Sworn to Secrecy

"Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives."
--James Madison, 1822

The Bush administration has moved to broadly restrict information that might interfere with its political agenda and point to stronger health, safety and environmental protections.

Perhaps most significant for its scope, Attorney General John Ashcroft has reversed past policy under the Freedom of Information Act, and in essence instructed federal agencies to withhold information whenever possible. Meanwhile, the administration has cracked down on government whistleblowers and continually thumbed its nose at Congress – for example, refusing to turn over documents related to the corporate-dominated Cheney energy task force.

Sept. 11 has also regularly been invoked to advance the cause of secrecy. In particular, the administration has withheld information on "critical infrastructure" and power companies, and removed tens of thousands of documents from the web, including information on chemical facilities. While the specific reasons for these restrictions are murky at best, the one clear effect has been to shield the administration and its corporate allies from public scrutiny.

Turning FOIA on its Head

On Oct. 12, 2001, Ashcroft issued a memorandum[1] that urges federal agencies to exercise greater caution in disclosing information requested under the Freedom of Information Act, which is a primary tool for obtaining health, safety and environmental information, and much more.

The memo affirms the Justice Department's commitment to "full compliance with the Freedom of Information Act," but then immediately states it is "equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy."

This new policy supersedes a 1993 memorandum from then-Attorney General Janet Reno that promoted disclosure of government information under FOIA unless it was "reasonably foreseeable that disclosure would be harmful." This standard of "foreseeable harm" is dropped in the Ashcroft memo. Instead, Ashcroft advises, "When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis..."

In a number of cases, agencies have expanded on the Ashcroft memo, affirming that the benefit of doubt no longer goes to disclosure, according to an audit covering 33 federal departments and agencies by the National Security Archive,[2] which files thousands of FOIA requests annually.

The Department of Interior, for instance, circulated the Ashcroft memo in an email entitled, "News Flash – Foreseeable Harm is Abolished." Interior later developed implementing guidance that stated, "We wish to emphasize that the shift related to release of information under the FOIA has moved from a presumption of 'discretionary disclosure' of information to the need to safeguard institutional, commercial, and personal privacy interests."[3] In other words, we are moving from disclosure where possible to secrecy where possible.

As viewed by EPA's general counsel office, "[I]n order to justify withholding a record, the agency no longer needs to be able to articulate a foreseeable harm that will befall us if the record is released."[4] This means that not only is the agency less likely to disclose, it won't even provide an explanation for why it is withholding.

Auto Safety

In one of the most egregious examples, the Department of Transportation is withholding "early warning" data about auto safety defects, including warranty claim information, auto dealer reports, consumer complaints, and data on child restraint systems and tires. Congress required reporting of this information in response to the 2000 Firestone Tire debacle (in which faulty tires resulted in 271 deaths), potentially creating a powerful tool for the public to hold manufacturers and the government accountable.

Unfortunately, in July 2003, DOT issued a rule that claimed disclosure could "cause substantial competitive harm" – an allowable exemption under FOIA – even though similar defect information has been routinely made public before.

Fox In the Henhouse

Jacqueline Glassman, NHTSA's chief counsel

Glassman spearheaded the decision to withhold early-warning auto safety information from the public. Prior to her appointment in 2002, Glassman was senior counsel for the DaimlerChrysler Corporation, where she spent seven years. The Alliance for Automobile Manufacturers, which represents DaimlerChrysler, as well as eight other manufacturers, strongly opposed disclosure of the early-warning information.

"The DOT is trying to slip a vast exemption to the Freedom of Information Act in the back door," said Amanda Frost, an attorney with Public Citizen, which filed suit in March 2004 to force the administration to make the information available. "The agency has failed to show how disclosure would harm manufacturers, but this exemption would surely harm consumers."

Gun Safety

The Bush administration has also fought a legal challenge by the city of Chicago to obtain records on gun purchases under FOIA. Chicago requested these records from the Bureau of Alcohol, Tobacco, and Firearms (ATF) to support a civil suit against several manufacturers, wholesalers and dealers for allegedly promoting and facilitating the unlawful possession of firearms. However, the Justice Department, backed by the National Rifle Association, argued that such disclosure is exempt from FOIA because it would interfere with law enforcement proceedings and violate personal privacy interests.

