

TESTIMONY OF CLETA MITCHELL, ESQ.

**COMMITTEE ON THE JUDICIARY
EXECUTIVE OVERREACH TASK FORCE**

Executive Overreach in Domestic Affairs, Part II:
IRS Abuse, Welfare Reform, and Other Issues

April 19, 2016

Mr. Chairman, Members of the Task Force:

Thank you, first of all, for allowing me to testify here today. And thank you for establishing this Task Force. It is absolutely crucial that Congress take stock of the lawlessness of this Administration, which is evidenced in virtually every action of every agency of the federal government and every area of federal jurisdiction.

Congress is the Article I branch of the federal government. It was intended by our Founders to play the leading role in the national government. Yet, what has happened over the past 90 years, and in particularly over the past seven years under the Obama administration is being reduced to mere bystanders in a government that barely resembles what the Founders had in mind. This Administration has transformed our Constitution and its delicately and carefully developed framework into a ruthless, unilateral monarchical form of government that our Founders rejected and which was and is the antithesis of what our Founders intended, and the opposite of the principles on which our country declared its independence from Great Britain in the first place.

I am here today to discuss what happened in the IRS targeting scandal – the scheme whereby the IRS rounded up and branded hundreds of citizens groups, involving tens of thousands of patriotic Americans nationwide, and quarantined them in a dumping ground within the IRS, stopped processing their applications for

exempt status based on (and I am quoting from the May 2013 report of the Treasury Inspector General for Tax Administration – TIGTA):

“...if the name included the terms Tea Party, or Patriots, or 9/12 Project...
or if the issues that the applicant wanted to work on included such things as
“government spending, government debt or taxes”

or if the group indicated that it planned to educate the public through
advocacy / lobbying to “make America a better place to live”

or IF there were statements in the case file CRITICIZING how the country is
being run...”.

If any of those factors were present, the applicant was shoved into a special
category where the application was subjected to heightened and unnecessary
scrutiny, where their applications were simply not processed over a period of
YEARS rather than weeks, and during which time the groups received multiple
sets of questionnaires demanding information that the IRS and TIGTA and even
Lois Lerner publicly stated were improper, unfortunate and unnecessary to the
processing of their applications. Then, when the scandal became public in May
2013, what have the IRS and this Administration done to ensure this never happens
again?

- A new IRS Commissioner was nominated and confirmed ... an individual who had given over \$80,000 to the Democratic party and Democratic candidates in the 10 years preceding his ascension to the top job in the IRS.
- The promised ‘investigation’ by the Department of Justice was a sham...during which the DOJ contacted few – if ANY – of the victims of the targeting, but spent 12 hours interviewing Lois Lerner...the same head of the unit who refused to testify before

Congress...and where the head of the DOJ “investigation” was a maxed out Obama donor.

- The IRS offered a ‘deal’ to the organizations whose applications had been subjected to the viewpoint discrimination that created the targeting scandal...and this ‘deal’ was that IF the organizations would forego *forever* certain constitutional rights the IRS would agree to give them their tax exempt status.
- The IRS issued proposed new regulations that they had developed in secret... “off plan” and never publicly acknowledged until the day the proposed regulations were issued on the day after Thanksgiving – Black Friday in 2013...which would have CODIFIED the unconstitutional mistreatment of citizens and permanently denied to exempt organizations their First Amendment freedoms of speech and association.
- No IRS employee or agent has been demoted, fired, reassigned, or held accountable for the IRS targeting scandal; Lois Lerner is drawing her taxpayer paid retirement and we the taxpayers are paying the legal bills for the private attorneys who are defending the IRS employees and agents who carried out the illegal targeting scheme.

What has Congress done? Congress has held hearings. And issued a number of very detailed reports that document this scandalous behavior by the IRS...And, there have been some changes to the Internal Revenue Code that should help to keep this from happening again.

But there is so much more that Congress must do and that is the purpose of my testimony here today.

