOR. We don't have a position on whether it should be amended.

Mr. BARR. I asked you whether that is your position on the current state of the Privacy Act applicability?

Mr. TREANOR. It is our position as a matter of law right now that it doesn't cover the White House Office.

Mr. BARR. And that is OK with you?

Mr. TREANOR. Again, the Department of Justice——

Mr. BARR. Otherwise you would be making an argument that you don't believe in court, and that is unethical.

Mr. TREANOR. We are making an argument which we believe is the best interpretation of the statute.

Again as I said before, the policy question of whether it should be changed is one that the Department of Justice doesn't have a lead on.

Mr. BARR. I bet if we proposed to change it, they would oppose it. Do you want to bet?

Mr. TREANOR. We, of course, review any particular legislation for constitutionality.

Mr. BARR. If I were you, I wouldn't take that bet up either because you would lose. This administration would oppose it. Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman.

Mrs. Mink.

Mrs. MINK. I think this matter has been somewhat fuzzed up by the questions and responses that you have given.

Can you clarify your earlier testimony in response to my questions which go to whether this decision or the opinion of the Department, which was initially rendered by Mr. Scalia, was an opinion just out of the blue or was this an opinion which interpreted what Congress said in the legislation which it enacted, that this is not a judgment call randomly made in order to suit the purposes of one administration or the other, but a clear statement of position of the Department of Justice by Mr. Scalia upon reading the two statutes in question, the Privacy Act and the Freedom of Information Act?

Mr. TREANOR. That's correct.

Mrs. MINK. What is correct?

Mr. TREANOR. It is correct that what Justice Scalia was doing was he was looking at the two statutes. He was looking—he was looking at the fact that the Privacy Act says agency—it means agency under FOIA.

Mrs. MINK. Now, is that language explicit in the Privacy Act? The definition of "agency" is as defined in the Freedom of Information Act?

Mr. TREANOR. It is explicit.

Mrs. MINK. It is absolutely explicit?

Mr. TREANOR. That's right. "Agency" is defined in section 552 E, and it is a reference to——

Mrs. MINK. So if you wanted to define it differently, you are stuck because that is what the law said?

Mr. TREANOR. The law says that they will be construed together.

Mrs. MINK. So if anyone has a problem with the way that it is now interpreted, you would have to change the law? It is not a matter of your coming here and saying this is your opinion. This is an application of the law by the Department of Justice; is that correct?

Mr. TREANOR. This is the view of the Department of Justice on the best reading of the law that was announced in 1975 and that we have consistently held.

Mrs. MINK. Thank you, Mr. Chairman.

Mr. MICA. Thank you. Additional questions?

Mr. CUMMINGS. I just have one more question. Just so we can hear the rest of the story, based upon what Mrs. Mink just said and who makes the law?

Mr. TREANOR. Congress makes the law.

Mr. CUMMINGS. Thank you very much. In other words, it is our decision. We make the law, not you. We do it and if we have a problem with the law, then we have to change it. That is our job. That is what we are paid to do.

Mr. BARR. Mr. Chairman.

Mr. MICA. Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

You know, sure, that is true and you can look in my primer that says Congress makes the law, but that is not the final answer here and everybody knows that. What we are talking about here is an interpretation of the law; is that not correct, Mr. Treanor?

Mr. TREANOR. It is our best reading of the law.

Mr. BARR. Right. It is an interpretation of the law. The law itself is absolutely clear on its face. The Executive Office of the President is covered by the Privacy Act. The Privacy Act is clear on its face. Congress has made that law, right? What you are looking to, to carve out an exception is what is called legislative history which is not part of the law itself, to carve out an exemption, that is what you are doing. So Congress has spoken. Congress has said the Privacy Act includes within its definition of "agency" the Executive Office of the President, the four corners of the statute say that.

So if we are talking about Congress making laws, it seems to me that Congress has already done that. Now in a different law, the Freedom of Information Act, Congress included some legislative

history that related to that act. That is legislative history that can be used to interpret the law which is what you are doing. But you have made this—this Department of Justice has made a decision to interpret the Privacy Act using legislative history from another act to carve out an exemption. That is what we are looking at here to determine whether that is proper.

A number of us feel that it is not. Others feel that it is proper to carve out an exemption and say that the criminal provisions of the Privacy Act should not apply to some people. People on the other side of the aisle and the Department of Justice believe that. I don't. I think that the law ought to apply equally. If in fact, as we now see because of a number of decisions by different Departments of Justice and two recent decisions which conflict on this issue, there has been interjected a degree of lack of clarity, and I think we ought to go back and address it because I think the law ought to apply equally. If people disagree, they can vote against such a bill.

I would be happy to yield.

Mrs. MINK. Thank you for yielding. I am not interested in making my argument and stating my case with reference to my questions. I am not interested in carving out an exemption. I don't believe in carving out anything.

The law states the explicit situation here that the definition of "agency" as found in the Freedom of Information Act applies to the Privacy Act. That is all that I am saying. I am interested in what the law says and applying that law. That's all. I feel that the Department of Justice is stating the law as it is written. Congress wrote it. I happen to have been here at that time and the Freedom of Information Act was something in which I was very much involved.

I was hoping that Mr. Treanor would cite the case in which I was the principal plaintiff, *Mink* v. *EPA, et al.* Some five or six other executive agencies were involved. I was trying to get information out of these agencies that had transmitted an opinion to the White House. We felt that the executive exclusion of those opinions from the public was wrong. I went to court and my case was heard all the way up to the Supreme Court of the United States.

This debate whether agencies are covered or not covered was an intricate part of the debate when we enacted the Freedom of Information Act in 1974, and the use of that definition which we agreed to in the FOIA to the Privacy Act was an explicit decision made by Congress.

If we disagree with it now, we should fix it. But the implication that the Justice Department since 1974 has been in any way complicit in trying to avoid the application of law to the White House is wrong. Congress did that. I can attest to that since I was here when those statutes were enacted.

Thank you.

Mr. BARR. Reclaiming my time, I don't recall any legislative history in which the Congress said we think that the provisions of the Privacy Act should not apply to a person in the executive office of the White House—Executive Office of the President. As a matter of fact, the statute itself provides that the Executive Office of the President is covered. But there is legislative history in this other

act, and I understand the gentlelady's position and she is absolutely correct, with regard to the congressional interpretation or direction with regard to the Freedom of Information Act, which the Department of Justice concedes serves a different purpose from the Privacy Act, there are additional limitations. But that does not mean that those necessarily are incorporated into the Privacy Act definition which makes very clear that it applies to the Executive Office of the President.

Thank you, Mr. Chairman.

Mr. MICA. I thank the members of the panel for their questions. I also want to thank our witness, Mr. Treanor, for representing the Department of Justice at this hearing and also providing us with your testimony.

I think we will excuse you at this point. There may be additional questions we will submit in writing for you or for the Department of Justice to respond to.

Mr. TREANOR. Thank you, Mr. Chairman. Thank you, members of the committee.

Mr. MICA. I would like to call our second panel this morning. The second panel consists of four witnesses. The four witnesses are Greg Walden, former associate counsel for the President from 1991 to 1993. Mr. Larry Klayman, who is the chairman of Judicial Watch, Professor Jonathan Turley, George Washington University school of law and Roger Pilon who is a constitutional scholar with the CATO Institute.

We do swear in our witness. If you would all please stand and raise your right hands.

[Witnesses sworn.]

Mr. MICA. The witnesses have answered in the affirmative. We welcome you and we try to get you to limit your presentations to 5 minutes. I make an exception to Mr. Klayman, when we recognize him. Mr. Dale is not appearing this morning. He was on the witness list, but Mr. Klayman is going to read his statement from Mr. Dale.

I will first recognize Greg Walden, former associate counsel for the President, 1991 to 1993 for your testimony. Welcome, and you are recognized, sir.

STATEMENTS OF GREG WALDEN, FORMER ASSOCIATE COUNSEL FOR THE PRESIDENT FROM 1991 TO 1993; LARRY KLAYMAN, CHAIRMAN, JUDICIAL WATCH; JONATHAN TURLEY, GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW; AND ROGER PILON, THE CATO INSTITUTE

Mr. WALDEN. Thank you. While I serve now as counsel to the law firm of Patton Boggs, LLP, the views expressed are my own and this marks my fifth appearance before the committee, and I am honored by your invitation. I will respond to two questions. The "is" question and the "ought" question. First, whether the Privacy Act does now apply to the White House Office; and second, assuming that it does not apply to the White House Office, whether the act should be amended.

My first answer to the question is frankly I am not sure; but the answer to my second question is an unqualified yes, the act should be amended to clarify the ambiguity. As previously noted, the Pri-

vacy Act expressly incorporates FOIA's definition of an agency, and that definition expressly includes the Executive Office of the President. So if all we were talking about was the language of the statutes, the White House would have no exemption from FOIA; the White House Office would have no exemption from the Privacy Act. But there is legislative history dealing with FOIA, and that legislative history was used by the Supreme Court in *Kissinger* v. *Reporter Committee* in 1980, so what is going on here is judicial gloss on a statute, FOIA, based on the legislative history in a conference report.

When I served in the Justice Department in the 1980's and later in the Bush White House, we understood that based on these court decisions, FOIA applied within the Executive Office of the President to OMB, the Office of Administration, the Council on Environmental Quality, the U.S. Trade Representative and the Office of National Drug Control Policy, but that FOIA did not apply to the Council of Economic Advisers or the units within the White House Office such as the counsel's office, the Office of Presidential Personnel, the executive residence and the like.

With regard to the National Security Council, we treated the council as a hybrid. Its staff was considered covered by FOIA; the National Security Adviser insofar as he served as a member of the President's inner circle of advisers was not. His files were segregated into NSC files covered by FOIA and White House Office files exempt from FOIA. And in 1993, the Office of Legal Counsel withdrew a 1978 opinion upon which we had relied and determined that the NSC in its entirety is not an agency under FOIA, and the Court of Appeals ultimately agreed with the more recent opinion. But in response to a previous question from Representative Mink, the Office of Legal Counsel has changed its position with regard to the application of FOIA to the National Security Council.

With regard to applying the Privacy Act to the White House, I do not believe this issue was ever litigated to a judicial decision during my tenure at the Department of Justice or in the White House, and I believe the only two reported decisions are Judge Green's and Judge Lamberth's. I do believe, though, at the time we would have relied on the views of the Office of Legal Counsel.

The District Court in *Alexander* v. *FBI* was the first court to face the question, and Judge Lamberth concluded that the White House was not exempt because he distinguished the purpose of the Privacy Act from the purpose of FOIA. Unlike FOIA, which provides only a public right of access to government documents, the Privacy Act protects individual privacy by placing restrictions on the acquisition, maintenance, use and disclosure of certain documents pertaining to that individual.

So the thrust of FOIA is to open up the government and release documents. The thrust of the Privacy Act is to withhold documents to protect an individual's privacy. Judge Lamberth found no evidence that the privacy protection provided by Congress in the Privacy Act must be necessarily limited for reasons of Presidential authority. And therefore, the District Court said there is no need to ignore the plain language of the statute, and limit of the word "agency" as has been done in the FOIA cases.

Now, Judge Lamberth recognized the issue was not free from doubt and he certified the question to the Court of Appeals. The Court of Appeals refused to accept the question and said well, we will wait—we will decide this question on appeal from the final judgment. In March of this year when the District Court broadened its holding to encompass the President and found that the President had violated the Privacy Act, the government sought a writ of mandamus from the Court of Appeals, asking again, for the Court of Appeals to bless its interpretation that the Privacy Act didn't apply to the White House Office, and again the D.C. Circuit declined.

These refusals might suggest that the Court of Appeals is not inclined to disturb Judge Lamberth's ruling. Much time and effort could have been avoided had the Court of Appeals determined in 1977 that count 2 of the complaint in *Alexander* could not be pursued because the Privacy Act does not apply to the White House Office. Yet as Mr. Treanor has noted, the Court of Appeals sent some strong contrary signals, too. No one can confidently predict whether the Court of Appeals will affirm or reverse Judge Lamberth. The language of the statute alone does not dispose of the matter, but when we consider it in connection with the Supreme Court's Kissinger decision, there is some support for the Justice Department's opinion.

As for legislative history, there is only the scantest legislative history on the Privacy Act, and all that history on the Privacy Act deals with is whether you use the FOIA definition, not the specific question before us as to whether the White House is exempt.

On the other hand, I do agree with the District Court that the policies reflected in the Privacy Act do not favor exempting the White House Office from the law. And whatever the D.C. Circuit's decision on this, eventually it will be a strong candidate for Supreme Court review. But the problem with waiting for the court system to work its will is that it will take a long time. This issue was first raised in 1997, or at least the government first objected to the application of the Privacy Act to the White House in 1997, it has gone on for 3 years with no end in sight.

Therefore, I recommend that Congress tackle the issue now and it would be beneficial if Congress were to clarify the issue, apply the Privacy Act to the White House Office before the beginning of the next administration. There would be no question whether Congress is taking a partisan act. No one knows who is going to be President in January.

So as to whether the Privacy Act should be amended to expressly apply to the White House, I say the answer is yes. Had I been called to testify when I served in the Bush White House, I would probably be up here, rather nervously, but advocating, please keep us exempt. Why? The fewer the restrictions on the Presidency, the lesser the burdens on that office, the greater the discretion and flexibility, and every chief executive desires that.

But you are Congress, and you can make the law and put restraints on what the President can or cannot do. I still believe the White House Office should be exempt from FOIA because of the nature of Presidential decisionmaking and in particular, to encourage the frank and candid advice from the President's advisers, but Con-

gress can get documents from the executive branch without regard to FOIA. The Privacy Act is different. As Judge Lamberth found, the protection of an individual's privacy from unwarranted disclosures, whether to the public or another agency, is the cardinal purpose of the Privacy Act.

In response to a question again from the committee as to whether there would be a problem with an agency such as the FBI or the Department of Defense sending documents to the White House that if they were released by the FBI or the Department of Defense would be a violation of the Privacy Act, whether sending them to the White House and the White House then releasing them, would be no problem. I think—and I don't know if there is a court decision on the question, I don't believe that there is a reported decision, but in the Privacy Act, subsection 552a(b) reads no agency shall disclose any record which is contained in a system of records by any means of communication to any person. I would say that if the FBI or the DOD, an agency, discloses to someone in the White House, that is, a person, because we are not dealing with the definition of an agency, and then that person discloses, the violation is the FBI's and the FBI's official or the DOD and the DOD's officials. Per the Justice Department interpretation, the White House is still off the hook. And that again is why I would recommend that the law be clarified.

