

**Written Statement
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**Public Hearing
Committee on Oversight and Government Reform
U.S. House of Representatives**

**Concerning
“Legislative Proposals for Fostering Transparency”**

**Wednesday, March 15, 2017
10:00 AM
2154 Rayburn House Office Building
Washington, D.C.**

Good morning, my name is Tom Fitton, President of Judicial Watch. Thank you, Chairman Chaffetz and Congressman Cummings for allowing me to testify on the very important topic of this hearing: “Legislative Proposals for Fostering Transparency.”

Judicial Watch is a conservative, non-partisan, educational foundation dedicated to promoting transparency, accountability and integrity in government, politics and the law. Our motto is, “Because no one is above the law!” We are the nation’s largest and most effective government watchdog group.

Founded in 1994, Judicial Watch has almost a quarter-century’s worth of experience using the Freedom of Information Act (FOIA) to advance the public interest, and we come before you today supporting congressional action to augment its strengths and mitigate its weaknesses.

Judicial Watch is, without a doubt, the most active FOIA requestor and litigator operating today. During the Obama administration, Judicial Watch worked overtime, making FOIA requests and—when the administration ignored the requests and obstructed access to public records—filing FOIA lawsuits to force executive agencies to comply with this vital open-records law.

Our nation faces a transparency crisis. The United States government is bigger than ever and also the most secretive in recent memory. To be frank, the Obama administration was an enemy of transparency. President Obama promised the most transparent administration in history, but federal agencies turned into black holes in terms of disclosure.

The Obama administration's casual law breaking, especially its "defend everything" approach to the Clinton email scandal, is President Obama's real legacy on transparency.

Judicial Watch filed nearly 3,000 FOIA requests with the Obama administration. And, our staff attorneys were forced to file nearly 200 FOIA lawsuits in federal court against that administration. Most of these lawsuits were filed just to get a "yes or no" answer from the administration.

There is a way forward out of the D.C. transparency and corruption crisis but it requires action on the part of a committed Congress to pave the way for outside watchdogs like Judicial Watch and activist citizens to investigate and expose corruption and malfeasance within the government. Judicial Watch shows that even in a hostile political environment, one citizen group, using the Freedom of Information Act and independent oversight can help the American people bring their government back down to earth and under control. How much more effective we would be if only Congress were to enact further transparency reform.

Despite the culture of secrecy of the modern administrative state, Judicial Watch has frequently succeeded in prying loose documents that had been denied even to Congress. For example, right after the Benghazi terrorist attack occurred, Judicial Watch uncovered a newly declassified email showing then-White House Deputy Strategic Communications Adviser Ben Rhodes and other Obama administration public relations officials—not "intelligence officials"—putting out the lie that the Benghazi attack was "rooted in an Internet video, and not a failure of policy." These documents had been withheld from Congress and half-a-dozen or so congressional committees had been made to look very foolish indeed. As a direct result of this disclosure, then-Speaker Boehner reversed his opposition to convening a Select Committee on Benghazi.

Even with a Select Committee investigation, Judicial Watch became the go-to source on Benghazi facts as we continued through the courts to uncover revelation after revelation about the Benghazi terrorist attack and the Obama administration's efforts to cover up the details.

Revelations such as those we managed to uncover on Benghazi did not come easy; they came about through multiple federal lawsuits and court orders requiring the administration to comply with FOIA. But, our efforts did bear fruit.

Judicial Watch document disclosures over the years have led to questions about criminal violations, obstruction of justice, and perjury by top officials of the last administration. For example, with respect to the Obama IRS scandal, Judicial Watch litigation forced the agency to admit that Lois Lerner emails were supposedly lost. And it was Judicial Watch FOIA litigation that forced the IRS to admit that her emails were not necessarily lost. And, only Judicial Watch uncovered the troubling revelation that the Obama IRS and Justice Department were collaborating on prosecuting the same groups that the IRS had lawlessly suppressed. While Congress seems to have lost interest in the IRS scandal, Judicial Watch continues to do the job of oversight and investigation, and we remain the

key vehicle for revelations about the continuing law breaking and abuse of power by the IRS.

Just two weeks ago, for instance, after stonewalling and slow walking FOIA requests and lawsuits for years, the IRS finally admitted to the court that the tax agency needs to search 6,924 previously unreported documents—documents they sat on for an entire year, an election year, I might add—in response to a 2015 Judicial Watch FOIA lawsuit over IRS targeting of conservative groups. Again, apparently, Judicial Watch has to pry loose documents not provided to Congress—these newly identified records are presumably not records that were contained in the “Congressional Database,” which the IRS created in 2013 to house records responsive to congressional inquiries into the IRS scandal. The IRS finally agreed to begin producing documents by March 10 but refused to provide a timetable for completion of the review.