With regard to protecting the American people against executive branch overreach, Congress must do two things:

1. Enact additional safeguards and protections in the tax code and other statutes to protect the American people from the IRS and, indeed, every federal agency, to ensure that there IS accountability and that there are legal remedies available to taxpayers whose constitutional rights are abused by the IRS and other federal agencies, agents and employees;

AND

2. Congress must restructure ITSELF and reclaim powers it has previously delegated to the executive agencies, in order to restore the constitutional balance between the executive and legislative branches of government, as envisioned by our Founders.

I. Changes to the Internal Revenue Code.

There are a number of changes to the IRC that Congress should enact this year, which will protect the American people from this too-powerful agency, the IRS.

1. **Repeal Schedule B.** The IRC today requires 501(c)(3) organizations to disclose to the IRS their donors of \$5,000 or more. That requirement has been extended by the IRS via regulation to every 501(c) organization. This is not a public schedule – by law, it is confidential. Yet, the IRS has on multiple occasions “accidentally” released the confidential donor information. Congress should repeal the requirement that exempt organizations tell the government who their donors are.

2. Prohibit the use by the IRS of any campaign finance donor disclosures as basis for IRS taxpayer audits. It is clear to me from my experiences over the past several years that the IRS is using required disclosure of donors to campaigns and political organizations as a basis for tracking, scrutinizing, monitoring and auditing taxpayers. It is an area that has NOT been sufficiently examined by Congress...and it should be. What Congress should do without delay is to statutorily prohibit the IRS from collecting and reviewing campaign finance reports or news articles about donors to candidates and political organizations – and to ensure that such information is NEVER included in the monitoring of donors or used in any manner in the selection of donors for audits by the IRS.

3. Add to the Taxpayer Bill of Rights an individual cause of action in federal court against IRS employees who violate the law and who Infringe upon the constitutional rights of a taxpayer. The Supreme Court in 1971 conferred a cause of action against individual federal employees who violate the constitutional rights of a citizen. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court said "...power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.... 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, *supra*, at 390—395, we hold that petitioner is

entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.”

On several occasions since the *Bivens* decision, Congress has considered creating a specific statutory cause of action within the Internal Revenue Code, such that citizens could recover monetary damages from IRS agents who violate the taxpayer's constitutional rights. In each instance, the IRS Commissioner has advised the congressional committees that such a statute is “unnecessary” because the Supreme Court has already articulated the existence of the remedy in the *Bivens* decision. Yet, in the cases filed against the IRS and individual IRS employees stemming from the targeting of the tea party groups, the IRS and the IRS employees named as defendants in the cases, have all argued to the federal court that a *Bivens* cause of action does not exist because Congress hasn't included it in the statutes.

I serve as counsel to a number of groups targeted by the IRS who are now plaintiffs in these lawsuits. My co-counsel and I disagree with the government's position and we believe that the Supreme Court meant what it said in *Bivens*. But Congress should, once and for all, eliminate any question on this subject and should pass legislation that clearly grants to the citizens the ability to sue federal agencies and individual federal employees who violate their constitutional rights.

I have attached to this testimony other suggested changes to the Internal Revenue Code that I have recommended in prior testimony to Congress about needed changes in the law to ensure that the IRS targeting of the tea party groups *never* is allowed to occur again. See Testimony of Cleta Mitchell to House Oversight & Government Reform Committee, Wednesday, July 30, 2014, “IRS Abuses: Ensuring that Targeting Never Happens Again”, Attachment #1.

II. Change Congress and Reclaim Congressional Authority Over the Executive Branch.

It is not sufficient for Congress to change the Internal Revenue Code. What Congress must also do is make substantive changes in the authorizing laws of the federal agencies and to change its own systems and structures to reassert its Article I authority. The modern Congress has evolved over a period of decades...and every system and structure within the Congress is designed to grow federal power. Every authorizing bill enacted by Congress in the past forty years has conferred unfettered authority upon federal agencies to take over the legislative power of Congress. The ability of citizens to hold federal agencies accountable through FOIA or through legal challenges to federal agency abuses are subject to doctrines that have evolved over the past forty years which treat the citizens as servants of the government, instead of the other way around.

Until and unless Congress changes the way IT is structured and the way IT operates, and until Congress reclaims its legislative authority and responsibility from the executive branch and until Congress gets rid of the doctrines developed – not by the Congress, but by federal courts -- that protect federal agencies from accountability, there is no reason to believe that Congress will be able to get control over the out-of-control federal bureaucracy.