True, FOIA disclosures may injure one's reputation and cause embarrassment, and where that injury or embarrassment results from a government decision, that is the price to be paid for having a transparent government. But FOIA contains exemptions designed to protect individuals from unwarranted invasions of privacy. In fact, those enumerated exemptions form the backbone of the Privacy Act. Records protected under the Privacy Act may also be disclosed, but the FOIA presumption is reversed and any disclosure must fit within an enumerated exemption.

Viewed from the perspective of an individual whose personal information is contained in a government record and disclosed to the public, whether it is Leslie Alexander, Billy Dale, Kathleen Willey, or any of the hundred of Clinton administration appointees whose background files are maintained in the White House, it matters little whether the disclosure is made by the Pentagon, the State Department, FBI or the White House. The damage is the same. From my own experience in the Bush White House reviewing the background files of prospective Presidential employees, those clearance files and personnel files include information, the disclosure of which would clearly constitute an unwarranted invasion of personal privacy.

I would submit that disclosure by the White House would result in a wider republication of the information than if it were done by a cabinet agency, and I have seen no countervailing Presidential interest that would justify allowing the White House the freedom to reveal to the media information which would be a crime for a DOD, State or FBI official to reveal. I also believe that applying the Privacy Act to the White House would not frustrate or interfere with the President's conduct of his office nor would it inhibit the candid exchange of views between the President and his assistants, the major rationale for the FOIA exemption.

Thus, I recommend that Congress codify Judge Lamberth's holding that the Privacy Act applies to the White House.

Thank you.

Mr. MICA. Thank you for your testimony, Mr. Walden.

[The prepared statement of Mr. Walden follows:]

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OTE: 5:15 - 6:15 pm The President has a COFFEE in the Map Room

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Ansley Jones
02/05/96 07:36 PM

To: schedules
cc:

Subject: final for 2/06 VP

SCHEDULE for VICE PRESIDENT AL GORE
TUESDAY, FEBRUARY 6, 1996
FINAL

SCHEDULER: ANSLEY JONES
PHONE:
PAGER:

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NSC is not an agency within the meaning of the FOIA." *Armstrong v. Executive Office of the President,* 90 F.3d 553, 555-56 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997).

If memory serves, we also considered the Office of Policy Development as a hybrid office. OPD was subject to FOIA, but the files of the Assistant to the President for Domestic Policy insofar as they related to advice and counsel to the President and other White House Offices were exempt.

With regard to application of the Privacy Act to the White House Office, I do not recall whether this issue was ever litigated during my tenure at the Justice Department or in the Bush White House. I do believe, however, that the Bush White House would have relied on the views of OLC.

The District Court in *Alexander v. FBI*, 971 F. Supp. 603 (D.D.C. 1997) apparently faced for the first time the question whether the judicial gloss on FOIA's definition of "agency" should apply also to the definition of the same term under the Privacy Act. Judge Lamberth concluded that it should not, because FOIA and Privacy serve "very different purposes." FOIA gives the public a right of access to Government documents. The Privacy Act gives an individual certain rights of access to Government documents, but only those pertaining to that individual. However, an additional purpose – perhaps the primary purpose – of the Privacy Act is to protect the privacy of individuals by placing restrictions on the acquisition, maintenance, use and disclosure of certain documents pertaining to an individual.

The District Court found "no evidence that the privacy protections provided by Congress in the Privacy Act must also be necessarily limited. . . . Thus there is no need to ignore the plain language of the statute and limit the word 'agency' as has been done under FOIA." 971 F. Supp. at 605-06.

Recognizing that the legal question is not free from doubt, the District Court certified the question to the Court of Appeals. However, the Court of Appeals refused to accept the question, determining that appellate resolution of the issue could wait until an appeal from a final judgment.

In March of this year, the District Court extended its holding to encompass the President himself, finding that President Clinton violated the criminal provisions of the Privacy Act in directing the release of several letters Kathleen Willey had written to him. *Alexander v. FBI*, 193 F.R.D. 1 (D.D.C. 2000). In denying the Government's petition for a writ of mandamus, the Court of Appeals again declined to rule on the issue of the applicability of the Act to the White House, despite the urging of the Justice Department that it do so. *In re: Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000).

These refusals might suggest that the Court of Appeals is inclined to agree with the District Court's holding. After all, much time and effort could have been avoided had the Court of Appeals determined in 1997 that Count II of the Complaint in *Alexander* could not be pursued because the Privacy Act does not apply to the White House Office. Yet, the Court of Appeals has sent some strong contrary signals, too. The Court of Appeals pointed out to the Government that "District Court decisions do not establish the law of the circuit, . . . nor, indeed, do they even establish 'the law of the district[.]'" 215 F.3d at 24. The Court of Appeals went even further, stating that "[i]n activities unrelated to the instant case, the White House, as it has done for many years on the advice and counsel of the Department of Justice, remains free to adhere to the position that the Privacy Act does not cover members of the White House Office." *Id.* at 24-25.

It is impossible to say with confidence whether the Court of Appeals will affirm or reverse the District Court's ruling applying the Privacy Act to the White House. The language of

the statute alone does not dispose of the matter, as the courts' construction of the term "agency" under FOIA, as well as under the Government in the Sunshine Act, *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038 (D.C. Cir. 1985), and the Administrative Procedure Act, *Franklin v. Massachusetts*, 505 U.S. 788 (1992), provides an additional gloss. What little legislative history of the Privacy Act there is supports the conclusion that the definition of "agency" should be the same under FOIA and the Privacy Act. Yet as to the purposes of the two statutes, I agree with the District Court that the policy reasons in favor of exempting the White House Office from FOIA are not present with respect to an exemption from the Privacy Act. The D.C. Circuit's opinion could go either way, perhaps resulting in a split decision. Whatever the D.C. Circuit's decision, the issue most certainly would be a strong candidate for review by the Supreme Court of the United States.

The trouble with awaiting a final judicial resolution of this issue should be apparent. The Government first objected to the application of the Privacy Act to the White House in 1997. The *Alexander* litigation has lasted more than three years, with no end in sight. Appellate proceedings would last at least another year, if not two. Thus, it would seem incumbent on Congress to determine this issue prospectively. Indeed, it would be beneficial to have the issue clarified before the beginning of the next Administration next January.

Assuming the White House is not covered by the Privacy Act, should the Act be amended to apply to the House?

If I had been called to testify when I served in the White House Counsel's office, I may well have advocated exempting the Office of the President, if not the entire White House Office, from the Privacy Act. The fewer the restrictions on the Presidency, the lesser the burdens on that Office, and the greater the discretion and flexibility, which every Chief Executive desires.

The underlying policy objectives of the Freedom of Information Act are the public's right to know, the benefits to our democratic system from the transparency of government decisionmaking, and improved accountability to the public. On the other hand, the nature of Presidential decisionmaking, and in particular the need to ensure frank and candid advice from the President's immediate advisers, supports exempting the White House Office from FOIA. While the contours of executive privilege are uncertain, an exemption from FOIA for the Office of President and his immediate White House advisers serves the same interests as those which form the basis of a claim of executive privilege. In any event, even though the White House Office is exempt from FOIA, Congress nonetheless may request and obtain White House Office documents outside of FOIA. I submit that these considerations support a continued exemption of the White House Office from the Freedom of Information Act.

In ways somewhat similar to FOIA, the Privacy Act also imposes burdens on an agency, requiring the establishment of systems of records, the publication of such systems in the Federal Register, and responses to requests for access. Yet, as Judge Lamberth found, the Privacy Act addresses a different set of objectives. The protection of an individual's privacy from unwarranted disclosures, whether to the public or to another agency, is the cardinal purpose of the Privacy Act. A person may be susceptible to injury to one's reputation or other embarrassment as a result of a FOIA disclosure, too. Where that injury or embarrassment results from a Government decision or action in which the person has participated, that is the price to be paid for having an open and accountable Government. But FOIA contains exemptions designed to protect individuals, whether Government officials or private citizens, from unwarranted invasions of personal privacy. What are deemed exemptions under FOIA form the backbone of

the Privacy Act. Records protected under the Privacy Act may also be disclosed, but the FOIA presumption is reversed, and any disclosure must fit within an enumerated exception.

Viewed from the perspective of an individual whose personal information is contained in the Government record and disclosed to the public – whether it is Leslie Alexander, Billy Dale, Kathleen Willey, or any of the hundreds of Clinton Administration appointees and White House staffers whose background files are maintained in the White House – it matters little whether the disclosure is made by the Pentagon, the State Department, the FBI, or the White House. The damage is likely to be the same. From my own experience reviewing the background files of prospective Presidential appointees, personnel files and White House clearance files include information the disclosure of which would clearly constitute an unwarranted invasion of personal privacy. In fact, disclosure by the White House could result in larger republication of the information than if it were done by an agency outside of the White House Office. What public policy reason could justify allowing the White House the freedom to reveal to the *Washington Post* information that would be a crime for DOD, State or the FBI to reveal? I do not see any good reason.

Moreover, I see no countervailing Presidential interest that would require the exemption of the White House Office from the Privacy Act. Applying the Privacy Act to the White House should not frustrate or interfere with the President's conduct of his Office, nor should it inhibit the candid exchange of views between the President and his assistants.

Civil liability under the Privacy Act runs to the Government, not to any individual. 5 U.S.C. 552a(g)(1)(D), (g)(4). The criminal provision, section 552a(i), applies only to an official who knows that disclosure of the specific material is prohibited, and "willfully discloses the material in any manner to any person or agency not entitled to receive it[.]" If there is any

concern with subjecting the President to criminal liability for conduct occurring "by virtue of his official position," Congress could exempt the President alone from criminal liability – as he is exempt from 18 U.S.C. 208 and other criminal statutes – while subjecting his Office to the other provisions and restrictions of the Act and the other White House officials to the criminal provisions.

In sum, whether the Privacy Act applies to the White House remains an open question. Whether the Privacy Act ought to apply to the White House is, in my view, an easier question, one which I would answer in the affirmative.

Mr. MICA. And I would like to recognize at this time Mr. Larry Klayman, who is chairman of Judicial Watch. You are recognized.

Mr. KLAYMAN. Thank you, Mr. Chairman. I want to commend you, Chairman Mica and Congressman Barr for being leaders in the protection of the privacy rights of American citizens, and never more have we needed you but in the last 7½ years of this administration. As you stated, my name is Larry Klayman, and I am general counsel of Judicial Watch, a public interest law firm which brings lawsuits to redress government corruption and educates the American public about the need for ethics, morality and respect for the law. In recent years since our founding on July 24, 1994, regrettably, we have been very active in matters involving the violation of privacy rights of American citizens.

During the current Clinton-Gore administration, the American people have witnessed a wholesale violation of their rights to privacy through the misuse of not only FBI files, but IRS and other government files containing confidential and personal information under the Privacy Act which can be found at 5 USC 552(a) et seq. Specifically, the committees uncovered, this committee, in June 1996, as part of the White House travel office investigation involving my client, Billy Dale, who was wrongfully terminated, prosecuted and smeared by the Clinton-Gore administration, yet a bigger scandal which became known as Filegate.

Filegate involved the illegal acquisition and misuse by the Clinton-Gore White House of the files of over 900 people, not only just files, but summary reports and raw data obtained from the U.S. Department of Justice, yes, the same people who were sitting here before, who handed them over to that White House and that information was misused. The reason for this later proved to be obvious. Not only with regard to Mr. Dale who was smeared by the Clinton-Gore White House to justify his firing, thereby enabling Bill and Hillary Clinton to hire their Hollywood friends, Harry and Susan Bloodworth Thomasson to run that office, but also during the impeachment proceedings of 1998 when Republican House managers had information leaked obviously contained in FBI and other government files to discredit them as part of an effort to stave off the conviction of the President.

In addition, over these Clinton-Gore years, information from IRS and other government files has been misused against perceived adversaries of Bill and Hillary Clinton and Al Gore. An article in the Capitol Hill Blue, which I am attaching to our written witness statement, a well-known Internet publication, states uncategorically that House managers, one of them sitting here, Mr. Barr, will be retaliated against through the misuse of FBI and IRS files for him simply carrying out his duty under the constitution of the United States to bring articles of impeachment. This cannot be permitted.

This campaign of terror was seen during the Nixon administration and can never be permitted to occur again. It was for that reason that not since Watergate and the abuses of that Nixon administration that a law came into effect known as the Privacy Act. It was the Democratic Congress that deserves credit for enacting that law. It was a just law and as reflected in the legislative history itself, and we didn't hear anything about that before, not only does

the express language of the statute state that it applies to all of the Executive Office of the President's agencies and offices, but the legislative history of the Privacy Act says the exact same thing. That was noticeably absent from some of the questions of the minority during this committee hearing this morning.

To do otherwise would create a loophole in the Privacy Act and allow the President to flout the law. An article written by John Fund in the Wall Street Journal of April 10, 2000, which I also attached to the witness statement, explains the logic in including the President and his advisors within the scope of the Privacy Act. And thank God for the American people that along came not only just Judicial Watch that decided to represent the people whose FBI files were illegally obtained by this White House—and they're not all Republicans, some of them are Democrats, if you can believe that. Perhaps this White House didn't trust some of its friends. But the reality is that along came a district court judge, perhaps the finest sitting district court judge in this country today; Judge Royce C. Lamberth has taken a tremendous amount of abuse for his courage. In fact, it was Democrat Members of the Senate who said that because of his decisions, he would never rise to a higher level. We gave that issue to Louis Freeh of the FBI. That's judge-tampering. But he came forward and he stated that in fact the plain language of the statute has to apply. That is the law. If there's no ambiguity, you don't go to legislative history. And as Greg said, as Mr. Walden said, it is a natural inclination of the Justice Department, which works for the President of the United States, to give him opinions that he wants to hear.

But I urge you to read the opinion of Mr. Sirica when he was a young guy—much younger than myself even, and I'm not that young anymore—back at the Justice Department. He didn't issue an unequivocal decision. Read that decision. This has been miscited during this hearing. But in any event, people make mistakes. And to rely on that, over 25 years ago, is another mistake. The plain language of the law states that the President and his advisors are indeed included.

Your Honor, our client, Billy Dale, would have liked to have been in front of the committee this morning. Unfortunately he is not able to do so. And he asked me to read this statement, and with the consent of the committee I'd like to read it on his behalf.

Mr. MICA. Please proceed.

Mr. KLAYMAN. And this is what he asked me to read. In fact, I talked to him last night.

I was formerly director of the White House Travel Office for 11 years and have served both Democrat and Republican administrations. In my previous days in the White House Travel Office, before the Clinton-Gore administration, I was honored, deeply honored to serve my country. However, 1 day in May 1993, my staff and I were summarily fired and accused of financial wrongdoing. To justify my firing when an uproar ensured among members of the media who knew me, the Clinton-Gore White House illegally obtained my FBI file and attempted to smear me with its contents in public. If this was not enough, it then used the IRS to intimidate me, along with a Clinton-Gore White House political operative who revealed improperly that I was being criminally investigated.