Early in 2003, the Seventh Circuit Court of Appeals, based in Chicago, ruled in favor of the city and ordered ATF to turn over its gun trace and sales databases, rejecting the administration's arguments as overly broad. According to the court, ATF can withhold particular records that might interfere with a specific investigation, but cannot claim a blanket disclosure exemption for the entire databases. Likewise, the public interest outweighs ATF's sweeping claim of personal privacy in concealing the names and addresses of gun purchasers. In fact, privacy advocates such as the Electronic Privacy Information Center strongly backed disclosure, arguing for more tailored privacy protections.

This information will help identify patterns to determine whether firearms used in crimes are sold by particular retailers or sold to particular purchasers, while allowing for an evaluation of ATF's effectiveness in monitoring unlawful sales and tracing crime guns.[5]

The Bush administration appealed the circuit court's decision to the Supreme Court, which accepted the case. Yet just days before oral arguments were set to begin, Congress approved an appropriations rider that prohibits the ATF from using any funds to comply with FOIA requests for the records in question. In response, the Supreme Court vacated the decision and remanded the case, instructing the Seventh Circuit to reconsider in light of Congress' action.

Stonewalling Congress

The Bush administration clearly does not want to answer to Congress. Vice President Cheney's showdown with GAO was just the most high profile case in what's emerged as a pattern of stonewalling. From "Clear Skies" to drinking water contamination to Medicare reform, the administration has been unwilling to deal with Congress honestly, and instead has sought to advance its agenda by withholding information that might spark open debate. Such secrecy subverts democratic decision-making and undermines public accountability.

The Cheney Energy Task Force

During the early months of the Bush administration, Vice President Cheney convened an energy task force whose ultimate recommendations, issued May 18, 2001, conspicuously reflected the interests of oil, gas and coal companies.

At the time, President Bush said, "I can assure the American people that mine is an administration that's not interested in gathering dust. We're interested in acting." As discussed earlier, this has meant weaker environmental standards and more extensive drilling and mining on public lands.

Given this profound effect on administration policy, members of Congress and other interested parties began to raise questions about the nature and composition of the Cheney task force, which took on increased urgency following the collapse

of energy-giant Enron. Unfortunately, the administration refused to provide even the most elementary answers, triggering a number of hard-fought lawsuits.

Most troubling was the administration's unwillingness to cooperate with the General Accounting Office, the research and investigative arm of Congress. GAO tried for months to obtain access to the names of task force participants, including anyone consulted outside government, as well as basic meeting records, including dates and topics.[6] However, persistent stonewalling by Vice President Cheney forced GAO to launch its first-ever lawsuit against a federal official on Feb. 22, 2002.

In announcing the decision to sue, David M. Walker, GAO's comptroller general, wrote, "Failure to provide the information we are seeking serves to undercut the important principles of transparency and accountability in government. These principles are important elements of a democracy. They represent basic principles of 'good government' that transcend administrations, partisan politics, and the issues of the moment."[7]

Meanwhile, a number of other interested parties had already initiated legal action of their own. On Feb. 21, 2002, just as GAO was preparing its suit against Cheney, a federal district court ordered the Department of Energy to hand over task-force documents to the Natural Resources Defense Council. "Despite being heavily censored, the documents show how the administration allowed energy companies and their lobbyists to help write our nation's national energy plan," NRDC reported. "For example, the records reveal that Energy Secretary Spencer Abraham met privately more than 100 times with industry executives and lobbyists – many of whom were major financial supporters of President Bush's campaign. Yet Secretary Abraham refused to meet with environmental organizations."[8] These documents also revealed that Enron had contact with the task force four times, in addition to the six times company officials, including former chairman Kenneth Lay, reportedly met with Vice President Cheney.[9]

The Sierra Club and Judicial Watch (best known for its numerous lawsuits against Clinton administration officials) were joined in another lawsuit against the task force – officially called the National Energy Policy Development Group – to gain access to White House documents, just as GAO was trying to do. In August of 2002, U.S. District Judge Emmet G. Sullivan ordered these documents turned over, but the White House failed to comply, drawing a strong rebuke from Sullivan, who reaffirmed his order that October.

Not surprisingly, the White House continued to resist disclosure as it appealed the case. On Dec. 6, 2002, a federal appeals court issued a two-page order indefinitely delaying the Dec. 9 disclosure deadline set by Sullivan.

Three days later, a Bush-appointed district court judge threw out GAO's case, finding that GAO lacked standing to sue, regardless of whether Congress was entitled to the documents. At the time, GAO seemed certain to appeal. But then congressional Republicans started to put the squeeze on, threatening to slash GAO's budget if it didn't drop the lawsuit.[10] In a statement on Feb. 7, 2003, GAO announced that it would not appeal, even though it strongly disagreed with the judge's ruling.[11]

"[I]n the world's greatest democracy, we should lead by example and base public disclosure on what is the right thing to do rather than on what one believes one is compelled to do," Walker said at the time.