Here are five suggestions for how Congress can reassert the power of the Article I branch of government and reduce the excess of the leviathan federal bureaucracy:

1. Abolish the congressional appropriations committees in the House and Senate and vest the spending authority with the committees of jurisdiction. Congress is structured today in a manner that separates the

spending and budgeting authority from the authorizing and oversight role of Congress. That is absurd. The only thing the agencies really understand is money. Congress should ensure that the funding and oversight roles are carried out in tandem, together. And that the committees charged with oversight also handle the appropriations. That would distribute the responsibility and the power to oversee the executive branch throughout the Congress, ensuring that oversight and authorizing roles are combined with the funding mechanisms. And to ensure that the committee staff do not develop “Stockholm Syndrome” – whereby they start to identify with the agencies rather than the congressional role – staff members should be reassigned every five years from their committees to new committees.

2. Stop the unconstitutional delegation of legislative power and end the unaccountable regulatory state. Congress must reassert its role over the regulatory state. Congress must stop delegating its legislative powers to nameless, faceless bureaucrats. Agencies must be stopped in their tracks from issuing new regulations without prior congressional approval. All of this requires work and focus. Congress must accept that responsibility immediately and halt the expansive growth of the regulatory state by repealing the vast, unlimited legislative authority that is now vested in federal agencies to essentially legislate – with little or no congressional accountability. Repeal that legislative authority that agencies now have, authorize only very limited authority to issue regulations and require all regulations to be approved in advance by Congress. Take away the power that Congress unwisely conferred on the executive branch. Start it today. It is no wonder that the executive branch has swarmed the American system...Congress gave its power away. It is time to reclaim that

congressional duty and power to legislate and to take it away from the executive branch, once and for all.

3. Abolish the Joint Committee on Taxation. There will never be tax reform as long as the JCT exists to block it. Even the changes in the IRC that I have recommended today will be “scored” by the JCT and found to cost billions of dollars, despite the fact that they have NO budgetary impact. Why? Because the JCT exists to protect the IRS from Congress. Until Congress gets rid of that entity altogether, Congress will never regain control over the Internal Revenue Code or the IRS.

4. Overhaul and strengthen the Freedom of Information Act statute and implementation. The Freedom of Information Act (“FOIA”) was established by Congress to ensure transparency and accountability within federal agencies, by requiring federal agencies to produce to taxpayers the documents and materials paid for by taxpayers -- but that process is broken beyond repair. It must be completely overhauled. The IRS, for instance, does not provide ANY documents or materials to taxpayers under FOIA unless the taxpayer SUES the IRS. And then, the documents are either withheld in their entirety or wholly or partially redacted to the point that the production is meaningless – relying on the “deliberative process privilege” that federal courts have expanded so greatly that the FOIA law is now virtually meaningless. Contrast that with the situations outlined in Sheryl Atkinson’s book Stonewalled, in which she recounts example after example of how our tax dollars are used by federal agencies to spin us...to lie to us...to tell the public things that are simply not true. Those same millions of dollars now being spent by federal agencies to lie to the American people should be reallocated to a FOIA office within GAO, and Congress should rewrite FOIA to substantially narrow the

privileges that federal agencies now claim to keep from complying with FOIA and to withhold information from the citizens. Attached to my testimony is my testimony before the House Oversight & Government Reform Committee last year, and my responses to the Committee's follow-up letter that outlines my suggestions on how to revise and breathe new life in the FOIA process, to reclaim FOIA as a tool to ensure accountability and transparency in the federal government. See Attachments #2, Testimony to the House Oversight and Government Reform Committee, June 2, 2015, on the Freedom of Information Act, and Attachment #3, Responses to Committee questions related to the June 2, 2015 hearing on the Freedom of Information Act.