Indeed, I was later prosecuted by a corrupt Clinton-Gore Justice Department but, predictably, I was acquitted in record time. And when all was said and done, my life was nearly ruined. I incurred hundreds of thousands of dollars in attorneys' fees for which Republicans, regrettably not the Democrats, and Congress sought to have me compensated. And my emotional well-being was severely affected. For 18 months

and more, I felt like I had to guard my words very carefully. In many ways, I feel as if I have been raped and that my private life was violated.

I have asked Mr. Klayman and his group Judicial Watch to bring a lawsuit against the Clinton-Gore White House for violating my privacy rights. Typically, this White House denies that the law applies to the President and his closest advisors. If this is true, then there will be many more Billy Dales in the future, and no citizen of this country can feel secure that his or her government will not do to them what the Clinton-Gore administration has done to my wife, my son, two daughters, their families, and me. I will not feel at ease until President Clinton is out of the White House. Respectfully submitted Billy Dale, September 8th, 2000.

[The information referred to follows:]

/07/00 18:02 FAX 202 846 5199

HEARING STATEMENT OF BILLY RAY DALE BEFORE THE GOVERNMENT REFORM COMMITTEE, SUBCOMMITTEE ON CRIMINAL JUSTICE, DRUG POLICY, AND HUMAN RESOURCES THE U. S. HOUSE OF REPRESENTATIVES

SEPTEMBER 8, 2000

Good morning. My name is Billy Ray Dale. I was formerly Director of the White House Travel Office for 11 years, and have served both Democrat and Republican administrations. In my previous days in the White House Travel Office – before the Clinton-Gore Administration – I was honored to serve my country. However, one day in May, 1993, my staff and I were summarily fired and accused of financial wrongdoing. To justify my firing when an uproar ensued among members of the media, The Clinton-Gore White House illegally obtained my FBI file and attempted to smear me with its contents in public. It then used the IRS to intimidate me -- along with a Clinton-Gore White House political operative, who revealed improperly that I was being criminally investigated. Indeed, I was later prosecuted by a corrupt Clinton-Gore Justice Department, but, predictably, I was acquitted in record time. When all was said and done, my life was nearly ruined; I incurred hundreds of thousands of dollars in attorney's fees, and my emotional well-being was severely affected. In many ways, I feel as I have been raped in that my private life was violated. I have asked Mr. Klayman and his group, Judicial Watch, to bring a lawsuit against The Clinton-Gore White House for violating my privacy rights. Typically, The Clinton-Gore White House denies that the law applies to the President and his closest advisors. If this is true, then there will be many more Billy Dales in the future, and no citizen of this country can feel secure that his or her government will not do to them

what the Clinton-Gore Administration has done to me.

Mr. KLAYMAN. It's a powerful statement Mr. Chairman. But there are two other things here that I can't leave unsaid. We heard about the position of the Justice Department in the *Alexander* case, and I'm speaking now on behalf of Judicial Watch and its clients. This case with regard to the travel office unturned a document written to John Podesta who's now White House chief of staff, I'm going to ask that it be made a part of the record. And it states unequivocally with regard to the personnel folders of Mr. Dale and the other State of California office employees—and this is a memorandum for John D. Podesta June 30, 1993—it states: Case closed. The contents of these records are covered by the Privacy Act of 1974, have restricted use and should be protected carefully. Please keep these folders in a locked place when not in use. Their contents should not be disclosed to anyone unless they demonstrate an official need.

This is the smoking gun document that shows that this Clinton-Gore White House has known the Privacy Act always applied to it. And if that's not enough, in my supplemental statement, which I also ask be made part of the record, I don't have time to read it, five other admissions, four or five other admissions by White House officials that they knew the Privacy Act applied. We're talking about this White House.

And last but not least, and, most incredibly, it was Hillary Clinton who claimed early on during the Filegate scandal that she did not know Craig Livingstone, or she was hazy whether she knew him. In the course of this *Alexander* case, we have uncovered photographs that indeed Mrs. Clinton did know Craig Livingstone. This is an 8 by 10 photograph produced by the White House, not voluntarily I might add. They are in each other's presence, and we have several. In addition, we have an 8 by 10 photograph, produced by the White House, of Attorney General Janet Reno with Craig Livingstone, if you can believe that. If you can believe that, believe this one: When we sought to have these documents produced to Judge Lamberth, the White House asserted the Privacy Act, said we cannot produce these documents because they're in a system of records and we can't produce them to you, Your Honor. And it had to take a special order of Judge Lamberth, who is one of the most courageous judges in this country, if not the most courageous judge, to force the White House to produce those photographs.

So we're not only talking about a misinterpretation of law, we're not only talking about hypocrisy of the highest magnitude, we're talking about cover-up. And that's the problem here, is that we look to this Congress, we look to Democrats in this Congress, to perform the noble purpose which they began in 1974 when they enacted a law to redress the outrageous abuse of privacy by a Republican President. There can be no justification for violating privacy, whether it's been a Democratic administration or a Republican administration.

And Judicial Watch, which is nonpartisan as we go into the future, whoever wins the next election, will move just as aggressively against any President of the United States who seeks to destroy the citizens, as this administration has, by leaking Privacy Act protected material to smear and destroy them so it can remain in office. Thank you.

Mr. MICA. Without objection, your entire statement and the document you referred to will be made part of the record. Thank you for your testimony.

[The prepared statement of Mr. Klayman follows:]

HEARING STATEMENT OF LARRY KLAYMAN BEFORE THE GOVERNMENT REFORM COMMITTEE, SUBCOMMITTEE ON CRIMINAL JUSTICE, DRUG POLICY, AND HUMAN RESOURCES THE U. S. HOUSE OF REPRESENTATIVES

SEPTEMBER 8, 2000

Good morning. My name is Larry Klayman. I am Chairman and General Counsel of Judicial Watch, a public-interest law firm which brings lawsuits to redress government corruption, and educates the American public about ethics, morality, and respect for the law. In recent years, since our founding on July 24, 1994, we have been very active in matters involving the privacy rights of American citizens. During the current Clinton-Gore Administration, the American people have witnessed a wholesale violation of their right to privacy, through the misuse of FBI, IRS, and other government files containing confidential and personal information protected under the Privacy Act, 5 U.S.C. § 552a. Specifically, this Committee uncovered in June of 1996, as part of the White House Travel Office investigation involving my client Billy Dale – who was wrongfully terminated, prosecuted, and smeared by the Clinton-Gore Administration – yet a bigger scandal which became known as Filegate. Filegate involved the illegal acquisition and misuse by the Clinton-Gore White House of over 900 FBI files, summary reports and raw data of Republican White House appointees of the Reagan-Bush Administration as well as others. The reason for this later proved to be obvious; not only with regard to Mr. Dale, who was smeared by the Clinton-Gore White House to justify his firing (thereby enabling Bill and Hillary Clinton to hire their Hollywood friends, Harry and Susan Bloodworth Thomasson to run the Travel Office), but also during the impeachment proceedings of 1998, when Republican House Managers had information leaked, obviously contained in their FBI

and other government files, to discredit them -- as part of an effort to stave off conviction of the President. In addition, over the Clinton-Gore years, information from IRS and other government files has been misused against perceived adversaries of Bill and Hillary Clinton and Al Gore. An article in *The Capitol Hill Blue*, a well-known Internet publication, which I am attaching and incorporating by reference, chronicles this campaign of terror so effectively used by the Clinton-Gore Administration. Members of Congress, some of whom sit on this Committee, have been the victims of this intimidation.

Not since Watergate – and the abuses during the Republican Nixon Administration – have we seen this cynical and criminal technique used to intimidate critics and investigators of a lawless administration. It is also for this reason that, after Watergate, the Democratic Congress correctly enacted a law known as the Privacy Act. As reflected in the legislative history itself, it is also intended to cover not only all branches of the Executive Office of the President, but the President and his closest advisors. To do otherwise would be to create a loophole in the Privacy Act allowing the President and his closest advisors to continue the same type of illegal conduct "introduced during the Nixon Administration." *See* John Fund, "Sorry Mr. President, This Law Applies To You Too," *The Wall Street Journal*, April 10, 2000, attached. I also call your attention to the legislative history of the Privacy Act to confirm that the President and his closest advisors are covered by the Privacy Act, as well as a Court decision by the Honorable Royce C. Lamberth, of the U.S. District Court for the District of Columbia. In the tradition of the Honorable John Sirica during Watergate, Judge Lamberth is perhaps the finest active District Court judge in the United States today. Judge Lamberth is also the presiding judge of a civil lawsuit over Filegate, *Alexander, et al. v. Federal Bureau of*

Investigation, et al., C.A. Nos. 96-2123/97-1288 (RCL).

The Clinton-Gore Administration and the President and his advisors have defied the ruling of Judge Lamberth, and refused to comply with the Privacy Act. This lawlessness not only underscores the arrogance and lawlessness of this White House, but presents a danger to all Americans who deserve to be free to express themselves without fear of having information from their government files smeared all over the media.

I now introduce my esteemed client, Mr. Billy Dale, who more than anyone was harmed by the illegal actions of the Clinton-Gore White House in violation of the Privacy Act.

Respectfully submitted,

Larry Klayman
September 8, 2000

Mr. MICA. And I'd like to now recognize Professor Jonathan Turley who is with the George Washington University School of Law. Welcome, and you're recognized, sir.

Mr. TURLEY. Thank you, Mr. Chairman. Thank you members of the committee. It's an honor to appear before you on a subject of this significance. I realize your time is short so I've submitted an excessively long testimony that shamelessly cites my own work.

Mr. MICA. Without objection, your entire statement will be made part of the record. Thank you.

Mr. TURLEY. Thank you very much. This is an area in which many academics have submitted provocative pieces on either side. While I have shamelessly ignored all their writings, I do cite a few of them. I don't yield entirely to academic immodesty.

We're at this hearing at an important juncture, I think. The fog and frenzy of scandal is beginning to dissipate. Regardless of the merits of the allegations involved in these scandals, I think it's time for people of good faith to look at lingering questions, lingering questions that were litigated and largely left unresolved during this entire period of crisis.

One of those issues is the issue of privacy. As Congresswoman Mink noted, Members on both sides of the aisle feel deeply about privacy and feel deeply about FOIA, and I think that's a very important ground upon which we can meet and a ground on which we may be able to agree. The key to this issue is the linchpin between the Privacy Act and the Freedom of Information Act.

Now, in my testimony, I note that I happen to agree with the position of Judge Lamberth that the Privacy Act should be interpreted as applying to the White House. I also say that I believe this is a matter of good faith disagreement, that there are arguments on both sides. But I feel that a faithful reading of the act should be that it applies to the White House. But more importantly, I believe that good policy and good government dictates that it does apply. And as we move away from the litigation currently in the court, that's the issue upon which there may be agreement, regardless of who's in the White House in a matter of months. That's an issue on which I think that there are very essential values in our government at stake. And I believe there are very few compelling arguments raised by the White House as to why it should not apply.

Now, the difference between these acts could be described as a difference between a sword and a shield. That is, FOIA in some ways is a sword given to the American people. It's a sword because it forces the government to yield information. It is sometimes information that's quite embarrassing to the government. The Privacy Act is different. The Privacy Act is a shield. It's a shield to keep citizens from being abused through the release of personal information. It's a very important guaranty to every individual citizen.

Now, obviously, most citizens are not going to be the subject of a target of the White House, thank God. But when you are a target of the White House, there is little that an individual citizen can do. When you come under that type of pressure and destruction, there is not enough of you to pour into a shot glass at the end of the day because you just don't have the ability to defend against that type of attack.

Now, we have two decisions written by two very good judges, Judge Lamberth and Judge Green. They disagree, obviously. The *Alexander* decision found that agencies under the Privacy Act do include, as the act is written, members of the White House. The *Barr* decision concludes otherwise. Now, in my view, Judge Green's analysis is misplaced, as much as I respect her. And it's not just because she's a graduate of my institution, but even our graduates can be slightly wrong on occasion.

The reason I disagree with Judge Green is, first of all I disagree with the use of legislative history. It's of course funny to hear Associate Justice Scalia cited in this controversy, because there's nobody on the face of the planet that hates legislative history more than Scalia.

Mrs. MINK. That's why he's cited.

Mr. TURLEY. That's a very good point. On the issue of legislative history, we have two essential problems. One is when a statute is plain on its face, there usually is not a call to go to legislative history. And the reason is that judges can do great mischief through use of legislative history. As you know, legislative history often compiles hundreds of pages and hundreds of statements.

Now, I have to acknowledge that the FOIA legislative history is pretty core legislative history. But the problem is that both the Privacy Act and FOIA are crystal clear on their face. The language is quite express, and normally faced with that type of language, courts do not go to legislative history. And if there's an issue of conflict, they leave it to those who made the law. They leave it to you to change the law.

But putting aside that issue, which admittedly is a close one, I have significant problems with Judge Green's view that her interpretation of the Privacy Act is compelled by constitutional concerns. Now, it is very much the case that courts are supposed to avoid constitutional questions in statutory interpretation. But not all constitutional arguments are equal. There are powerful and good-based—well-based constitutional questions, and there are those who are not as well based. I consider the constitutional questions raised with regard to the Privacy Act to be not well based. The reason is that nothing in the Privacy Act stops the President from carrying out his duties or functions. Quite to the contrary. I honestly don't think that if the act was applied to the White House that it would have any material effect on those duties or functions.

We have to remember that the Privacy Act has exceptions that protect the White House in most of the areas in which they would be concerned. The only area in which the White House would be restrained is the release of personal information that is damaging to individual citizens. Frankly, I believe that does not offer a very compelling rationale. I certainly don't think that it rises to an issue of a constitutional claim. It's on that issue that I think we can reach middle ground since this institution has a very significant interest in preserving the shield of the Privacy Act.

If the interpretation of Judge Green was correct, we have a rather bizarre situation. Whether it's well based or not, it's certainly bizarre. It means that if a person in the White House who's an FBI agent is carrying a folder with personal information about me, she can't release that information, and she could be charged with a

criminal violation. But if she places it on the desk of an associate White House counsel and that counsel opens it up and calls up the New York Times, suddenly what was a shield for me as a citizen has evaporated. That obviously is not a good policy.

It doesn't make for good government. And I don't see the functional rationale of why the White House should have that authority.

Now, if Congress intervenes, I think that it must realize—and I'm singing to the choir, to the members of this committee that the greatest enemy of privacy is ambiguity and uncertainty. That is always the greatest enemy. It's when you don't know. And right now, because of these decisions, we don't know the scope of privacy protections. Whether we disagree on how the law is written, it must at a minimum be clear.