Unfortunately, the administration has been more interested in preserving its "right" to secrecy. The appeals court ultimately affirmed Sullivan's decision on July 8, 2003, but just over five months later, on Dec. 15, 2003, the Supreme Court granted the administration's request to review the ruling, further delaying release of the task force documents. Unfortunately, whatever the outcome of this case (which is expected to be decided by July 2004), there is now little stopping the administration from withholding information from GAO virtually as it pleases,

striking a severe blow against transparency and accountability.

No Answers for the Minority Party

In one of its more brazen moves, the administration announced that it would not answer any questions from the minority party (which happens to be the Democrats in both the House and Senate). In an email sent Nov. 5, 2003, to majority and minority staff on the House and Senate appropriations committees, Timothy A. Campen, director of the White House Office of Administration, explained, "Given the increase in the number and types of requests we are beginning to receive from the House and Senate, and in deference to the various committee chairmen and our desire to better coordinate these requests, I am asking that all requests for information and materials be coordinated through the committee chairmen and be put in writing from the committee."[12]

This would effectively give the Republican majority, which controls congressional committees, veto authority over inquiries from the Democratic minority. "I have not heard anything like that happening before," said Norman Ornstein, a congressional specialist at the American Enterprise Institute. "As far as I know, this is without modern precedent."[13]

The Clear Skies Initiative

EPA withheld analysis showing that the administration's plan to reduce power plant emissions – the "Clear Skies Initiative" – is far less effective than alternative bipartisan legislation and only marginally less expensive.[14] Clear Skies does not address carbon dioxide emissions – a major contributor to global warming – unlike the competing bill, which was introduced by Sen. Thomas Carper (D-DE) and is co-sponsored by Republican Sens. Judd Gregg (NH) and Lincoln Chafee (RI). EPA gave Carper an analysis that found his bill would also more quickly and dramatically reduce power-plant emissions of sulfur dioxide, nitrogen oxide and mercury. However, the agency withheld information, later leaked, that these cuts could be achieved relatively cheaply – increasing electricity prices by two-tenths of a cent per kilowatt hour more than the Clear Skies Initiative. "All we're interested in is having a full and honest debate so we can make a well-informed decision," Carper said. "I don't believe that's too much to ask."[15]

Drinking Water and Lettuce Contamination

EPA has prevented regional offices from speaking to congressional staff about perchlorate contamination. Perchlorate is found in rocket fuel and has contaminated drinking water near Department of Defense sites in at least 22 states. On Jan. 15, 2004, Reps. John Dingell (D-MI) and Hilda Solis (D-CA) released a GAO report that found the Pentagon had made little progress in cleaning up these sites.[16] Democratic staff of the House Commerce Committee, where Dingell is the ranking Democrat, followed up with further investigation, but discovered that regional officials "had been instructed by an EPA headquarters official not to speak with committee staff."[17] Dingell and Solis responded in a letter to EPA Administrator Mike Leavitt, stating, "There is no need to interject another level of Headquarters bureaucracy into the process unless there is a decision on your part to delay and hamper EPA employees from providing information about the contamination of actual and potential drinking water supplies and the health impacts for the public."

Previously, the administration imposed a gag order on EPA scientists and regulators from publicly discussing perchlorate after two independent studies from the spring of 2003 strongly suggested that it is contaminating the nation's lettuce supply.[18] An internal agency study – completed but bottled up – suggests that perchlorate concentration in much of the nation's lettuce could range as high as 90 parts per billion, more than four times EPA's current recommended daily dose.[19] In 2002, EPA found that perchlorate in drinking water poses a threat to human health, particularly

infant development, at concentrations above one part per billion. Defense contractors and the Pentagon, which potentially face hefty compliance costs should EPA adopt a new perchlorate standard, challenged the agency's findings, and have apparently won out with the White House.

In response, the Natural Resources Defense Council launched a legal challenge to force the administration to reveal documents regarding industry and White House influence over EPA's approach to perchlorate. (The administration had previously denied NRDC's request for these documents under the Freedom of Information Act.)