5. **Repeal the Chevron Doctrine.** Our government is built on the premise that ours is a nation of laws, not of men. One of the ways that federal agencies have grown ever more powerful over the past forty years is that both Congress and the federal courts have vested the agencies with too much unchecked power and ability to run roughshod over the citizenry. The doctrine articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is a landmark case in which the United States Supreme Court set forth a doctrine which essentially states that in litigation against a federal agency, the federal agency gets the wink and the nod by the court...against the citizens. This doctrine is alien to everything we believe as Americans, and it must be overturned by Congress. It should not be the law in this country that a person who sues the federal government starts with the deck stacked against him. That is what Chevron deference does – it utterly eliminates the notion that is central to our American theory of justice, which is that all parties come before the courts in this country with the equal opportunity to be heard. Chevron deference

turns that principle on its head. And because of Chevron deference, the federal courts are essentially lost to the American people as a source for helping to curb the power of runaway federal agencies. Congress can and must abolish the Chevron deference doctrine if there is to be any hope of restoring the proper balance and separation of powers our Founders gave to us in our Constitution.

These are five things that Congress should do IF you are serious about restoring the rightful role of Congress and IF you are serious about clipping the wings of an out-of-control executive branch of government.

Our nation is at a crossroads and our constitutional framework is completely imbalanced. It bears no resemblance to the balance envisioned and enacted by our Founding Fathers. These steps I've outlined are not easy to accomplish because the entrenched bureaucracy and interest groups both within and outside the Congress will squeal bloody murder at some of these suggestions.

But unless Congress acts boldly to reclaim its role in the constitutional constellation, Congress should just become content with being a bystander – watching with the rest of us as the executive branch runs amok, tramples the rights of the citizens and our country evolves into yet another tyrannical system.

It is up to you, Members of the Task Force. There are many millions of Americans who will support your efforts IF you determine to be bold and do what is necessary to restore the power of the people's branch of government.

Of whom much is given, much is required.

You are the Article I branch – the FIRST branch – under our Constitution.

We are counting on you to act like it.

Thank you.

ATTACHMENT 1

TESTIMONY OF CLETA MITCHELL
ATTORNEY
PARTNER, FOLEY & LARDNER LLP

HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
WEDNESDAY, JULY 30, 2014

"IRS Abuses: Ensuring that Targeting Never Happens Again"

MR. CHAIRMAN;

Thank you for conducting this hearing and for conducting the investigation into the unlawful and unconstitutional political targeting of American citizens and citizens groups by the Internal Revenue Service. You have been determined and dogged and relentless – and for those of us on the receiving end of the IRS targeting – the IRS and its top leaders were determined and dogged and relentless in denying the First Amendment rights of hundreds of organizations and literally thousands of law-abiding, patriotic American citizens. What the IRS has done – and which, I believe, they are still doing and planning to do – is unconscionable, unconstitutional and must be stopped and must never be allowed to happen again.

So, how, Mr. Chairman, can the Congress of the United States make certain that the IRS never again singles out Americans for their political beliefs and subjects them to harassment and the denial of the statutory procedures available to others who do not share their beliefs?

I have several recommendations. These recommendations are based on my years as an attorney representing many, many of these groups before the IRS, as someone who realized in early 2010 that something was going on at the IRS with regard to applications for exempt status, and as someone who represents three different citizens groups who have sued the IRS in the past year over various egregious violations of federal law and the US Constitution.

First, I believe that the Internal Revenue Service is so corrupt and so rotten to the core that it cannot be salvaged. It has too much power, too much money, too many employees and it needs to be absolutely jerked out at the roots. I would urge the members of this Committee and all members of Congress to support Rep. Jim Bridenstine's bill, House Joint Resolution 104, which would repeal the 16th Amendment to the US Constitution. It would abolish the income tax and, by extension, it would abolish the IRS. Yes, that's what I said. **Abolish the IRS.** The only way to ensure that the IRS never does this sort of thing again is to get rid of the agency altogether

The IRS cannot be saved. The 16th Amendment and the IRS should both become relics of American history –and the sooner the better.