One of the reasons I believe that good government calls for this shield to be completely protective for citizens is that there are hundreds, as many as 400 people who will be exempted from the Privacy Act under this interpretation. That includes the White House counsel. Yet, many of our worst instances of abuse have come from White House counsel members. I've just written a piece for a symposium documenting the problems we've had in the failure to have clear lines between the roles of government officials in the White House and private counsel. That was best personified by Bernie Nussbaum who actually said, when he came in as White House counsel, that he was like the private counsel to the First Couple. I disagree with that. Such a misguided view creates the type of latent condition in which abuses can occur.

So, if there's one office that should be covered by the Privacy Act it is this office. It's the most political part of the government. It's where the pressures are most severe. It's where the temptation to yield is the greatest.

The greatest disappointment I have with the Clinton administration is not that it's fighting for prerogatives, but it's failure to realize that good government sometimes demands that you yield on a prerogative, not yield to temptation. To yield, because it makes for better government. When the Justice Department says, we haven't thought about whether this is good for the government or not, I am mystified. You have to think about it. It's not just a question of whether you think you have the prerogative, but whether you're going to fight that prerogative in court, to assert it over a judgment that it doesn't make for good government.

Now, these types of hearings sometimes make for more heat than light. But, as we're coming to the end of this administration, I truly believe that we can concentrate on the two different acts and not what we've gone through in the last few years. FOIA and the Privacy Act represent our most noble moments as a people. I truly believe that. FOIA represented a government taking an acquired power and giving it back to citizens. It's an extraordinary thing and, in the Privacy Act, the government created a shield from itself. Those are remarkable acts that set this country apart.

And we now have a significant question of whether one of those acts will be seriously degraded and a major loophole presented. I think we can close that loophole and we can do it together as peo-

ple of good faith, separate from the scandal, but looking at the legacy this body created in these two acts.

I will stop there, and I appreciate your time today.

Mr. MICA. Thank you for your testimony Professor Turley.

[The prepared statement of Mr. Turley follows:]

PREPARED STATEMENT

OF

JONATHAN TURLEY
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Thank you, Mr. Chairman.

Mr. Chairman, members of the Subcommittee, my name is Jonathan Turley. I am a professor at George Washington University Law School where I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law. I greatly appreciate the opportunity to speak before you on a subject of considerable importance: the application of the Privacy Act to the Presidency.

I realize that your time is limited and, while I am trained as an academic to speak exclusively in fifty minute increments, I will attempt to be brief in my oral statement this morning. With the approval of the Subcommittee, Mr. Chairman, I ask that my full prepared statement be entered into the record.

I come to this issue as both an academic and a litigator in this area. Much of my academic work has focused on the role and proper

use of statutory interpretation.[1] Sometimes called "legisprudence," this area of study touches on constitutional and policy implications of statutory interpretation that range from separation of powers issues to economic analysis of the law. I also have a long-standing interest in presidential power and the application of federal laws to the Executive Branch as an academic[2] and as a litigator.[3] The Privacy

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[1] See, e.g., Jonathan Turley, A Crisis of Faith: Congress and The Federal Tobacco Litigation, 37 Harvard Journal on Legislation ___ (2000) (forthcoming) (exploring constitutional and legisprudence issues surrounding the tobacco litigation); Jonathan Turley, Through a Looking Glass Darkly: National Security and Statutory Interpretation, 53 Southern Methodist University Law Review 205-249 (2000) (Symposium) (interpretation of statutes in the area of national security); Jonathan Turley, Dualistic Values in the Age of International Legisprudence, 44 Hastings Law Journal 145-275 (1992) (interpretation of statutes in the area of transnational regulation); Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Northwestern University Law Review, 598-664 (1990) (same); Jonathan Turley, Transnational Discrimination and the Economics of Extraterritorial Regulation, 70 Boston University Law Review 339-364 (1990) (same); Jonathan Turley, The Not-So-Noble Lie: The Nonincorporation of State Consensual Surveillance Standards in Federal Court, 79 Journal of Criminal Law and Criminology 66-134 (1988) (interpretation of surveillance statutes on the state and federal levels).

[2] See, e.g., Jonathan Turley, Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege, 60 Maryland Law Review ___ (2000) (Symposium) (discussing the loss

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of presidential privilege during the Clinton presidency); Jonathan Turley, "From Pillar to Post": The Prosecution of Sitting Presidents, 37 American Criminal Law Review ___ (2000) (discussing the constitutional issues surrounding a prosecution of a sitting president); Jonathan Turley, Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, 49 Duke Law Journal 1-146 (1999) (discussing the constitutional issues relating to impeachment, including Article II issues); Jonathan Turley, The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies, 77 North Carolina Law Review 1791-1866 (1999) (discussing the constitutional issues relating to impeachment, including Article II issues); Jonathan Turley, Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President, 67 George Washington University Law Review 735-790 (1999) (Symposium) (discussing the constitutional issues relating to impeachment, including Article II issues); Jonathan Turley, Reflections on Murder, Misdemeanors, and Madison, 28 Hofstra Law Review 439-471 (1999) (Symposium) (discussing the constitutional issues relating to impeachment, including Article II issues); Turley, Through a Looking Glass Darkly, supra, at 205-249 (discussing the constitutional and legisprudence issues relating to national security cases and statutes).

[3] For the purposes of full disclosure, past cases dealing with presidential power issues or executive privilege include my representation of four former U.S. Attorneys General in opposition to "the protective function privilege" asserted by the Clinton Administration. In re Sealed Case, 148 F.3d 1073, 1079 (D.C. Cir. 1998); see also Susan Schmidt, Starr Wins Appeal in Privilege Dispute; Secret Service Fears Dismissed by Court, The Washington Post, July 8, 1998, at A01; Meet the Press, NBC, July 19, 1998 (exchange between Professor Jonathan Turley and former White House Counsels Jack Quinn and Leon Panetta). While I have never represented anyone connected to a privacy claim against the Clinton

Act presents an intriguing question at the heart of these areas, a question with considerable importance to both the federal system and the public at large.

It is my opinion that the Privacy Act can be legitimately applied to the White House[4] under a reasonable interpretation of its language, history, and purpose. However, this is an admittedly close issue that is subject to honest debate.[5] What is abundantly clear, in

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Administration, this litigation successfully defeated a claim of privilege raised by the White House in relation to the Lewinsky scandal.

[4] Specifically, the contemporary question before the federal courts is the application of the Privacy Act to the Executive Office of the President. See, e.g., In Re: Executive Office of the President, 215 F.3d 20 (D.C. Cir. 2000); Alexander v. Federal Bureau of Investigation, 971 F. Sup. 603 (D.D.C. 1997). For simplicity, I will refer to this office as the "White House" or the "Office of the President."

[5] See Alexander v. Federal Bureau of Investigation, 971 F.Supp. 603, 606 (D.D.C. 1997) (acknowledging that the decision to apply the Privacy Act to the White House involves a question of first impression with countervailing precedent in FOIA cases). Judge Lamberth correctly certified this question for appeal and frankly acknowledged that "there is substantial ground for difference of opinion". In Re: Executive Office of the President, 215 F.3d 20, 22 (D.C. Cir. 2000) (quoting Alexander v. FBI, No. 96-2123 (D.D.C. Aug. 12, 1997)). As will be obvious, I tend to agree with Judge Lamberth's

my view, is that the Privacy Act should apply to the White House as a matter of good government and policy. To that end, I believe that the statute should be construed as applying to the White House but that Congress should further enact legislation to eliminate any lingering doubts as to gaps in the statute's coverage. Ironically, if there is one governmental office that should be covered by this statute it is the Office of the President. The Office of the President is the most political part of the Executive Branch. The intense political pressures and activities of the White House create enormous potential privacy violations and injuries. It is all too easy for a political operative to yield to the temptation of releasing damaging information to undermine critics or political opponents. The public should not have to rely on the good faith and self-restraint of such officials in the privacy area, particularly given the rather poor record of some past Administrations.

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interpretation of the Privacy Act as faithful to the language and history of the Act.

Ultimately, my views on the "correct" conclusion of this debate are less important than the process used to reach that conclusion. In a Madisonian system, issues of this kind belong in the legislative branch where they are subject to open and deliberative debate. Absent a decision from Congress to narrow the broad language of the Act, the courts should give full force to its language and its laudable purpose. If the Administration believes that the Act places undue restriction on its activities, it has two options. First, it may argue in the courts that these restrictions violate presidential powers and privileges contained in Article II of the Constitution. This attack is rather unlikely since existing privileges are sufficient to protect the confidentiality of communications and the functioning of the White House. Second, it may ask Congress for a change in the law to allow greater flexibility in the inner sanctum of the President. It is for this reason that the hearing today is so important. We are near the end of the Clinton presidency. It is now time for people of good faith to address the lingering questions left in the aftermath of the crisis. The

future of the Privacy Act is one of those questions and certainly worthy of the attention of this body.

The Privacy Act and the Freedom of Information Act

The Freedom of Information Act (FOIA) is one of the great political reforms in our nation's history.[6] Through FOIA, Congress endeavored to change a long history of governmental secrecy and information control with "a general philosophy of full agency disclosure."[7] In some way, FOIA can be accurately described as the sword given to citizens to monitor the conduct of, and to disclose wrongdoing by, their government. Conversely, the Privacy Act was the shield given to citizens to deter the government from monitoring or disclosing private conduct of citizens. This difference in statutory purpose is critical to the interpretive issues discussed below.

On its face, the Privacy Act is sweeping in both its scope of covered information and its application to the government agencies.

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6 5 U.S.C. §552 (1994 & Supp. 1998)

7 S. Rep. No. 813, 89th Cong., Ist Sess., 3 (1965); see also Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 772 (1989).

The Act strictly limits the right of the government to maintain information about individuals[8] and mandates safeguards for that information that may be properly maintained.[9] To deter violations of this important Act, Congress gave access to the federal courts for aggrieved citizens to sue federal agencies and seek damages.[10] It is the definition of federal "agency" that has caused such controversy in this area. In defining this critical term, Congress incorporated by reference the definition of federal agency found in section 552(e) of FOIA. FOIA was intentionally written to broadly apply to the Executive Branch and its definition of federal "agency" expressly includes "the Executive Office of the President" in that definition.[11]

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8 5 U.S.C. §552a(e)(1) (establishing that federal agencies can maintain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency as required to be accomplished by statute or executive order of the President.").

9 5 U.S.C. §552a(e)(10) (imposing a requirement on all agencies to safeguard such information "to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity.").

10 5 U.S.C. §§ 552a(g)(4).

11 The relevant passage reads

> For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive

Despite the express language of FOIA, the courts have imposed a different meaning from the plain meaning of the statute.[12] In Kissinger v. Reporters Comm. for Freedom of the Press,[13] the Supreme Court ruled that the definition of "agency" would not be read as including the presidential advisers and close staff members.[14] This was based on the Courts view of the "unambiguous" legislative history indicating the narrower view of the term "agency."[15] While

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> department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(f) (emphasis added).

12 Courts have ruled that a variety of federal offices fall outside of the definition of "agency" under FOIA. See, e.g., Armstrong v. Executive Office of the President, 90 f.3d 553, 557-66 (D.C. Cir. 1996) (National Security Council); Meyer v. Bush, 981 F.2d 1288, 1292 (D.C. Cir. 1993) (Task Force on Regulatory Relief).

13 445 U.S. 136 (1980).

14 Id. at 156.

15 Id. There was indeed legislative history that suggested an intent to incorporate the meaning of "agency" contained in the decision in Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), which followed a narrower meaning. See H.R. Conf. Rep. No. 93-1380, at 14-15 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6285 (noting that "[w]ith respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in Soucie v.

such legislative history existed, the decision resulted in a significant change from the express language of the Act. Unfortunately, the narrowing of this term resulted in hundreds of members of the Executive Office of the President being moved outside of the confines of FOIA (and potentially outside of the confines of the Privacy Act.)[16] Such significant changes are inherently problematic when based on legislative history, particularly a history with conflicting notions of covered federal offices. For example, Congress indicated that its intended definition of "agency" included "entities 'which perform governmental functions and control information of interest to the public.'"[17] Certainly, the exempted staff of the White House would appear to meet this definition. Such policy implications and conflicting legislative history should give pause for any court in

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David.)." This narrower view specifically did not "includ[e] the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." Id.

16 See Meyer v. Bush, 981 F.2d 1288, 1293 n.3 (D.C. Cir. 1993) (noting that the personal staff of the president "would emcompass . . . approximately 400 individuals employed in the White House Office.).

17 H.R. Rep. No. 93-876, at 8 (1974).

abandoning the plain meaning of a statute for a narrower, judicially imposed meaning.[18] Although the Supreme Court's interpretation is not unreasonable, the decision to judicially narrow the meaning of FOIA raises some constitutional and legisprudential concerns that should ordinarily be avoided by leaving the clarification of the law to those who made it.[19]

Putting aside the merits of the Kissinger decision, Congress and the courts must face the secondary question of whether it is appropriate to import the judicially augmented meaning of "agency"

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[18] It is notable that the Supreme Court has considered such legislative history as relevant in past decisions on the meaning of FOIA. See, e.g., Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976) (citing legislative history).

[19] The courts have issued other narrowing decisions on the meaning of "agency" including the ruling in Dong v. Smithsonian Institution, 125 F.3d 877 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 2311 (1998). In Dong, the Court of Appeals for the District of Columbia ruled that the Smithsonian Institution was not an agency under the meaning of the Privacy Act. Id. at 878. This decision, in my view, was not as problematic as rulings excluding White House staff due to the unique make up of the Smithsonian Institution and board. The Privacy Act expressly excluded "such entities as Congress, the federal judiciary, governments of U.S. territories, and the government of the District of Columbia." 5 U.S.C. 551(1). The

under FOIA into the Privacy Act. Despite the fact that Congress incorporated the meaning of "agency" from FOIA before it was narrowed by the courts, it is claimed that the Privacy Act must be necessarily narrowed retroactively to fit the later meaning given to FOIA. Judge Lamberth correctly isolated the operative interpretative issue when he noted in his opinion in the Alexander case that the judicial construction given the FOIA language is not necessarily relevant to the Privacy Act given the different purposes of the two acts. Judge Lamberth noted that "[w]hen passing FOIA, Congress was addressing the need for individuals to have access to government information" while "[w]hen passing the Privacy Act, Congress was addressing the need for individuals to have protection for their privacy concerns."[20]

Smithsonian is neither involved in typical Executive Branch activities nor appointed or controlled by the President. Dong, 125 F.3d at 879.

[20] Alexander, 971 F. Supp. at 606.