"It appears that the White House and Pentagon have joined forces with a handful of defense contractors to stop EPA from doing its job," said Erik Olson, a senior attorney with NRDC. "They want EPA out of the business of protecting the public from this dangerous tap water toxin because it would cost the Pentagon and industry polluters millions of dollars to clean it up."[20]

Medicare Reform

In June of 2003, Bush Medicare chief Tom Scully threatened to fire his top actuary, Rick Foster, if Foster released calculations to House Democrats that called into question the administration's prescription-drug plan to introduce private managed care into Medicare.[22] As provided by legislative language approved in 1997, Democrats requested updated calculations based on changes in an administration-backed Medicare reform bill. Yet Scully refused to hand over Foster's analysis, saying he would release it "if I feel like it."[23]

Testifying before the House Ways and Means Committee in March 2004, Foster said he had estimated at the time that the president's plan – which was signed into law in November 2003 – would cost $500 to $600 billion over the next decade, substantially higher than the $395 billion forecast by the Congressional Budget Office and the $400 billion the president said he would spend. "We know you would not have had the votes to pass this bill if the true cost of the bill was known," Rep. Charlie Rangel (D-NY), the committee's ranking Democrat, said to Republican members, adding he was amazed "how far the majority party was willing to go to keep the Congress in the dark."[24]

Justice Department Secrecy

On March 27, 2003, the Justice Department issued a directive that seeks to tighten control over communication between department employees and Congress. Specifically, employees are to inform the department's Office of Legislative Affairs "ahead of time and as soon as possible – of all potential briefings on Capitol Hill and significant, substantive conversations with staff and members on Capitol Hill," including phone calls. Legislative Affairs, in turn, must clear the contacts and accompany employees to briefings.

Sen. Charles Grassley (R-IA), co-sponsor of legislation to enhance whistleblower protections, called the directive "an attempt to muzzle whistleblowers" and "a very inappropriate interference," adding that he has already observed a chilling effect.[25]

Rep. James Sensenbrenner (R-WI), for one, has contended that the Justice Department has failed to share enough information on the implementation of the USA Patriot Act, which greatly expanded the government's ability to conduct domestic

Fox In the Henhouse

Tom Scully, former administrator of Centers for Medicare and Medicaid

Prior to his appointment as CMS administrator, Scully served as president and CEO of the Federation of American Hospitals, the trade association representing for-profit hospitals. He also served on the board of Oxford Health Plans and DaVita Corporation, two of the nation's largest health care service providers. Months before Scully resigned in December 2003, he obtained a waiver from HHS officials permitting him to work on Medicare legislation while negotiating with potential employers whose work would be affected by it.[21]

surveillance. The act is set to sunset in 2005, and Congress must be able to give a fair evaluation in deciding whether to reauthorize.

Cracking Down on Whistleblowers

Government whistleblowers perform an essential societal function. They alert the public to problems that would otherwise be allowed to fester in secret, and in doing so, create pressure to solve those problems. Frequently, lives are at stake. During the Bush administration, for example, a USDA meat inspector warned of listeria contamination; two Department of Energy employees testified on rampant mismanagement at Yucca Mountain, which is set to become the country's nuclear waste dump; and an FAA employee publicly complained about the rigging of mock terrorist raids, which left a false impression of readiness. Unfortunately, instead of acting on this information, the administration sought to punish each one of these whistleblowers for speaking out.

Yucca Mountain Nuclear-Waste Dump

In May of 2003, the Department of Energy intimidated and silenced two potential whistleblowers from testifying before Congress on politicized scientific reports and rampant mismanagement at Yucca Mountain, which Energy is pushing to make the nation's nuclear-waste dump.[26] Remarked Sen. John Ensign (R-NV), "It is disturbing that responsible workers who uncover problems with Yucca Mountain procedures are being retaliated against by the Department of Energy and its contractors. Their attempts to silence critics of the project have amplified our concerns about their commitment to quality assurances at Yucca Mountain."[27] Previously, in fall of 2002, DOE transferred the project's director of quality assurance and ordered the firing of another quality assurance manager because of their aggressiveness in identifying technical deficiencies in the project.[28] A Labor Department investigator deemed this termination "extraordinarily egregious."[29]

Cleanup of Nuclear Waste

EPA ombudsman Robert J. Martin alleges that former EPA Administrator Christie Todd Whitman punished him for opposing a number of nuclear-waste cleanup settlements that appeared to be industry giveaways. This included a settlement with Citigroup – a principal investor in the venture

Fox In the Henhouse

Robert Card, DOE's undersecretary for energy, science and environment

Card is the lead federal official in charge of developing the multi-billion dollar Yucca Mountain nuclear waste dump, where the administration plans to ship 77,000 tons of spent nuclear fuel from the nation's nuclear electricity plants and bury it for tens of thousands of years.