The IRS is comprised of 90,000 civil service employees and 2 who are not protected by the civil service system. Two. The Commissioner and the Chief Counsel. Congress thought that by protecting the IRS employees from political pressure, the IRS employees would be politically neutral and would not succumb to political pressure. Well, as Dr. Phil says, “how’s that working out for us?” The entire IRS targeting scandal was carried out by civil service employees who were **TOTALLY** directed and motivated by political pressures and momentum from one side of the political aisle – that is perfectly clear from the investigation this Committee has conducted. This scandal began as a result of political pressure from the White House, from the President’s speeches over many months demanding that ‘something be done’ about these conservative organizations, political pressure from Democrats in Congress and political pressure from liberal interest groups. All demanding, as Lois Lerner remarked, that her office “do something” about these conservative groups. So they did.

An agency which by every objective measure should have total freedom to function in a totally objective manner, instead completely succumbed to political pressure.

And so I say, #1 – abolish the IRS. Repeal the 16th Amendment. This agency can NOT be saved.

But knowing how difficult it is to change the US Constitution – its having happened only 29 times in more than 200 years – and the first 10 times came in the first years of the country – I will turn my attention to what I believe Congress should do in the meantime to ensure that the IRS targeting of citizens and citizens groups never happens again.

Here are ten recommendations that Congress should adopt to protect the American people FROM the IRS, while the citizens go about the business of repealing the 16th Amendment.

1. **Prohibit IRS employees from being part of a union.** The National Treasury Employees Union provides no protection to IRS employees that federal statutes and the civil service system do not already provide. Holding an IRS employee accountable for his/her actions seems to take an act of God. So it is redundant for IRS employees to belong to a union. IRS employees should not be unionized. Period. It is a conflict of interest for any IRS employee to be part of a political organization like the Treasury employees union, when these are agents and employees who have such power over all the citizens of the United States. The National Treasury Employees union in this cycle alone, has given 94 % of its contributions to Democrats – including to the ranking member and 10 of the minority members of this Committee.

So I can understand why the Democrats on this and other committees are defending the IRS and trying to shut down the Committee's investigation into the IRS targeting.

2. **Eliminate the application process for exempt organizations other than Section 501(c)(3) entities.** Stop this "mother, May I?" application process to the federal government before a citizens group can function. Every exempt organization should do what every for profit entity does and what any other type of tax entity in America does: just file. Tell the IRS what it is that the entity is and just operate that way. The IRS must never again be allowed to decide who can and cannot be a social welfare organization – or a union or a business league or a veterans organization or any other type of exempt organization. The IRS does not get to decide those questions for any other type of entity in America – and the exempt organizations unit should be confined to making those decisions solely about groups that seek exemption as charitable organizations. The IRS in the targeting scandal and, indeed, according to guidance issued this past March, used the application process as a means of conducting program audits of citizens organizations – without any expertise, criteria, legal standards or accountability. Just eliminate the application process altogether and allow random statistically based program reviews of exempt organizations after they have been operational as a means of ascertaining whether the organizations are operating within their designated section of the Internal Revenue Code. But the application process is hopelessly broken and should be eliminated altogether for all but 501(c)(3) organizations. ONLY Section 501(c)(3) groups are entitled to tax deductible contributions. None of the others receive that benefit and there is no justification for an application process that the IRS admits is not required by law. Get rid of it.

3. **Define by statute that political activities ARE social welfare activities.** Social welfare organizations SHOULD conduct candidate debates and they SHOULD tell the public how candidates stand on issues and they SHOULD develop voting records and voter guides and encourage citizen engagement in politics. Political involvement is a good thing, not a bad thing – and it shouldn't be reserved just to the editorial writers and the political consultants and the professional politicians. Normal Americans who join citizens groups whose values and principles they share SHOULD be able to associate for political purposes and we need to get rid of the obstacles to their involvement. And there should NEVER be a situation where the IRS, as the most powerful agency in the country without bombs and missiles, is allowed to run roughshod over the constitutional rights of the American people to engage in protected speech and political activities. That is not their job and it should be made clear that it is not their job.

4. **Repeal the tax imposed on political expenditures by 501(c) organizations.** It cannot be constitutionally permissible for a citizens group to be taxed on the exercise of its First Amendment rights. The tax on political expenditures by 501(c) organizations is an egregious and hateful tax and should be repealed.