Judge Lamberth's analysis was both cogent and well-supported in distinguishing the two statutes.[21] FOIA, as noted earlier, is like a sword given by the government to its own people to monitor government conduct and, to some extent, uncover government misconduct.[22] Nevertheless, FOIA was always fashioned as a balancing between the "public interest in

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[21] Judge Lamberth's decision, however, is now at odds with a recent countervailing decision by Judge June Green who ruled that "a fair construction of the Privacy Act . . . exclude[s] the President's immediate personal staff from the definition of 'agency.'" Barr v. Executive Office of the President, No. 99-CV-1695 (D.D.C. Aug. 9, 2000) (Green, J.). Judge Green, however, bases this ruling in part on the fact that "applying the FOIA definition equally to the Privacy Act, properly avoids constitutional questions." Id. There is, of course, little question that it is proper to avoid such questions in statutory interpretation. Yet, not all constitutional questions demand such circumvention. I fail to see any compelling constitutional argument against the application of the Privacy Act. While there are certainly policy issues to be considered by Congress, arguments that this Act would impair a constitutional function are misplaced in this context. A president's use of information is not unlimited but tethered to his constitutional duties. The alternative view would yield a president who can use personal information for any purpose to any harmful consequence. This runs against the grain of our system and would decouple the president from the system of laws that demands both his enforcement as well as his own submission.

freedom of information and countervailing public and private interests in secrecy."[23] The Privacy Act constitutes the "shield" to FOIA's "sword." In protecting "individual[s] against an invasion of personal privacy,"[24] the Privacy Act is not subject to the same number of exceptions or balancing tests that are integral to FOIA. There is every reason to believe that Congress wanted this shield to cover the entire executive branch and specifically the White House. Moreover, even if one disagrees with the exemption of such a significant number of White House officials under FOIA, one can see a plausible argument that the costs of subjecting these advisers to FOIA outweigh the benefits. Given the highly political and confidential nature of some of this work, FOIA could be seen as presenting a certain chilling effect for presidential advisers.

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22 Sweetland v. Walters 314 U.S. App. D.C. 9, 60 F.3d 852 (D.C. Cir. 1995) ("FOIA is intended to enlighten citizens as to how they are governed").

23 Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067, 1076 (D.C. Cir. 1971) (quoted in Alexander, 971 F. Supp. at 606).

Conversely, the Privacy Act is meant to present a chilling effect for such officials to the deter the abusive use of personal information against citizens. The White House argument to protect these officials from mandatory disclosures under FOIA has little resonance in the area of the Privacy Act. It would be perfectly consistent for Congress to exempt White House officials from having to disclose information to citizens under FOIA while barring the same officials from disclosing personal information about citizens. Such an approach seems entirely balanced and reasonable.

Given the fact that the narrowed FOIA definition of "agency" was judicially imposed on that statute and tailored to fit the purpose of FOIA, there is a compelling basis to apply a different meaning of "agency" in the two statutes.[25]

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[24] Section 2(a)(4), Preamble to the Privacy Act, 5 U.S.C. §552a(a) note.

[25] It was argued in the Alexander case that the Sunshine Act was also construed to limit the meaning of "agency" based on a similar incorporation provision. 971 F. Supp. at 606 - 607. However, the district court noted that "[u]nlike the Privacy Act, the Sunshine Act

Admittedly, this runs against the statutory incorporation of the FOIA definition of "agency." However, once the courts grafted on a new meaning to the statutory language in FOIA, a distinct interpretative line of cases was created that does not readily translate in the area of the Privacy Act.

Any statutory construction of the Privacy Act raises core Madisonian issues for our system. Our tripartite system was designed to force divisive and potentially explosive issues into a legislative core.[26] This legislative process was carefully calibrated to force compromise and debate. It is vital both to ensuring accountability among our elected officials and to maintain democratic values in our political system. Judicial interpretation can at times undermine those values and play a destabilizing role for the system. A judicial interpretation

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serves the same purposes as FOIA by providing individuals with access, not protection for individual rights." Id. at 607.

[26] See generally United States Senate, Committee on the Judiciary, "Big Government Lawsuits: Are Policy Driven Lawsuits in the Public Interest?," November 2, 1999 (testimony of Professor Jonathan Turley

narrowing a statute can bring about a significant change without any of the balancing and compromise of the political process. Judge Easterbrook and others have advocated textualism to leave the "legislative market" to its own devices and outcomes.[27] One does not have to be a strict textualist, however, to favor a broader interpretation of legislation like the Privacy Act. Others, like Macey, advocate "gap-filling" to advance the stated purpose of a statute and leave it to Congress to divert from that purpose in narrowing a statute.[28] Under

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on the Madisonian implications of federal governmental litigation in areas of controversy).

[27] See Jonathan Turley, Through a Looking Glass Darkly: National Security and Statutory Interpretation, 53 SMU L. Rev. 205, 243-47 (2000); Jonathan Turley, Transnational Discrimination and the Economics of Extraterritorial Regulation, 70 B.U. L. Rev. 339, 354-65 (1990) (citing various works of other authors in the area).

[28] This public choice critique is part of a wider "family" of positive political theory that share "a core general presumption that political behavior is to be explained as the outcome of rational (and often strategic) actions by relevantly situated individuals within some set of defined institutional boundaries." Jerry Mashaw, Explaining Administrative Process: Normative, Positive and Critical Stories of Legal Development, 6 J.L. Econ. Organization, Special Issue 1990, at 280 (quoted in Daniel A. Farber & Philip P. Frickey,

either Easterbrook's or Macey's approaches, a court would favor an interpretation of the Privacy Act to apply to the broader definition of "agency" contained in the text of FOIA.

The Need for Legislative Action

The controversy over the scope of the Privacy Act is likely to continue absent a legislative correction. People of good-faith can disagree on the different meaning of "agency" under either FOIA or the Privacy Act. There is little reason to continue that uncertainty or to leave this matter to continuing litigation. Ambiguity and uncertainty are the greatest threats to privacy. They create the opportunity for mischief and a chilling effect on citizens unsure of their protection.

The use of the FOIA definition for "agency" was understandable at the time of the enactment of the Privacy Act as part of a package of legislative amendments of FOIA. The post-enactment changes in the meaning of "agency" under

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Foreword: Positive Political Theory in the Nineties, 80 Geo. L.J. 457, 458 (1992)).

FOIA, however, create a need for a reexamination of the incorporation of the FOIA definition. The interpretation given to the Privacy Act by the Clinton Administration is, in my view, antithetical to the public interest. As the recent crisis demonstrated, personal attacks and damaging leaks are a predictable by-product of political instability and scandal. The individuals closest to these controversies are the inner circle of White House officials around the President. During the Clinton crisis, White House officials often engaged in open rebuttals of allegations made against the President that related to his personal life. I have criticized this role of government employees and the lack of clear lines at the White House as to those areas that should have been left to private counsel or political figures.[29] The lack of such bright lines is particularly dangerous when coupled with claimed exemptions from the

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[29] See Jonathan Turley, Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege, __ Maryland Law Review ___ (forthcoming symposium issue/2000).

Privacy Act.[30] These are the government employees who are most likely to yield to damaging disclosures and the White House is the environment which most encourages such political "hardball." This is not a reality confined to the Clinton Administration but a frank understanding of the concentrated political pressures directed at the White House staff.[31] Certainly, the rampant abuses of the Nixon Administration,

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[30] For example, the White House Counsel is viewed as falling outside of the definition of "agency" under FOIA. See National Security Archive v. Archivist of the United States, 909 F.2d 541, 545 (D.C. Cir. 1990). Yet, some White House Counsels, special counselors, and staff have been at the heart of controversies over personal attacks. See Turley, supra, Paradise Lost. A recent example was Bernard Nussbaum who viewed the position of White House Counsel as serving the President as would private counsel. Id.; see also Jim Oliphant, Losing Privilege; A Scandal-Scarred Legacy for Future Presidents, Legal Times, March 6, 2000 at 20; Neil A. Lewis, Wherein a 'New York Style Litigator' is Cast as the Heavy in the Whitewater Affair, The New York Times, July 28, 1995, at 18 (quoting Nussbaum friend, Webster Hubbell, as criticizing Nussbaum as "too eager to get involved in matters from which he should have withdrawn.").

[31] Moreover, the narrow interpretation of "agency" pre-dates the Clinton Administration, though it was not advanced in litigation until the Clinton Administration.

which gave life to the Privacy Act, demonstrate that this is a problem that stretches across party lines.

Conversely, there is little compelling basis, in my view, to argue that the application of the Privacy Act to the White House represents a serious burden or threat to the presidential staff. A violation of section 552a(i) requires a showing of an "intentional or willful" violation,[32] a particularly high standard that should exclude most acts of negligence or inadvertence.[33] It is also important to remember that the Privacy Act contains two exceptions that significantly reduce its effect in some areas. First, the Act exempts the maintaining of information for "routine use."[34] This exception allows the disclosure of information that is "compatible with the purpose for which [the information] was collected."[35] Likewise, the Act exempts all information that would be

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32 5 U.S.C. 552a(g)(4).

33 Moreover, in civil cases, any liability falls on the government as opposed to individuals. 5 U.S.C. § 552a(g)(1)(D). Thus, any "chilling effect" of applying the law to White House staff would be due largely to the discovery process and the loss of personal standing for an official.

34 5 U.S.C. 552a(b)(3).

35 5 U.S.C. 552a(a)(7).

obtainable under FOIA.[36] Under this latter exception, information that is not obtainable under FOIA includes "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[37] This constitutes core material that the Privacy Act was most concerned to protect and information that the White House should not need to disclose in the normal course of business. It is this FOIA "exception 6" material that is at the center of some of the litigation involving the Clinton Administration.[38]

It is difficult to see the compelling basis for an exemption for White House officials from the Privacy Act while it is abundantly obvious why such protections could be important to protect citizens

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36 5 U.S.C. 552a(b)(2).

37 5 U.S.C. 552(b)(6).

38 The most obvious example is the allegation by Linda Tripp that Clinton officials at the Defense Department disclosed she had been arrested for shoplifting as a teenager. While these officials may not have been located at the White House, the case is a chilling example of the potential abuse of privacy by misguided political appointees. See Privacy Wrongs, San Diego Union-Tribune, April 4, 2000, at B-6 (discussing the Tripp and Willey allegations); Jerry Seper, Appeals

from abuse. Ultimately, this is a political question that belongs in a committee room and not a courtroom. They touch on essential aspects of our view of the democratic system and the rights of an individual citizen against the power of the State. FOIA and the Privacy Act represent two of our most noble moments as a people. They represent a rare instant when a government yielded acquired power back to its citizens. It is a precious legacy that should not be curtailed by judicial construction or legislative acquiescence. I encourage the Subcommittee to act to reinforce the Privacy Act by reaffirming not just the original scope of its application but the underlying values that led to its enactment.

I would be happy to answer any questions that the Committee may have on my testimony.

Panel Upholds Ruling Willey's Privacy Was Violated, The Washington Times, May 27, 2000 (discussing Willey allegations).

Mr. MICA. I'd like to recognize now—and apologize if I've gotten the pronunciation wrong—is it Roger Pilon?

Mr. PILON. It's Pilon.

Mr. MICA. Who is a constitutional scholar with the CATO Institute. Pleased to welcome you and recognize you for your testimony, sir.

Mr. PILON. Thank you, Mr. Chairman, and members of the committee. And thank you for inviting me to be here today. I am Roger Pilon. I'm vice president for legal affairs at the CATO Institute where I direct the Center for Constitutional Studies.

My purposes here are threefold: First, I want to argue that the President and his immediate advisors are already subject to the requirements of the Privacy Act. And I will do that with reference to some of the larger presumptions and burdens of proof, the framing of the issue that seems to me is too little done.

Second, I want to argue with respect to any ambiguities there may be on that point that Congress should indeed act to correct those.

And third, I'd like to make a few political points, drawing from my own experience litigating against the Justice Department under the Privacy Act, because I think that bears directly on points that have been raised by you, Mr. Chairman, and by Mr. Cummings.

I'm not going to, as the final witness, repeat the legal issues that are before us; I'll just simply summarize those. As we know, the two acts, the Freedom of Information Act [FOIA], and the Privacy Act are at issue here. And the question is whether the explicit language that applies both acts to the White House is to be drawn upon in interpreting and applying the Privacy Act, or whether the exception that came out of a conference report with respect to FOIA is to carry over to the Privacy Act as well.

I would frame my remarks by simply saying that if the latter is the case, why on Earth would Congress have ever applied that exception to the Privacy Act? Because it creates such a gaping hole in the Privacy Act, as has already been brought out, that it leads us to ask what was Congress thinking of if it meant to apply that conference report exception for the FOIA to the Privacy Act as well?

Now, it goes without saying, of course, that congressional intent, especially when it runs contrary to explicit text, is always a difficult jurisprudential matter, and that's been proven in the litigation in these cases, the two cases that have recently been litigated on the Privacy Act. In Judge Lamberth's case, the *Alexander,* case and the FBI found that the White House was covered by the Privacy Act. In August, however, Judge June Green found, in Congressman Barr's case, that it did not apply. So we have the split right there at the district court level.

So let me try to frame these issues—given that Congress did not make its intent clearly known as to whether the FOIA exception was meant to apply to the Privacy Act. And here there's no substitute for going back to first principles. And as Chief Justice Rehnquist announced in *United States* v. *Lopez* in 1995, there is no principle that is more basic than the principle known as the Doctrine of Enumerated Powers, which says that Federal officials, whatever the branch of government, may act only from authority

delegated by the people through the Constitution. Absent such authority, they have no power to act.

And so the question before us is what authority does the President have to release documents as he has done? Pursuant to his enumerated powers, he may acquire, maintain, and disclose personal information about citizens, but that's not an unlimited power. It's limited at the most general level by his enumerated powers. Thus, even absent a Privacy Act, the President may not disclose information obtained pursuant to his authorized powers for reasons unrelated to such powers. He has the executive power, he has the power to see that the laws be faithfully executed. But I submit that he will be hard pressed to answer, in service of what constitutional authority or what statutory authority does he release documents, as he has done in numerous cases?

So what is so troubling about June Green's opinion in Representative Barr's case is that she seems oblivious to these fundamental presumptions and burdens of proof. She seems to be in total deference to the executive branch in this, as if the President were not already constrained, absent the statute, as to what he can do. And she recites, for example, the arguments from the Justice Department to the effect that the application of the Privacy Act to the White House would restrict what information the President may disclose and to whom it may disclose. That strikes me as hardly problematical. And yet she poses it as raising a serious constitutional question.

Here I join Professor Turley in saying that these constitutional concerns, as she put it, are merely that; they are concerns, they are not conclusions. In fact, she goes on to the old shibboleth that statutes should be construed to avoid doubts about constitutionality. That, of course, is only a prima facie presumption. It only gets the argument off the ground. It remains then to litigate the case by bringing arguments on the opposite side. And here Judge Green cites as a corollary the principle that Congress, in enacting legislation restricting Presidential action, must make its intent clear. Congress has not done that here, she continues. Therefore, the implication seems to be that because Congress did not make its intent clear, the President can do pretty much what he wants to do.