Previously, beginning in 1995, Card was director and senior vice president of CH2M-Hill, a large science, engineering, construction, and operations firm, which is under DOE contract to clean up the Hanford (Washington) nuclear weapons site. Card also served as president and CEO of Kaiser-Hill – founded by CH2M-Hill – which has a 10-year $7 billion DOE contract to clean up and close the Rocky Flats (Colorado) nuclear weapons site. Both contracts fall under Card's purview as undersecretary.

At Rocky Flats, DOE has fined and reprimanded Kaiser-Hill for poor management and "serious deficiency" in safety performance, and the company had to pay restitution after revelations that $200,000 in federal contract money had been diverted to fight a whistleblower.[30] Parent company CH2M-Hill has also been fined or penalized more than $725,000 since 1996 for numerous worker safety, procurement, and other contract violations, and a House subcommittee found it overcharged the EPA Superfund millions of dollars for environmental cleanups.[31]

capital firm of Whitman's husband – that limited the financial giant's liability for a Superfund site in Denver to $7.2 million, leaving taxpayers with a potential $93 million tab for the remaining cleanup costs, according to Martin.[32] Whitman decided to move Martin to EPA's Office of Inspector General after this dispute. However, Martin refused the transfer and resigned on April 22, 2002, because "I will not continue to serve as an independent ombudsman but will merely answer a telephone."[33]

Listeria-Contaminated Food

Vincent Erthal, a USDA inspector who worked the night shift at a Wampler Foods plant in Franconia, Penn., repeatedly reported food safety violations at the facility – including Listeria contamination – and requested enforcement action in the fall of 2001.[34] Yet USDA ignored these warnings and 10 months later the plant was linked to a listeria outbreak that killed eight people and sickened more than 50, resulting in the recall of 27 million pounds of ready-to-eat poultry products. When the Wampler story received media attention, USDA Undersecretary for Food Safety Elsa Murano attempted to discredit Erthal, claiming "he has not produced any proof, any evidence"[35] of USDA negligence (leaving aside the fact that inspectors are prohibited from removing government documents from inspected establishments[36]), and seemed to imply that he was responsible for the outbreak because he didn't push "harder to blow the whistle."[37]

Hunting Around Yellowstone

At the beginning of the Bush administration, Bob "Action" Jackson, a long-time seasonal ranger at Yellowstone National Park, raised concerns over lax enforcement of wilderness rules. In particular, he turned the spotlight on hunters who use salt to lure elk out of the park and then leave behind carcasses that attract endangered grizzly bears, which are frequently shot when they come into contact with hunters. The Park Service initially put a "gag order" on Jackson, prohibiting him from talking to the press, and then retaliated by refusing to rehire him for the summer of 2002.[38] Fortunately, as a result of a whistle-blower complaint, Jackson was able to negotiate his reinstatement for the summer of 2003.[39] "He's been through the wringer for no apparent reason other than speaking the truth," Sen. Grassley said. "I'm glad the National Park Service finally came to its senses."

Airport Security

The Federal Aviation Administration transferred Bogdan Dzakovic, who formerly led mock raids on airports, to bureaucratic Siberia after he publicly faulted the agency for suppressing warnings and rigging security tests.[40] "The more serious problems in aviation security we identified, the more the FAA tied our hands behind our backs and restricted our activities," Dzakovic told the National Commission on Terrorist Attacks Upon the United States, in testimony May 23, 2003. "All we were doing in their eyes was identifying and 'causing' problems that they preferred not to know about." Dzakovic further described his reassignment to the new Transportation Security Agency: "During most of 2002, my primary job was punching holes in paper and putting orientation binders together (and other menial work) for the hundreds of newly hired TSA employees. My current job is even further removed from keeping bombs, weapons, and terrorists off planes."

Dzakovic also warned that his fate could have been worse under the new law pushed by the Bush administration that restricts critical infrastructure information (discussed below): "If an employee blows the whistle with this unclassified CII evidence, it is a criminal act subject to immediate termination from the government, and up to a year in jail… If it had been law when I blew the whistle, I could have been fired and be sitting in jail instead of being vindicated and testifying today."

Far from being a threat, such whistleblowing is essential to protecting the public. As Dzakovic put it, "Lack of personal accountability for ALL levels of government service; repression of government professionals exercising the freedom to warn of security breakdowns caused by mismanagement; and abuses of secrecy as an excuse to cover up the government's own misconduct are three strikes against public safety."