5. **Strengthen 26 U.S.C. § 6103 to make it meaningful for taxpayers, not capable of being used as an excuse for the IRS to fail to cooperate with taxpayers whose rights have been violated by the IRS.** Congress enacted Section 6103 for the clear purpose of protecting taxpayers from having their confidential taxpayer information inspected or released by IRS employees. Now, the IRS uses Section 6103 as an excuse for NOT telling taxpayers the truth when an IRS employee has unlawfully inspected or disclosed confidential taxpayer information. Section 6103 is relied upon by the IRS as a shield to protect itself, and its employees, from being held accountable for violating 6103. For example: If I learn or believe that my confidential tax information has been inspected, compromised, or released, the IRS takes the position that it cannot tell me, the taxpayer who is the victim of a violation of this law, anything about the violation. The IRS argues that the IRS employee who perpetrates the offense is ALSO a taxpayer and for the IRS to disclose information to me about the compromise or disclosure of my taxpayer information would constitute a violation of the IRS employee's 6103 rights. Yes, the IRS has turned Section 6103 on its head – it is unbelievable but some courts have bought this legal fiction. Congress has to fix it.

Some recommendations for strengthening Section 6103:

- Congress should provide a cause of action for taxpayers to be able to sue personally any IRS employee who violates Section 6103, and should provide for treble damages to injured taxpayers.
- Any taxpayer, upon written request, should be able to obtain the name and employee ID information about any IRS employee who has accessed or inspected the taxpayer's information and the legal authority for the IRS employee's inspection.
- Congress should repeal the authority of state and local government agencies to have access to the taxpayer's federal tax information or, at the very least, require state or local agencies to issue subpoenas, with notice to the taxpayer of the request for inspection by the state or local government agency, employee or official of the taxpayer's confidential federal tax information.
- Prohibit the sharing of taxpayer information by the IRS with any other federal agency without due process: a subpoena and written notice to the taxpayer that the taxpayer's confidential information is being sought by another federal agency.

- Shift the burden from the taxpayer to the IRS when it comes to taxpayers being forced to provide information to the IRS. Make the IRS responsible for showing that any information it seeks from taxpayers has a lawful, legitimate purpose and is not just demanded by an overreaching federal employee. Section 6103 should protect taxpayers from being forced to provide information to the IRS to which it is not entitled, thereby allowing the IRS to unlawfully inspect confidential information that taxpayers should not have to provide without a legal basis for doing so.

Section 6103, is supposed to protect taxpayers from the unlawful inspection or disclosure of confidential taxpayer information. It should NOT be used as an excuse for the IRS to refuse to tell taxpayers who has unlawfully inspected or disclosed their taxpayer information, and it should not be the catch-all excuse for the IRS to avoid accountability to Congress and the taxpayers for violations of the rights of the American people. Section 6103 needs to be thoroughly reviewed and strengthened for the benefit of the taxpayers, NOT the IRS.

6. **Repeal the provision of the IRC that requires exempt organizations to disclose their donors to the IRS.** There is no public purpose to this mandatory, compelled disclosure of donor information; it is not publicly disclosed, nor should it be. And we saw just three years ago, in the first inkling of the IRS targeting scandal, the situation where the IRS targeted several donors to one conservative group and attempted to impose a gift tax on those donors for their contributions to that exempt organization. There is no public policy imperative for citizens groups to be required to disclose to the IRS the donors to their organizations. Congress should repeal this provision and prohibit the disclosure to the IRS of donors to exempt groups.
7. **Prohibit the use of or reliance upon by the IRS of any/all information regarding contributions to candidates, political organizations, parties, committees or exempt organizations by a taxpayer for purposes of targeting or initiating audits of any taxpayer.** I believe that the IRS has used campaign finance reports of donors / contributors to political campaigns as a selection criteria for personal IRS audits. I believe this Committee should investigate that issue. I have received too many reports from too many people from across the nation to think it is coincidental. And I am quite certain it has happened because I noticed IRS Commissioner Koskinen, in his first appearance before the House Ways & Means Committee in January, came prepared and briefed by his staff – as he always does – he shows up spouting the party line – but he made a preemptory comment that ‘of course donors would be more frequently audited because they are higher income persons...’ That is not what has happened. Imagine that the IRS uses campaign finance reports, required to be filed with the FEC – or a state or local campaign finance agency -- as the source for targeting taxpayers for IRS personal tax audits. That should be investigated by this Committee – did they