That, I submit, gets the presumptions of our system exactly backward. The premise of our system is not all that is not retained by the people is given to the government; rather, as the 10th amendment makes clear, the presumption is that all that is not given to the government is retained by the people. That is the elementary presumption of our system of government. It isn't that the President has plenary power and it's now up to us to try to find rights to assert against him. It's the other way around, namely, that the President's powers are strictly enumerated, just like those of Congress. The burden is upon government to show it has a power, not upon the citizen to assert rights against that power.

Now, none of this goes to the merits, it's just speaking to the procedures of the case. But when we go to the merits, it seems to me that Judge Lamberth far and away had the better of the argument when he looked at the functions of the two acts. Indeed, in a democracy, the function of the FOIA act is to see that information is readily available. And in a liberty-respecting free society, the func-

tion of the Privacy Act is to see that the rights of the people to be secure in their private affairs and to have information about them that is needed by the government retained in documents that are secure.

Indeed, the exceptions under FOIA preclude release, whereas the exceptions under the Privacy Act allow release. And it is the burden upon those who are asserting the exceptions to carry that case forward. So in sum, Judge Lamberth got it right: The two acts serve very different purposes. In fact, as I said a moment ago, it's hard to imagine why Congress ever would have excluded the White House from coverage under the Privacy Act if it had noticed the gaping hole that would exist in the act. Any administration that wanted to release damaging information about a person could then simply channel it through the White House Office, which is the most advantageous place to release such information in any event. Indeed, one might add, that if there is any agency that should be covered by the Privacy Act, it's the White House.

Now let me just simply conclude on a personal note. I litigated under the Privacy Act when I was under investigation for, of all things, espionage when I was serving in the Reagan Justice Department. My wife at the time was up for Assistant Secretary of the Interior, and we were both charged with espionage. An investigation was conducted. At the end of 9 months we were cleared. We thought the case was over. A year later, however, the case went public when the Office of Professional Responsibility, of all offices in the Justice Department, released its annual report. There followed a complaint from us to the Justice Department another 9-month investigation, two more clearances of us, and finally a profuse apology from the Justice Department to the effect that this would never happen again, and a $25,000 payment to offset legal fees.

Two days after the press reports on that, however, another leak occurred. We found out about it 3 months later when we read it in the AP wire service and in the newspapers. At that point we did what every red-blooded American would do: We sued. The case went for 6 years longer, as the Justice Department fought us every step of the way.

One of the noteworthy aspects of this case is that it raises precisely the issue that you, Mr. Chairman, and Mr. Cummings raised, the possibility of sending a document to someone not covered by the Privacy Act. Here it's the White House. In our case, it was a former Justice Department employee. The Department argued that it had not "disclosed" the document because that employee had seen the document when he was in the Justice Department, and you cannot disclose a document to someone who had previously seen it.

Incredibly, Judge Harold Green, in a two and a half page opinion, bought that argument. But a unanimous appellate court overturned him. And in fact, at that point the Justice Department settled not for $25,000, but for a quarter of a million dollars of the taxpayers' money, to say nothing of the money that was spent in the litigation.

Now, I raise this case for a simple reason. First, it's a clear example of exactly what it is that Mr. Cummings and you, Mr. Chair-

man, were concerned about: Why couldn't someone from another department take this document to the White House? Of course, that other person, as Mr. Walden said, would be subject to violations under the Privacy Act. However, the White House itself would not be subject to any sanctions as the Justice Department is currently interpreting the act.

Any my case, after all, involved the watchdogs, the Office of Professional Responsibility, the office that is in charge of overseeing the ethics of the rest of the Justice Department. Yet they were the ones who leaked the document. It was the Director who tried to release the document and had it handed back to him by the former Deputy Attorney General. And then the Director's Deputy finally leaked the document by faxing it out to a former official, who turned right around and faxed it to the Associated Press and to ABC News.

All of this reminds us of Lord Acton's adage of a century ago, that power tends to corrupt; absolute power corrupts absolutely; which, of course, was understood implicitly by the Founders, which is why they separated and divided power as they did in our constitutional framework.

The Privacy Act is a statement about the perils of power. If it reaches anywhere, it should reach the most powerful officer in the Nation, where power is most susceptible to abuse, as this administration has demonstrated in spades.

Thank you, Mr. Chairman.

Mr. MICA. Thank you for your testimony Mr. Pilon. Also the other witnesses.

[The prepared statement of Mr. Pilon follows:]

Statement

of

Roger Pilon, Ph.D., J.D.
Vice President for Legal Affairs
Director, Center for Constitutional Studies
Cato Institute

before the

Subcommittee on Criminal Justice, Drug Policy, and Human Resources
Committee on Government Reform
United States House of Representatives

September 8, 2000

"The Presidency and the Privacy Act"

Mr. Chairman, distinguished members of the subcommittee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies.

I want to thank you Mr. Chairman for inviting me to testify at this hearing of the subcommittee on "The Presidency and the Privacy Act." As the final witness today I will try not to repeat what others have already covered but instead will simply summarize that material by way of background. My purposes are threefold. First, with respect to the main issue before the subcommittee, I will argue that the president and his immediate advisers already are subject to the requirements of the Privacy Act. In so arguing, I will focus especially on the framing of the matter. Second, I will argue that, in any event, Congress should make that coverage more explicit than it presently is. And, third, I will offer a few reasons why Congress should so act, based on my own experience with the Privacy Act.

Is the President Subject to the Privacy Act?

Two acts of Congress are mainly implicated in this question. In brief, the Privacy Act was written to afford individuals access to certain information about them contained in government records and to protect that information from unauthorized disclosure by placing restrictions on officials regarding the acquisition, maintenance, and disclosure of the information. The Freedom of Information Act (FOIA) was written to afford the public a right of access to government documents and information.

The Issue in a Nutshell

When Congress amended FOIA in 1974 it defined those agencies covered by the act to include "the Executive Office of the President" (EOP). But the EOP is made up of several components, ranging from the Office of Management and Budget, the National Security Council, and others to the Office of the President (sometimes referred to as the White House Office), which includes the president and his immediate advisers. In its Conference Report, therefore, Congress sought to qualify FOIA's definition of "agency" by writing that the term "Executive Office of the President ... is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." Shortly thereafter Congress enacted the Privacy Act. In doing so, it defined "agency" by express reference to the definition contained in FOIA. The nub of the matter, therefore, is whether Congress meant to include the qualification contained in the FOIA Conference Report in its definition of "agency" for Privacy Act purposes. Nothing in the records of Congress speaks directly to that question.

It goes without saying that congressional intent, especially when it runs contrary to explicit text, is always a difficult jurisprudential matter. Thus, when then Justice William Rehnquist applied FOIA in 1979 in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), he found congressional intent to be clear enough to exclude the Office of the President from FOIA's coverage.

But when Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia faced the problem more recently of applying the Privacy Act, he drew upon the plain language of the act, referencing the FOIA definition of "agency," not upon the qualification the Conference Report introduced in the FOIA context. *Alexander v. FBI*, 971 F. Supp. 603 (D.D.C. 1997); *Alexander v. FBI*, 193 F.R.D. 1 (D.D.C. 2000). And he did so because the two acts serve "very different purposes." FOIA is meant to afford openness, except for good cause. By contrast, the Privacy Act is meant to protect privacy, except for good cause. Lamberth reasoned, by implication, that if Congress had thought about it, it would not have left so gaping a hole in the Privacy Act as would happen if the Office of the President were excluded from the act's coverage by invoking the FOIA exception when applying the act.

More recently still, however, Judge June L. Green of the same district court ruled that the Privacy Act does not reach the Office of the President. *Barr v. Executive Office of the President and U.S. Department of Justice*, Civil Action No. 99-cv-1695 (D.D.C. Aug. 9, 2000) (Green, J.). Regarding congressional intent, Judge Green writes that "[t]he legislative history ... does not demonstrate that the [Privacy] Act considers the White House Office to be an 'agency.' " But in addition she raises two other points. First, statutes should be construed to avoid doubts about constitutionality. Here, the Justice Department has contended that Privacy Act restrictions on the president would raise constitutional concerns. Second, in enacting legislation restricting presidential action, Congress must make its intent clear. Here, Congress has not clearly brought the White

House Office under the Privacy Act. Thus, by applying the FOIA exception to the Privacy Act, constitutional questions are avoided.

Framing the Issue

Given that Congress did not make its intent clearly known about whether the FOIA exception was meant to apply to the Privacy Act, there is no substitute for "first principles" in framing the issues. And no such principle is more fundamental than the one Chief Justice Rehnquist articulated in 1995 in *United States v. Lopez*, 514 U.S. 549, 552 (1995): "We start with first principles. The Constitution establishes a government of enumerated powers." The doctrine of enumerated powers, which is the centerpiece of the Constitution, stands for a very simple, but profoundly important, point: federal officials, in each branch of the federal government, may act only from authority delegated by the people, through the Constitution. Absent such authority, they have no power to act.

Thus, when Congress enacted the Privacy Act, it was not restricting powers the president had; nor was it giving citizens rights they did not already have. Rather, it was simply making explicit the limitations on officials that should already have been implicit. Pursuant to his enumerated powers, the president may acquire, maintain, and disclose personal information about citizens. But those means are not unlimited. They are constrained by the enumerated powers themselves. Thus, even absent a privacy act, the president may not disclose information obtained pursuant to his authorized powers for reasons unrelated to such powers. He has no authority to do so. When it passes such an act, therefore, Congress should be seen neither as expanding nor as contracting the president's powers—provided it stays within the bounds of its own power—but rather as more precisely defining those powers. The courts might have done that on a case-by-case basis, under the doctrine of enumerated powers. But Congress might do so as well, in a more systematic way.

What is so troubling about Judge Green's opinion is its apparent deference to the executive branch, as if the president were not thus constrained absent the statute. Thus she cites, as background for her conclusions, Justice Department arguments to the effect that "application of the Privacy Act to the White House Office would restrict what records the President may keep and from whom the President may obtain information, … would require the President to disclose certain information to individuals from whom he seeks his information, … as well as restrict what information the President may disclose and to whom it may be disclosed." The implication seems to be that the president is not already so restricted, not even implicitly; for these restrictions, she continues, again following the department's line of argument, "would raise constitutional concerns, including separation of powers and Article II confidentiality."

To be sure, they would. But without proper analysis, they are only constitutional "concerns," not conclusions. And there is no analysis here, much less proper analysis. Instead, we find the modern shibboleth, that a statute should be construed to avoid doubts about its constitutionality. Surely that is correct as a prima facie matter, but only for that purpose—to get the argument off the ground, so to speak, after which objections, such as

those from a consideration of enumerated powers, may tip the balance. Yet when Judge Green cites "a corollary" of that principle—"that Congress, in enacting legislation restricting presidential action, must make its intent clear"(and Congress has not done that here)—the implication seems to be that, absent such clear articulation of congressional intent, the president's power is plenary. Judge Green concludes, in fact, that "Congress has not *clearly* extended the Privacy Act to the White House Office." (emphasis added) Thus, presumably, the White House may do as it pleases.

That gets the presumptions of our system exactly backwards. The premise of our system is not "All that is not retained by the people is given to the government." Rather, as the Tenth Amendment makes clear, it is "All that is not given to the government is retained by the people." Thus, the burden is on government to show that it has a power, not on people to show that they have rights. It falls to the White House to show that it has the powers the Justice Department claims for it. It does not fall to individuals to show that they have rights that trump the otherwise plenary powers of the president. If the president can show that he has the powers in question, then Congress may not restrict them (or expand them), even if it does so "clearly." If he cannot make that showing, then any congressional articulation of those limits would merely make explicit what is already implicit. It would not amount to a restriction on the president's powers, since he has no such powers.

That same concern for presumptions and burdens of proof arises in the case of statutes as well, of course, even if the applications are somewhat different. Thus, here too we find Judge Green writing that "[t]he legislative history … does not demonstrate that the [Privacy] Act considers the White House Office to be an 'agency.'" First, acts don't consider. Congress might, and so the question is whether Congress, through the Privacy Act, considers the White House to be an "agency." Plainly, given the language of the statute, Congress does. But given that language, it is now for Congress to qualify it—clearly, not ambiguously. Thus, it is not for Congress to "consider the White House Office to be an 'agency'"—it has already done that. Rather, it is for Congress to "consider the White House Office *not* to be an 'agency,'" which it has not done clearly, if at all. Thus, the presumption remains standing from a consideration simply of framing the question correctly.

None of this goes to the more particular merits of the matter, of course. Rather, it is to argue simply that when the issues are better framed, the question is not only whether Congress exempted the president from the Privacy Act—I do not believe that it did—but whether, if it had, it would have had a power to do so. I do not believe Congress has such a power because I do not believe that Congress has the power to expand the executive's enumerated powers. All kinds of issues arise here, of course, not least the modern delegation doctrine. But there it is. It can be ignored only on pain of ignoring the very premises of our system of government.

And on those more particular merits, I believe that Judge Lamberth went to the heart of the matter when he took a functional look at the issue, which again can be recast usefully in the language of presumptions and burdens. With FOIA, the presumption is

that, in a democracy, information about government should be readily available. Thus, the exceptions *preclude* release, for specific reasons related to the very purpose of the act—to ensure good government. That is why the White House Office is excluded from coverage—to ensure candid advice from close advisers to the president. But the burden is on those asserting such an exception to the presumption of disclosure, not on those asking for openness.

By contrast, with the Privacy Act, the presumption in a free society is that people have a right to their privacy, a right, especially, to be free from government disclosure of personal information that was acquired for a specific, limited purpose. Thus, unlike with FOIA, the exceptions *allow* release, for specific reasons related, again, to the very purpose of the act—to enable information to be gathered under secure conditions. That is why the White House should be included under the act—to enable it to gather necessary information under secure conditions. But again, the burden is on those asserting such an exception to the presumption of privacy, not on those asking for privacy.

In sum, Judge Lamberth got it right: the two acts serve "very different purposes." In fact, it is hard to imagine why Congress ever *would* have excluded the White House from coverage under the Privacy Act. If it had, a gaping hole would exist in the act. Any administration that wanted to release damaging information about a person could then simply channel it through the White House Office, which is the most advantageous place to release such information in any event. Indeed, one might add that if there is *any* "agency" that should be covered by the Privacy Act, given its purposes, it is the White House Office.

Congress Should Resolve All Ambiguity

Thus, I conclude, from a consideration of both constitutional and statutory principle, that the Office of the President already is included under the Privacy Act. At the same time, to satisfy any ambiguity that remains among those enamored of black letter law devoid of such a framework, it would be well for Congress to make explicit what should already be implicit. Accordingly, I urge Congress to do so. And in that regard, there is no reason why the exceptions to the nondisclosure presumption now in the statute cannot apply with equal force to the White House Office as to any other agency of the executive branch. They are all functionally related. They should enable the White House Office to do everything it is authorized to do, while the act precludes it from doing what it is not authorized to do.