Hiding Information in the Name of 9/11

In the aftermath of 9/11, the administration has moved to broadly restrict access to information, including, for example, data on power plants and chemical facilities. In the past, the public has used such information to hold corporate interests and government accountable to achieve significant safety improvements. However, the administration has declined to even consider the idea that disclosure can actually make us safer, while upholding our democratic values. Instead, secrecy has taken root through a host of misguided policies, whose clearest effect has been to shield the administration's corporate allies from public scrutiny.

A Black Hole for Corporate Secrets

To protect our nation's communities we need to ask ourselves some tough questions. Are bank computer systems safe from hackers? What threat is posed by hazardous chemicals stored near population centers? How secure are state water supplies or electrical power facilities? Are local health systems adequately prepared to respond to a community emergency?

Unfortunately, the answers to these questions are now more elusive thanks to a new exemption to the Freedom of Information Act, which was pushed by the Bush administration as part of the law that created the Department of Homeland Security.

Under this expansive exemption, which also preempts state disclosure laws, companies can permanently inoculate such "critical infrastructure information" by voluntarily handing it over to Homeland Security. This information cannot be disclosed to the public, and crucially, it cannot be used in any civil action, private or governmental, even if the action concerns a violation of legal standards. Any government official who "leaks" such information is further subject to criminal prosecution and up to a year in prison.[41]

Purportedly, this is supposed to give an incentive to companies to report information on possible security vulnerabilities. Yet in the process, it creates an enormous loophole to dodge public accountability for corporate wrongdoing. Indeed, companies themselves are allowed the chief responsibility for determining what constitutes "critical infrastructure information," with virtually no criteria for government validation.

As a result, potential abuses are not hard to imagine – especially if interpreted broadly by the increasingly corporate-friendly courts. For instance, suppose a manufacturer begins using a new unregulated chemical in its production process that is highly flammable and can cause acute respiratory distress, endangering workers and the surrounding community. Under the new law, the manufacturer could head off inquiries from federal regulators – and stop workers and the public from being alerted – by disclosing potential vulnerabilities associated with the chemical to Homeland Security. In the process, it would block the information from being used in a civil action should something ever go wrong, resulting in injuries or deaths.

Needless to say, this removes important incentives for fixing the problem, making us less safe as a result. Homeland Security may be alerted to the danger, but its hands would be tied to do anything about it. Meanwhile, everyone else is left permanently in the dark, removing the threat of public pressure and embarrassment – which has always been a crucial factor in changing corporate behavior – as well as civil action against company negligence.

In the lead-up to passage, Sen. Robert Bennett (R-UT), a key co-sponsor of the

legislation, originally reached a compromise with Sens. Carl Levin (D-MI) and Patrick Leahy (D-VT) that stripped out the most troubling provisions – preempting state disclosure laws, granting civil immunity, and subjecting government officials to criminal penalties for leaks. The Governmental Affairs Committee approved this version on May 22, 2002, but during the lame-duck session following the 2002 elections, the Bush administration insisted that these provisions be restored.

Not surprisingly, a number of powerful corporate interests urged this decision. Born in the aftermath of the "Y2K" problem, the idea originated with the computer industry over concerns about cyber security, but quickly drew interest from the traditional manufacturing sector, such as the Edison Electric Institute, a trade association for electric utilities.[42]

In fact, as Maryland Law Professor Rena Steinzor conveyed, "EEI's advocacy was so pronounced that, during a fall 2001 visit to [Bennett's office], I was startled to discover that an EEI lobbyist named Larry Brown had been invited to the meeting to explain how the prospective law was intended to operate. Although Mr. Brown assured me that my comments about the legislation's overly broad language were 'paranoid,' it rapidly became clear that none of the bill's industry supporters had any interest in making revisions to address such concerns."[43]

Likewise, Homeland Security's implementing rule[44] provides no clarity for validating claims and no process to "declassify" critical infrastructure information, setting up the Bush administration as a black hole for corporate secrets.

Cloaking the Power Industry

FERC, lead by Bush appointees, has made it more difficult for the public to evaluate problems with our electrical supply, which is especially troubling given the commission's recent lackluster performance. Between November 2000 and May 2001, California endured rolling blackouts to compensate for what power companies said were electricity shortages caused by soaring demand. As details emerged, however, it became clear that these companies had purposely caused the shortages to drive up prices and pad their bottom line – taking advantage of the state's deregulation of electricity two years earlier.