And then we have perhaps one of the most egregious violations of federal transparency law since FOIA was passed nearly 50 years ago: the Hillary Clinton email scandals.

Before the revelation by *The New York Times* on March 2, 2015 that then-Secretary Clinton used at least one non- “state.gov” email account to conduct official government business during her entire tenure as the Secretary of State, Judicial Watch had filed six FOIA lawsuits seeking Clinton’s email on ethics matters and the Benghazi terrorist attack. After the revelation, JW filed some 15 lawsuits having to do directly or indirectly with Clinton’s emails. Today, there are at least 20 lawsuits, 19 of which are active in federal court, and upwards of 200 Judicial Watch FOIA requests that could be affected by Mrs. Clinton and her staff’s use of secret email accounts to conduct official government business. Judicial Watch’s litigation against the State Department exposed key documents about both Benghazi and the Clinton pay-to-play cash scandals.

I also must tell you that we dismissed several lawsuits based on lies by the State Department that it had searched all of Hillary Clinton’s emails and couldn’t find anything. In two cases, federal judges actually reopened closed FOIA lawsuits—practically unheard of—after it came to light that information had been unlawfully withheld from Judicial Watch and the court. In two instances, federal judges also granted Judicial Watch discovery in cases concerning Clinton emails because it appeared there had been government misconduct in the handling of the FOIA requests.

Indeed, as with Lois Lerner’s emails, our litigation forced the State Department to publicly disclose Hillary Clinton’s secret email accounts. The rest is history.

Before suggesting ideas for fostering greater transparency in government, let me reflect for just a couple of minutes about what we know works and doesn’t work.

Many people ask, including members of both parties in Congress, how is it Judicial Watch gets documents and forces action that Congress can’t get even under subpoena? The easy answer is that FOIA is a straightforward tool, for all its flaws, that quickly gives

Judicial Watch, other media, and citizens access to the federal courts in order to ensure compliance with lawful records requests.

Congressional investigations, even with subpoenas, are political by nature and require, under the current practice, effective enforcement in court with the cooperation of a conflicted Justice Department.

The Fast and Furious scandal is a perfect example of this issue. Obama Attorney General Eric Holder was held in contempt of Congress, and in response, President Obama made a remarkable assertion of executive privilege to protect his attorney general and thwart Congress. Rather than enforcing the contempt citation, the Justice Department ignored it. Only after Judicial Watch secured key court victories separately against the Justice Department did Congress, after two years of getting nowhere, obtain many of the documents it had been seeking.

It is time to put an end to the obsessive and destructive secrecy in government. But, to be successful, a commitment to transparency and openness must cut across partisan lines.

Judicial Watch has urged President Trump to commit to a transparency revolution, and today we ask the Congress to join in that transparency revolution by reforming FOIA and giving private citizens and groups like us stronger and better tools to hold our government to account.

We are pleased to see renewed congressional interest in reforming FOIA. We ask only that such reforms be real, be significant, and provide greater access to information for the American people. And speaking of FOIA reform, Congress should apply the freedom of information concept to itself and the courts, the two branches of the federal government exempt from the transparency laws that presidents and executive agencies must follow. Certainly, in the least, the administrative activities of Congress and the federal courts should be subject to the same transparency rules as the Executive Branch.

In the meantime, Judicial Watch is interested in two proposals for increased transparency with respect to Fannie Mae/Freddie Mac and the Smithsonian institution.

Judicial Watch has tried to investigate scandals behind the collapse of Fannie Mae and Freddie Mac and their role in helping trigger the global financial and related housing crises. A key component of this investigation involved the role political corruption played in the failure of adequate congressional oversight and the catastrophic collapse of these "government-sponsored enterprises" in 2008.

That is why we filed a [Freedom of Information Act \(FOIA\) lawsuit](#) (*Judicial Watch, Inc. v. U.S. Federal Housing Finance Agency*, USDC Case No. 9-1537; <http://www.judicialwatch.org/judicial-watch-v-u-s-federal-housing-finance-agency>) against the Obama administration to get a hold of documents related to Fannie's and Freddie's campaign contributions.