A Brief Personal Note

As I noted at the outset, I have some personal experience with the Privacy Act, which I sketch here in the briefest way simply to give point to the importance of the act. (See *Pilon v. U.S. Department of Justice*, 73 F.3d 1111 (1996).) When I was at Justice serving President Reagan and my wife was up for an appointment as assistant secretary of the Department of the Interior, we came under investigation for, of all things, espionage. It was a harrowing experience, that lasted all of eight years before it was finally over.

Although my wife's appointment never did go through, and I was placed on paid leave from the department for nine months, we were finally cleared, but not before leaks occurred, which fortunately were bottled up during the first phase of the ordeal.

A year after that, however, one of the agencies that had investigated us, the Justice Department's Office of Professional Responsibility, made the investigation public through its Annual Report, egregiously misstating the outcome in the process. We protested to Justice, testified before Congress, and another nine-month investigation followed, with more leaks. At the end, we were cleared two more times, given a profuse apology, promised that there would be no more leaks, and given a $25,000 payment to offset legal fees.

Within two days of the press reports of that settlement, however, another leak occurred, which we would discover only three months later on the AP wires and in the papers. At that point we did what every red-blooded American would do. We sued, under the Privacy Act. Notwithstanding the earlier settlement, the Department of Justice fought us for six more years, during which time we finally discovered the source of the leak—the Office of Professional Responsibility, the office at Justice that is charged with overseeing the professional conduct of the rest of the department. The leak at issue came from the deputy director, who succeeded in getting the document in question out where the director had failed.

In its legal briefs, the department argued, incredibly, that no "disclosure" had occurred under the Privacy Act because the document had been faxed to a former employee who was familiar with it, who in turn sent it to the Associated Press and ABC News. One could not "disclose" something to someone already familiar with it, the department argued. Incredibly, the lower court bought that argument in a two-and-one-half page opinion. The court of appeals reversed unanimously, however, at which point the department decided to settle, this time at ten times the rate of the previous settlement, or $250,000.

Now I raise this case for a simple reason. We should never depend upon the good will of government officials. In my case, after all, it was the watchdogs who needed watching. In reminding us a century ago that power corrupts, Lord Acton was simply repeating a truism that the Founders understood implicitly a century before that when they separated and divided power as they did. The Privacy Act is a statement about the perils of power. If it reaches anywhere, it should reach to the most powerful office in the nation, where power is most susceptible to abuse.

Mr. MICA. At this time I'm going to yield the first round of questioning to Mr. Barr, the gentleman from Georgia. I know he has another commitment. I want to honor that. So we'll yield first to you, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. I'd like to first of all commend you, Mr. Chairman, and your staff for the subcommittee, for putting together a very excellent two panels here today. All of these gentlemen, including Mr. Treanor, have presented, I think, a very clear picture of the problem, whether they wanted to or not. And we've heard from this panel in particular a very, very learned explanation both in terms of constitutional law as well as practical application of Federal statutes of the problem here, and perhaps at least some direction for us in it. And it's that aspect of this that I'd like to address to the panel now. I think we've done a very good job. You all have done a particularly good job of laying out the constitutional issues and the statutory issues here.

The problem is one of remedy. We have a statute, as we all agree, that is clear on its face; that is, the provision of the Privacy Act as it pulled in the definition of agency, which includes the Executive Office of the Presidency. We have, on the other hand, interpretations of that which bring in from the Freedom of Information Act a separate statute with a separate purpose and intent into the Privacy Act in order to justify a limitation on the applicability of the Privacy Act.

Well, if we say OK, we need to address this problem, if we say there is a problem and we need to address it by proposing an amendment to the Privacy Act, do we not run a risk of setting a precedence that a statute clear on its face, for which you really shouldn't need to go into legislative history for another statute, has to be amended? How do you address this question?

Given the fact that we have a statute clear on its face, and yet interpretations by the Departments of Justice, not just one but several, and one court decision here, should we proceed by proposing an amendment to clarify this; and, if so, how can we do so without setting a precedent that other statutes that don't need clarification need clarification?

Mr. KLAYMAN. Congressman Barr, in answer to your question, I'd like to read a portion of the legislative history from the Senate report which was not discussed this morning. The Justice Department knows about this provision. I'm surprised they didn't bring it up. And it states—this is the Senate report No. 1183, 93rd Congress, Second Session 102. It's in our supplemental filing of my hearing statement. And it states that the purpose of the Privacy Act—I'm inserting Privacy Act—it's Senate 3418, that was the bill as amended, is to promote governmental respect for the privacy of citizens by requiring all, all, departments and agencies of the executive branch and their employees to observe certain constitutional rules in the computer station collection, management use, and disclosure of personal information about individuals.

If you also look in other provisions of the legislative history of the Privacy Act, not the Freedom of Information Act, the one that actually applies, even if you had to go beyond the plain language of the statute, which you don't have to, you'll find it specifically was enacted because of the abuses of Richard Nixon in having a

plumbers' unit inside of the Oval Office. Not much different than what we've seen in the 7½ years; misusing the IRS, misusing the FBI and other government agencies and their own files as well.

So our position is you don't need an amendment. If you want to call it something, call it a clarification. But you don't even need a clarification. But that's why I made specific reference to this particular Judge Royce Lamberth. What we need are judges like Judge Lamberth who don't read things because they happened to be nominated by a President of a different political party. Just simply read the law. We need better judges. That's the bottom line here.

With regard to the D.C. Circuit decision, there was no statement when the mandamus action was filed, when Judge Lamberth found that by releasing Kathleen Willey's letters from the recordkeeping—Kathleen Willey was one of the women he harassed—when it was released from the recordkeeping system into the public domain to discredit her and destroy her reputation during the impeachment proceedings, that was a criminal violation of the Privacy Act. Judge Lamberth made that finding in the context of a discovery dispute, which was whether or not conversations that the President had with his advisors were covered by the attorney/client privilege. Lamberth had to make that ruling. Consequently, the court refused to hear it on mandamus because discovery disputes don't go up on mandamus.

Gratuitously, some judges again appointed by the other party that weren't affected by what happened with Ms. Willey, made some gratuitous remarks in that decision, they have no force and effect. No force and effect. What they criticize Judge Lamberth for doing, which wasn't even accurate, making a finding that he had—that Willey's privacy rights were violated, which he had to make, to pierce the attorney/client privilege, they violated their own principles and put this dicta into their decision.

So the bottom line here is the law is fine, let's get some judges who enforce the law. That's the problem here.

Mr. BARR. I mean, that is certainly the problem. The problem is also any system of government or any branch of any system of government is only going to be as good as the people behind it, whether it's judges or executive branch officials. And history has proved that there are certain things that executive branch officials do, regardless of party, and that is to seek power and do everything they can to resist giving up power. The very eloquent historical recitation by Mr. Turley notwithstanding, that was unfortunately the exception, for a government to give up power. And that didn't happen exactly voluntarily on the part of the executive branch.

Mr. Pilon, would you address the question? How can we address this? We obviously have a problem with misinterpretation here. And while Mr. Klayman is absolutely correct, ultimately the resolution has to rest with our judges. Is there something the Congress should do here and can do without setting a bad precedence?

Mr. PILON. It's unfortunate that the two statutes, which are very different statutes, were linked from the outset by this common definition of agency by reference from one to the other. That's where the problem begins. Because then it raises the possibility, which the Justice Department has seized upon, of drawing from the con-

ference report exception to interpret the Privacy Act. And that's where all the mischief occurs, obviously.

So my first suggestion is that you decouple the two statutes in some way by subsequent language, if necessary. But the setting of a bad precedent, which seems to concern you, I'm not sure I understand. Perhaps you could elaborate on that and tell us what you mean by setting a bad precedent—the bad precedent has already been set by the coupling and then the infusion later on of this conference report.

Mr. BARR. It may be just too theoretical. It may not be a problem.

Mr. PILON. I don't see a problem, but the problem is when a judge gets in.

Mr. BARR. If you have a statute, in this case the Privacy Act, that is clear on its face, for which you normally would not even have to reach into legislative history for that statute, much less a different statute, because it is clear on its face, and if we now say if we were to take the position that we need to go back and amend the Privacy Act to make clear that it applies to the Executive Office of the President, when the statute already clearly says that on its face, does that set some sort of precedent for other statutes that are clear on their face being interpreted as not really being clear?

Mr. PILON. I don't think so. I mean, all you're asking for is what we often ask for with the Constitution. The founders should have added four words: "and we mean it." And that's pretty much what should have been done in the Privacy Act, too. Right after the definition of agency, "and we mean it."

Mr. BARR. Mr. Turley, do you have anything to add?

Mr. TURLEY. I actually think there is a problem. I agree with everything Roger said, as usual. But I think there is a problem in one sense, in that you shouldn't have to do it. I am troubled by the methodology used in the *Barr* case. I'm troubled because you have sort of a two-step process. Both of those steps is controversial. First, you must go to legislative history on a statute that on its face is unclear. We can debate about whether it's appropriate or not to take that step all day. People have different philosophies on statutory construction. However, you must then go the further step and say that the legislative history of a reference statute comes in, jot for jot, into the other statute. This is not common. You have an incorporation provision in the Privacy Act that says we hereby adopt the definition in FOIA. Usually that means that you adopt the textual definition in that section of the statute. It's never assumed that the legislative history attached to the act will piggyback on the incorporation of a textual provision. This case is a good example why, because the Freedom of Information Act has various purposes that makes the exception of the White House far more compelling. I happen to disagree with the FOIA decision in that I believe that the White House should be under FOIA's coverage. But you can come up with reasons why it would not apply under FOIA. But none of those reasons are relevant to the Privacy Act.

So to answer your question, I think there is a fundamental problem here, because judges too often use as an excuse that if Congress doesn't like it, they can change it. That's not a very good excuse for either liberal or conservative judges. If you enact legisla-

tion, I think there should be a sense of the House as to the need for a clarification because we can't afford to continue with the ambiguity. Whether or not we have new judges of one kind or another, that's going to take time. The makeup of the Federal bench changes at a glacial pacem. But the privacy issue needs to be addressed now. As for the ambiguity—this body just doesn't have the luxury of standing by with claimed ambiguity in an area this sensitive.

Mr. BARR. So would all of you agree that it really ought to be addressed legislatively?

Mr. WALDEN. Yes. In this Congress I know time is short, but as I mentioned before, how can anyone say that you're going to gore a particular administration's ox when we don't know who's going to be President? It's going to apply across the board.

Mr. KLAYMAN. Let me add, Congressman Barr, there is one area that I am in agreement that needs not just to be clarified but changed; that the violation of Privacy Act should not just be a criminal misdemeanor, it should be a felony, with what has occurred in the last 7½ years, people's lives destroyed, the attempts made to destroy you, quite unfairly, outrageously, a Federal officer who is simply carrying out his duty that he had to do under the Constitution. This needs to be a felony and it's currently just a misdemeanor.

That's why Independent Counsel Ray—and it was incorrect, again, for the Justice Department to come forward and give this misimpression that Ray exonerated people. He didn't exonerate people. If it wasn't Justice, then it was somebody on the panel. He said, I can't reach it because I don't have jurisdiction over misdemeanors. If he had jurisdiction over felonies he could have reached it. Of course, I still question whether he would have wanted to. But, of course, that's another story for another hearing. But I think it needs to be made a felony, because this is the most egregious thing that can happen to an American citizen is to be smeared with information by his own government that, through his tax dollars, he's paying to keep in operation.

Mr. BARR. Thank you. I'd like to thank the panel. I'd also like to go on the record thanking Mrs. Mink for her historical work in this area. She was much too modest in simply referring to the opinion. I mean, this very, very sincerely. As Professor Turley said, that was a historic law and a historic precedent. We benefit from that. I don't want any of my remarks today regarding current interpretations of one aspect of the Privacy Act to be interpreted in any way as a criticism—far from it—from her work. What I'm trying to do is to buttress and strengthen what I think she clearly intended to do many years ago. And I appreciate it.

Mr. MICA. I'm very fortunate to have both you as vice chairman, Mrs. Mink as the ranking member, both very personally involved in this issue in both the Freedom of Information Act and Privacy Act. Did you have further comments?

Mr. BARR. No, Mr. Chairman. Thank you for the time.

Mr. MICA. Thank you again for your time. I recognize now our ranking member.

Mrs. MINK. I have no questions. I simply want to thank Mr. Barr for his comments praising my work on the Freedom of Information

Act. I think that from a historic perspective, it would be I think useful to underscore the reason why the Privacy Act was so essential at the particular time that we were debating the Freedom of Information Act. The Freedom of Information Act called upon the agencies of government to release information upon the request of private individuals. We wanted to make sure that at the release of that information, that private personal information was excluded.

So if you have been involved in seeking information from the government under the FOIA statute, you will note that all the references to individuals are blacked out. And sometimes it's a real agony to figure out what the agency was saying, because so much of it is inked out. But that was the reason for the linkage between the two statutes. And at the particular time, the definitions, the applicability of both with the other was considered important. And so it's not by accident that there was a reference to the necessity to relate the two definitions as to the applicability of one statute with the other, but it was considered an essential part of the organizing of these two statutes.

So I think that the current events, of course, put to question as to whether all the litigation under FOI should be made applicable to the now definition of the Privacy Act. I would certainly admit that we need to look at that. But to infer on this administration some ulterior application of the Privacy Act and their exclusion as they saw it, I think is an extreme situation with which I do not concur.

It seems to me that the decision that was rendered by Mr. Scalia in his early days in the Justice Department should not be impugned in any way. He was not under any pressure to interpret the definition or applicability of the executive branch to benefit anyone. He was simply looking at the statutes and trying to interpret it as best he could as to what the definition was. So I think that to try to extend what has happened to some sort of a conspiracy on the part of this administration goes too far.

Having said that, Mr. Chairman, I hope that this committee will continue to consider this question, and hopefully a third panel convened in which all four will concur with Justice Scalia. Thank you very much.

Mr. MICA. Thank you Mrs. Mink.

Let me just ask a few questions in conclusion here. First of all, Mr. Klayman had recommended—and I understand the penalty now—I guess the President is charged right now with a violation of the Privacy Act, and that's under dispute or appeal. And there's a 1-year and $5,000 fine and it's a misdemeanor.

Now, Mr. Klayman has recommended that it be changed to a felony.

Mr. Walden, Mr. Turley, Mr. Pilon could you give me your recommendation about such a change?