In a plea agreement, the head of Enron's western trading desk, Timothy Belden, acknowledged that between 1998 and 2001, he and "other individuals at Enron agreed to devise and implement a series of fraudulent schemes" in the California market designed to "obtain increased revenue for Enron from wholesale electricity customers and other market participants…"[45]

This market manipulation should have been obvious to the Federal Energy Regulatory Commission, which repeatedly refused to take action to protect consumers. As stated in a report by the Senate Governmental Affairs Committee on Nov. 12, 2002, "On a number of occasions, FERC was provided with sufficient information to raise suspicions of improper activities – or had itself identified potential problems – in areas where it had regulatory responsibilities over Enron, but failed to understand the significance of the information or its implications. Over and over again, FERC displayed a striking lack of thoroughness and determination with respect to key aspects of Enron's activities – an approach seemingly embedded in its regulatory philosophy, regulations, and practices."[46]

Now FERC is insisting that it be trusted, absent public disclosure, to appropriately monitor and deal with information on the country's power companies. On March 3, 2003, FERC completed a rule that exempts "critical energy infrastructure information" from the Freedom of Information Act. This exemption, which is legally questionable under FOIA, includes anything deemed potentially useful to a person planning an attack on "production, generation, transportation, transmission or distribution of energy."

Needless to say, this is incredibly broad. For example, FERC no longer discloses "historical transmission planning reports,"[47] in which utilities describe their power flow,

transmission plans and reliability, and present a detailed evaluation of system performance.[48] This sort of information could be especially important as the country moves to address deficiencies in the electrical grid following the massive power outage that swept through New York, parts of New Jersey, Ohio and Michigan in August 2003.

In an amazing provision of the rule urged by the power industry, utilities also no longer have to publicly disclose plans for building a new plant – leaving no opportunity for public questioning at any point. Likewise, FERC is withholding maps on proposed pipelines, which carry high-pressure explosive gas, including one that would run through 12 New York counties.[49]

Foxes In the Henhouse

Nora Mead Brownell, Patrick Henry Wood III, and Joseph T. Kelliher, Federal Energy Regulatory Commission

Enron CEO Kenneth Lay successfully lobbied President Bush to appoint Brownell and Wood, both of whom are strong proponents of energy deregulation.[50]

Brownell, chair of the commission, previously served as a utility regulator with the Pennsylvania Public Utility Commission (PPUC). In this capacity, she helped Enron move into Pennsylvania, earning herself the nickname "Nora Mead Brownout." Before her appointment to the PPUC, Brownell was senior vice president for corporate affairs at Meridian Bancorp, a Philadelphia financial institution, and had no experience in public utility management.

Wood is former chairman of the Public Utility Commission in Texas and previously worked at Baker & Botts, a big Texas oil law firm.

Kelliher previously worked at Public Service Electric and Gas Company as manager of federal affairs, and before that worked for the American Nuclear Energy Council in the late 1980s. Just prior to his nomination, Kelliher served as a senior policy advisor to Energy Secretary Spencer Abraham and sat on the Bush-Cheney presidential transition team.

FERC actually removed such information from its web site before completing the rule and just after the terrorist attacks of Sept. 11, 2001. In the process, the commission assumed that "all oversized documents" contained information that should not be disclosed. No review was undertaken to confirm the truth of this assumption.

FERC, in its words, "next identified and disabled or denied access to other types of documents dealing with licensed or exempt hydropower projects, certified natural gas pipelines, and electric transmission lines that appeared likely to include critical energy infrastructure information" – again, automatically yanking them from public view with no systematic review. According to FERC, this affected "tens of thousands of documents," which the commission laughably asserts was "undertaken as cautiously and methodically as possible."[51] With the new rule – which was strongly backed by power companies, including their trade association, the Edison Electric Institute – these once widely disseminated documents may be off limits even through a FOIA request.

Information on Government Web Sites

Following the terrorist attacks on Sept. 11, 2001, federal agencies began summarily removing tens of thousands of documents from their web sites, purportedly because they might be useful in preparing another attack. Yet in yanking this information, the Bush administration failed to consider the substantial benefits of disclosure, depriving communities of critical information to protect themselves (see examples on next page).

This information can be scary, to be sure, but its removal doesn't solve the problem. In fact, it removes important incentives for change – namely public pressure and embarrassment – and may invite complacency and a false sense of security, which is exactly what we don't need. In this way, disclosure can be a potential tool to fight terrorism (along with everyday health and safety concerns) while upholding our democratic values.

Of course, in some cases, it may make sense to withhold information for security reasons. For instance, there is no compelling reason to provide detailed floor plans of chemical or nuclear facilities. Yet where health and safety are concerned, the presumption should lie with disclosure. The Bush administration has unfortunately gone the other way, keeping the public in the dark and potentially making us less safe as a result.