Since American taxpayers are on the hook for trillions of dollars, potentially including already \$187 billion alone for Fannie and Freddie, we deserve to know how and why this financial collapse occurred and who in Washington, D.C., is responsible.

Unfortunately, the Obama administration disagreed.

The Federal Housing Finance Agency (FHFA), the agency responsible for Fannie Mae and Freddie Mac, responded to our FOIA lawsuit by telling us that all of the documents we seek are not subject to FOIA.

Here is the exact language the Obama agency used in its [court filing](http://www.judicialwatch.org/files/documents/2010/jw-v-fhfa-defmem4sj-01292010.pdf) (<http://www.judicialwatch.org/files/documents/2010/jw-v-fhfa-defmem4sj-01292010.pdf>):

...Any records created by or held in the custody of the Enterprises (Fannie Mae and Freddie Mac) reflecting their political campaign contributions or policies, stipulations and requirements concerning campaign contributions necessarily are private corporate documents. They are not “agency records” subject to disclosure under FOIA.

And here is why the Obama administration’s reasoning is flat-out wrong, as detailed in a [court motion](http://www.judicialwatch.org/files/documents/2010/jw-fhfa-opp2sj-cm4sj-03052010.pdf) (<http://www.judicialwatch.org/files/documents/2010/jw-fhfa-opp2sj-cm4sj-03052010.pdf>) our lawyers filed in response (on March 5, 2010):

At issue in this Freedom of Information Act (“FOIA”) lawsuit is whether FHFA, the federal agency that has custody and control of the records of Federal National Mortgage Association (“Fannie Mae”) and Federal Home Loan Mortgage Company (“Freddie Mac”), must comply with a FOIA request for records relating to those previously independent entities. Until they were seized by FHFA in September 2008, Fannie Mae and Freddie Mac were private corporations with independent directors, officers, and shareholders. Since that time, FHFA, a federal agency subject to FOIA, has assumed full legal custody and control of the records of these previously independent entities. Hence, these records are subject to FOIA like any other agency records.

Unfortunately, the courts have ruled ([Judicial Watch, Inc. v. FHFA, 646 F.3d 924 \(D.C. Cir. 2011\)](#)) that as long as these records are not “used,” the records are not subject to FOIA.

The decision to keep these Fannie/Freddie records secret is the most significant anti-transparency decision of the Obama administration. You can obtain documents from the Central Intelligence Agency, the National Security Agency, and other “secretive” government agencies that deal with life-and-death matters. But not one document from the government Fannie and Freddie mortgage monsters would *ever* be disclosed under the freedom of information law that governs most every other executive branch agency.

Legislation that would address this Fannie/Freddie transparency gap is long overdue.

(Along with FOIA, the Federal Advisory Committee Act (FACA) was passed by Congress to shed light on federal advisory committees. Among other topics, it has a special emphasis on open meetings, chartering, public involvement, and reporting. Because the Consumer Finance Protection Bureau (CFPB) was established in the Federal Reserve System, the CFPB is exempt from FACA even though it regularly uses and relies on four advisory boards and councils. Bills have been introduced in previous sessions, and we believe such legislation should be reintroduced. Even though the CFPB claims it complies with the spirit of FACA, without a statutory fix, there is no available mechanism for Judicial Watch, other good government groups, and the public to insure compliance.)

Then there's the issue of the Smithsonian Institution, another taxpayer-funded entity that is not subject to FOIA. The Smithsonian, which operates as a trust, received [\\$840 million](#) in taxpayer funds in FY2016. The Institution, established in 1846, is governed by a board of regents which, by law, is composed of the vice president of the United States, the chief justice of the United States, three members of the Senate, three members of the House of Representatives and nine citizen members (who are approved by Congress and the President). The chief justice of the United States has traditionally served as chancellor of the Smithsonian.

Most of the Smithsonian's permanent staff are federal employees and its Secretary is appointed by public officials and other government appointees.

Courts have ruled that the Freedom of Information Act doesn't apply to the Smithsonian. As a result, Americans must rely on voluntary disclosures by this government institution. Judicial Watch, for instance, is trying without success to obtain documents from the Smithsonian about its decision-making regarding the inclusion of Justice Clarence Thomas in its African American Museum.

Rather than relying on the "kindness of strangers" to find out how billions of tax dollars are spent, Congress would do well to consider Delegate Holmes Norton's bill to apply FOIA explicitly to the Smithsonian Institution.

Thank you. I am happy to answer any questions the committee may have.

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