Mr. WALDEN. Yes. My immediate recommendation is to keep it civil, because if it includes criminal provisions, you might have to refer it to the Judiciary Committee. And I am—and I am sincere in wanting the law clarified within this session.

Mr. MICA. Professor Turley.

Mr. TURLEY. I agree. I think the priority should be to quickly close this gap in the privacy law. I would tend to favor an in-

creased penalty for privacy violations because I think they have an inordinately severe effect on individual citizens. They warrant a felony count, but I think the priority needs to be to close this gap, hopefully in this Congress, without delay.

Mr. MICA. Mr. Pilon.

Mr. PILON. I agree with what has been said, except I would not characterize it as a gap. And that raises, it seems to me, a point that needs to be raised with respect to what Mrs. Mink just said, and the concern that Representative Barr just raised with respect to the implications of correcting this.

I would be loath to see Congress make clear what should already be clear at the cost of litigation that is already ongoing under the Privacy Act. That is to say, insofar as a "correction" is read as a correction rather than as a clarification, it might be construed as saying that up to this point the Privacy Act did not apply to the White House, and courts would be inclined to construe that against plaintiffs who are engaged in ongoing litigation, or who might in the future be engaged in litigation, regarding acts that took place prior to any clarification Congress might pass.

And so I think that Congress ought to stand pat, saying that the Privacy Act has always applied against the White House. Indeed, I would put to Representative Mink the following proposition—question, rather: Does she recall any discussions during the congressional debates over the Privacy Act to the effect that the White House should be excluded from coverage under the Privacy Act? One can understand those discussions perfectly well with FOIA—indeed, that's what the conference report is about, because the President needs to have confidential advice from his confidential advisors and needs to keep that from the public. There are no such concerns in the case of the Privacy Act. Indeed, the concerns are all on the other side.

Therefore, I would ask Representative Mink, were there any discussions that you can recall, because there are none that I have discovered in the records, to the effect that the White House was to be excluded under the Privacy Act?

Mrs. MINK. I have to only say that our primary discussions went to FOIA. My litigation was an attempt to get information from the White House. The Amchitka underwater nuclear test was the source of my concern. And five executive agencies had provided recommendations to the President as to the test and made recommendations against it. And so we were debating this matter in the Congress and I wanted desperately to get those recommendations from these agencies. And I was prevented from doing so. So we sued. So our attention was primarily on the executive branch. And so we struggled with this issue when we were clarifying the FOI, and tried to write it consistent with what the Supreme Court said in my case. And it was our attempt to try to keep the two statutes similar, and not make them different in terms of their applicability.

So while we didn't discuss specifically the executive branch's relevance to privacy, what was attempted was to make them consistent.

Mr. KLAYMAN. If I may followup on that—and I agree with what Mr. Pilon said, very well put—but Congresswoman Mink, you are

to be commended for the Mink case. I studied that when I was at the Justice Department and I did FOIA cases. But can you explain to me——

Mrs. MINK. Did you agree with me?

Mr. KLAYMAN. I don't agree with you on the last point. I want to ask your opinion on this. This is a photograph showing Craig Livingston, who was the one who was responsible for getting the FBI files on Republicans and others, improperly, and gave rise to the Filegate litigation which is still ongoing. This is a photograph of Craig Livingstone, on the right-hand side where my hand is, with Mrs. Clinton. And of course initially she didn't know whether she ever knew Mr. Livingstone.

Why would the White House invoke, under the reasoning that you're talking about, the Privacy Act to avoid providing this to Judicial Watch's clients and the court in this Filegate litigation. They actually invoked the Privacy Act so they wouldn't have to turn this photograph over. Why would they do that if they were in good faith?

Mrs. MINK. I can't respond for the White House. I can only discuss the statute and how I see it has been written and interpreted. So I can't speak for Hillary.

Mr. MICA. Mr. Turley.

Mr. TURLEY. Just a very quick point, Mr. Chairman. I disagree with one thing that Roger said. I don't believe that if an amendment is made to the Privacy Act, it can be legitimately applied to answer the interpretive question in either *Barr* or *Alexander*. There are prior cases in which courts have said that a subsequent decision by Congress is not very persuasive in reading the earlier language. In fact, Congress has repeatedly, when faced with a court opinion, stepped in to correct that opinion.

Now, I would agree with Roger if we didn't have two cases in disagreement and you simply amended the statute, that would create the danger that Roger talked about. But now that you have a statute—I'm sorry, a case saying that you really did intend for "agency" not to include in its definition the White House. I think you can make that corrective change and it would not be appropriate for a court to read that as to suggest any meaning with regard to the original language.

Mr. PILON. It may not be appropriate for a court to do, but that's not to say that a court might not do it.

Mr. MICA. Thank you, Mr. Pilon. The only other question I might have is the question of exemption. Are the exemptions adequate, or the law? I mean, given this thing plays out and the White House is found to be subject to the Privacy Act, are the exemptions adequate under the current statute?

Mr. Walden.

Mr. WALDEN. The exemptions in the Privacy Act?

Mr. MICA. Yes.

Mr. WALDEN. That allow for disclosures. I think they provide sufficient flexibility within the executive branch to conduct its business, but at the same time protect the privacy interests. I would not touch the exemptions.

Mr. MICA. Mr. Klayman, exemptions adequate?

Mr. KLAYMAN. Yes, they're more than adequate. They're used broadly. When this administration came in, Congressman Mica, President Clinton stated that he was not going to assert those exemptions because the people should have the information. This is the FOIA exemptions. But the same exemptions are applicable under the Privacy Act as well. They have been widely used and they protect the White House more than it deserves to be protected.

Mr. MICA. Like from the testimony you've presented today, they've used all sides of the argument.

Mr. KLAYMAN. Whatever suits them at any moment of time. One last point——

Mr. MICA. The Podesta memo, was that—what was the context on which that was given? I thought that was kind of interesting that he's now chief—what is he? The——

Mr. KLAYMAN. White House chief of staff.

Mr. MICA. Chief of staff now. In that position, what was he, in what position?

Mr. KLAYMAN. He was assistant to the President, which is just one notch below.

Mr. MICA. But he was in that case using it to make the Privacy Act apply.

Mr. KLAYMAN. Well, the document, which comes from an individual from personnel management, Mary Beck, to Mr. Podesta, is saying to Mr. Podesta that if only Mr. Podesta had followed her advice and kept these documents under the Privacy Act. Now we know that Billy Dale, our client, was smeared. We believe that he was smeared with information covered by the Privacy Act.

So apparently Ms. Beck was trying to do the right thing, but Mr. Podesta and others higher up did not do the right thing. This is an admission.

Mr. MICA. I wasn't sure of the context of whether he had written that.

Mr. Turley, the exemption question.

Mr. TURLEY. I think the exemptions are adequate. Part of the problem with Judge Green's opinion is that she doesn't really address the fact that you have a routine use exemption under the Privacy Act. You also have an exemption that says anything that's obtainable under the Freedom of Information Act is exempt. Now that's a large amount of information. And so the exemption already afforded to the White House is very generous.

Mr. MICA. Mr. Pilon.

Mr. PILON. The exceptions are, by and large, functional. There is an exception for consent, of course. If a party consents to have his information transferred from one agency to another or to a private party, that's all permissible. There is an exception for court orders. But other than that, it seems to me that they're perfectly adequate as is.

Mr. KLAYMAN. Congressman Mica, if I may put one thing on the record.

Mr. MICA. One final quick statement, since you are representing two folks today.

Mr. KLAYMAN. In the context of this Filegate case, which has given rise to Judge Lamberth's decision on the Privacy Act, it is

this Justice Department that appeared in front of the committee today that is currently—and I'm not overstating this—under criminal investigation by the independent counsel and its own criminal division for withholding e-mail, hundreds of thousands, if not millions, participating in that as alleged over this whole Filegate scandal. So obviously their testimony is tainted.

Mr. MICA. Well, I want to thank each of our witnesses today. This has been most enlightening about a very difficult subject. Something that is very important. I think we have heard, I think Mr. Turley gave a very outstanding presentation on importance of these two laws, Freedom of Information Act and also the Privacy Act, which do separate our systems of government from many others and give our citizens some protections and some rights that are very important in a democratic system and also a system of checks and balances, and we want to make certain that works.

So we appreciate your testimony, your being with us today. I appreciate the Members staying over and also participation.

We have no further business to come before the subcommittee on Criminal Justice, Drug Policy, and Human Resources so therefore I declare this meeting adjourned.

[Whereupon, at 12:31 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
Washington, D.C. 20503

June 30, 1993

C.F.

RAN

COPY from ORM

MEMORANDUM FOR JOHN D. PODESTA
ASSISTANT TO THE PRESIDENT AND
STAFF SECRETARY

FROM: MARY COUTTS BECK
ACTING DIRECTOR
PERSONNEL MANAGEMENT DIVISION

SUBJECT: Official Personnel Folders

Andre Oliver, of the Chief of Staff's Office, requested that I forward the Official Personnel Folders of seven White House travel office personnel for your review. They are attached.

The contents of these records are covered by the Privacy Act of 1974, have restricted use and should be protected carefully. Please keep these folders in a locked place when not in use. Their contents should not be disclosed to anyone unless they demonstrate an official need.

When you have completed your review, please call me on 395-1147, so that I may have them picked up.

Also delivered to Cliff Sloan W.H. Counsel

C.F.

CGE 029652

EXHIBIT
NUSSBAUM
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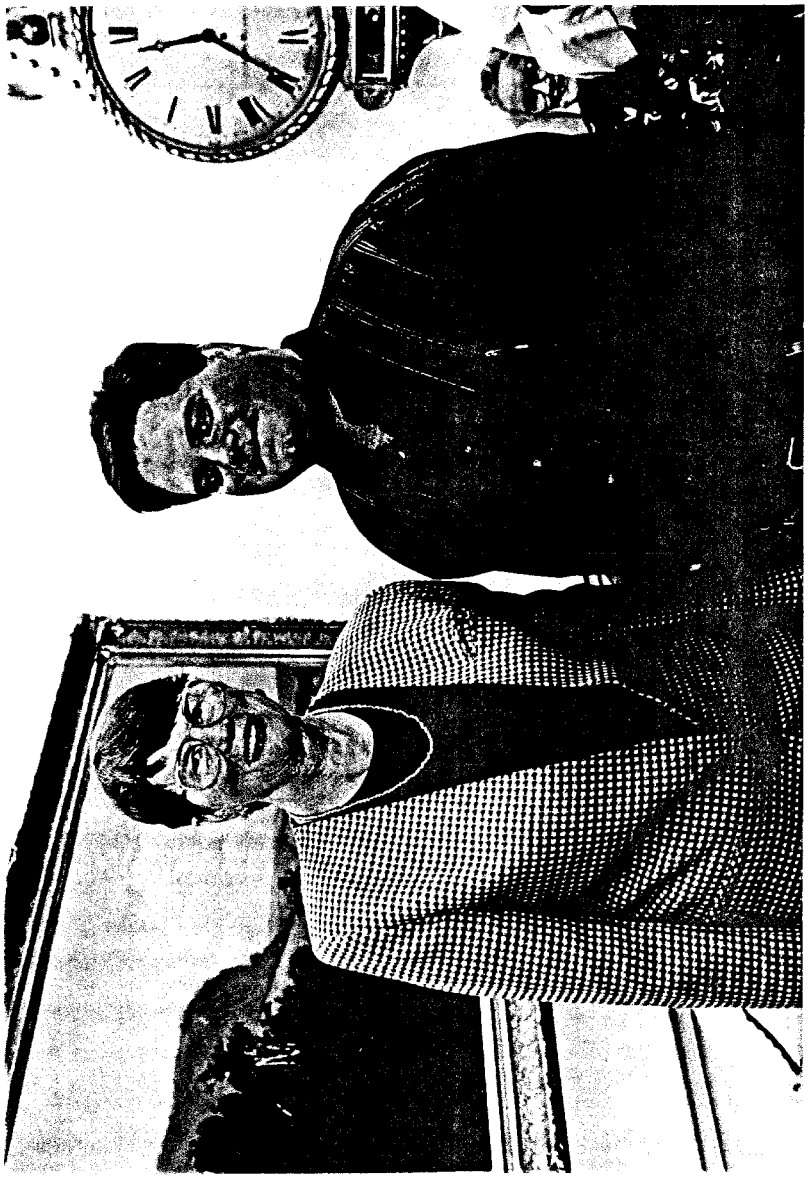
BWN 0349



September 8, 2000

Filegate, Willey cases raise question: Is the president covered by the Privacy Act?
Cato scholar says yes; argues presidents have no authority to disclose private information

WASHINGTON—Is the president subject to the Privacy Act, which protects personal information held in government files from public disclosure?

In 1997, Judge Royce C. Lamberth of the District Court for the District of Columbia Circuit held that the White House violated the Privacy Act in the "Filegate" case, involving the FBI's shipment to the White House of hundreds of files on Republican appointees to previous administrations. Then in March of this year Judge Lamberth extended his holding to reach the president himself in the Kathleen Willey case, involving the release by the president of Ms. Willey's private letters following her appearance on CBS's "60 Minutes" to discuss unwanted sexual advances she alleged the president made. Just last month, however, Judge June L. Green of the same court held that the White House was not covered by the Privacy Act. This case involved an effort by Rep. Bob Barr to obtain information the White House was holding about him.

In testimony delivered today before the Government Reform Committee's Subcommittee on Criminal Justice, Drug Policy and Human Resources, Cato Institute Vice President for Legal Affairs Roger Pilon argues that the White House is covered by the Privacy Act. He examines Judge Green's arguments and finds them troubling by virtue of their "apparent deference to the executive branch." Returning to "first principles" to frame the issues, Pilon shows that government officials may act only from authority. The first question is whether the president would be authorized to release sensitive information even absent a privacy act. Pilon says he would not. The act simply codifies and makes explicit restraints that are already implicit.

The problem arises today because Congress, when it enacted the Privacy Act, defined "agency" by referring to the definition in the Freedom of Information Act (FOIA), which included the Executive Office of the President. But in a FOIA Conference Report, Congress then made an exception for the president and his immediate advisers. Thus, the question is whether that exception carries over to the Privacy Act. Judge Lamberth said no because the two acts serve "very different purposes." FOIA is designed to see that information is released. The Privacy Act is designed to see that information is protected. Pilon agrees, but puts the issue in a larger framework, which shows that the burden is on those who want to exclude the White House from coverage to show that the law does in fact exclude it. Pilon says the evidence does not support such a conclusion. He drives home his point with a brief account of his own experience litigating against the Justice Department under the Privacy Act.

Roger Pilon's testimony can be found at **www.cato.org/testimony/ct-rp090800.html**

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The Cato Institute is a nonpartisan public policy research foundation dedicated to broadening policy debate consistent with the traditional American principles of individual liberty, limited government, free markets, and peace.

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