On March 19, 2002, White House Chief of Staff Andrew Card affirmed the practice of withholding information from web sites in a memo to all federal agencies ordering them to "safeguard" information that is "sensitive but unclassified."[52] This new category broadly includes, in the agency's judgment, "information that could be misused to harm the security of our nation and the safety of our people" – a virtual catchall since most information (even the phone book, for instance) at least carries the potential to be used for harm.

Shortly after Card's memo, a provision codifying the "sensitive but unclassified" category – labeled "Sensitive Homeland Security Information" – was slipped into the Homeland Security Act (which created the Department of Homeland Security), drawing no attention or debate.[53] The president now has the legal authority to "prescribe and implement procedures" for suppressing such information, which is truly an ominous development given the administration's penchant for secrecy.

Information on Chemical Hazards

In 1984, a Union Carbide plant in Bhopal, India, released 40 tons of the toxic chemical methyl isocyanate into the surrounding community, killing more than 2,000 and injuring over 300,000, many of whom still suffer long-term effects.[54]After this catastrophe, Americans began wondering whether such an accident could happen here – and the answer demanded action.

A study commissioned by EPA in 1990 found that since 1980 there were at least 15 accidents in the United States that exceeded Bhopal in volume and toxicity of chemicals released.[55] Only circumstances such as wind conditions, containment measures, and rapid evacuations prevented disastrous consequences from taking place.

Congress responded to this danger through a series of actions designed to make chemical facilities more accountable to the public. In particular, as part of the 1990 amendments to the Clean Air Act, Congress directed each facility to develop a "Risk Management Plan," which EPA is to make available for public scrutiny.

Information Yanked from Government Web Sites

- Chemical-facility Risk Management Plans.
- Report on chemical site security that concluded "security around chemical transportation assets ranged from poor to non-existent."[56]
- Data on enforcement actions by the Federal Aviation Administration.[57]
- Maps from the Office of Pipeline Safety that show the location of pipelines and whether and when they have been inspected.
- Report by the Department of Energy on the dangers of liquefied gas fuel.
- Maps from the International Nuclear Safety Center allowing users to click on the location of a nuclear plant to learn more about it.
- For a time, the entire Nuclear Regulatory Commission web site. "Select content" was later restored.
- Reports on water resources by the U.S. Geological Survey, which also instructed the Federal Depository Libraries to "destroy" all copies of a CD-ROM on "characteristics of large public surface water supplies."

These plans include, among other things, five-year accident histories, measures to prevent an accidental release, response plans to mitigate damage should one occur, and assessments of potential dangers to surrounding communities, including worst-case scenarios.

More than two years before the 9/11 terrorist attacks, Congress decided to restrict access to these worst-case scenario assessments for security reasons, making them available only in 50 "reading rooms" around the country. This happened after the chemical industry – a longtime opponent of such disclosure – convinced the FBI that this data created an increased risk of terrorism.

At the time, the FBI determined there was no increased risk associated with the rest of the information contained in Risk Management Plans. Nonetheless, even after this scrubbing, the RMPs were immediately yanked from EPA's web site following 9/11. To date, all RMP information remains down, and no explanation for its removal has been given (other than in the most general sense).

While the usefulness of this information to terrorists is murky or perhaps nonexistent, the broader usefulness is crystal clear, enabling citizens to hold facilities accountable to make upgrades and improve safety in their communities.

Although new – EPA did not begin posting RMPs until June of 1999 – health and safety advocates have already used this information to highlight problems at specific facilities. For example, exposure of this data led to hazard-reduction measures at the Blue Plains Wastewater Treatment Plant, whose vulnerability zone included the White House, Congress, and Bolling Air Force Base (see page 61 for discussion). In short order, the Blue Plains facility substituted chlorine with sodium hypochlorite bleach, which does not have the potential to drift off-site.

The Washington Post also relied on RMP data – including the worst-case scenarios restricted by Congress – to describe a number of frightening possibilities in an extensive front-page story on Dec. 16, 2001.[58] For instance, "a suburban California chemical plant routinely loads chlorine into 90-ton rail cars that, if ruptured, could poison more than 4 million people in Orange and Los Angeles counties"; "a Philadelphia refinery keeps 400,000 pounds of hydrogen fluoride that could asphyxiate nearly 4 million nearby residents"; and "a South Kearny, N.J., chemical company's 180,000 pounds of chlorine or sulfur dioxide could form a cloud that could threaten 12 million people."

Some continue to argue that the mere reporting of such information is gravely dangerous. Yet ignoring it, as the Bush administration has done thus far, is far worse. The information may be gone, but the danger remains.