just use the Romney donor information? Or did they also use the Obama donor information for selecting their targets for audit? This Committee should find the answers to that question – and using reports of donors to political campaigns and committees as a basis for IRS audit should be illegal. Making an after tax voluntary campaign contribution should not subject a donor to an IRS audit. This prohibition should apply as well to the use by IRS employees of contribution and/ or donor information disclosed to the IRS of contributions to exempt organizations – See #7 above – and to the use of ANY reports of taxpayer campaign contributions required to be disclosed to local, state or federal campaign finance agency.

8. **Amend 42 USC Section 1983 to reinforce that citizens are entitled to constitutional protections when dealing with any federal agency; establish under the statute that citizens have a cause of action against IRS employees - and any federal employees - who violate their constitutional rights. Just as it is the case with state and local government employees.** We believe from our legal research that there is a clear cause of action against the IRS employees personally – people like Lois Lerner – who violated the constitutional rights of the organizations targeted by the IRS in this scandal. The IRS employees argue to the federal courts that there is NO cause of action available to the injured citizens and citizens groups because there is no statute which clearly authorizes the suit- and thus, they claim, they are immune from suit. We have argued that that is not the case – and have cited to the Court that the reason there is NOT a specific provision included in the Internal Revenue Code is that, when Congress was considering and enacting the Taxpayer Bill of Rights in 1987, the IRS commissioner testified to Congress that there wasn't a need to include such a provision in the Code because the Supreme Court had already recognized that a federal employee, including any employee of the IRS, who violates the constitutional rights of a citizen may be sued personally for those actions.

My fellow attorneys and I who represent the plaintiffs who have filed these lawsuits disagree and we believe that such a cause of action does exist. But it would certainly enhance the protections available to the American taxpayers against abuse and discrimination against them by the IRS and other federal employees if Congress were to codify the Supreme Court's decision in *Bivens v Six Unnamed Agents*, and to give the American people the same rights against federal employees that now exist against state and local employees. A violation of the civil rights of a citizen should be capable of being redressed whether it is a local policeman or an IRS employee who has committed the violation of a person's constitutional rights.

9. **Reaffirm clearly that the laws Congress enacted to provide due process rights to the American people at the hands of their government and to protect the citizens from over-regulation and overreach by federal agencies – that those laws do in fact apply to the IRS, just as they apply**

to other federal agencies. In the past several years, I have seen, heard and watched the IRS assert that the laws enacted by Congress either do not apply to the IRS or the IRS essentially *ignores* the federal law: the Administrative Procedures Act, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Federal Records Act, the Federal Information Security Management Act – these are all examples of federal statutes the IRS either disregards or actually argues are inapplicable to the agency. The IRS has made a mockery of the Freedom of Information Act, either lying outright to citizens who file FOIA requests – telling them there are no responsive documents, but when sued by the taxpayer, it turns out that there are thousands of responsive documents. Or, what appears to be the current practice is for the IRS simply to ignore FOIA requests, forcing citizens to sue to obtain documents from the agency. The IRS has contempt for the law and contempt for the citizens. Congress should at the very least take steps to clarify for the judiciary that, indeed, the IRS and its employees are not immune from the application and coverage of the laws Congress enacts and failure to comply will result in adverse consequences to the agency.

- 10. Apply the provisions of 18 U.S.C. § 1001 to federal agencies and employees: if the citizens can be punished for lying to the government, the government and its employees should be capable of being punished for lying to the American people.** 18 U. S. C. § 1001 makes it a criminal offense for any person to make a false statement to a federal agency, agent or investigator. Yet, the IRS has made false statements to the American people consistently, and with seeming impunity. The IRS Commissioner in March 2012 told this Committee that there was no targeting by the IRS of citizens groups based on their political beliefs. That was a lie. The IRS lied to the American people when it stated publicly last November that there were no 'supporting documents' related to the proposed IRS regulations for 501(c)(4) organizations. We are now suing the IRS and Treasury for failure to produce such documents via a FOIA request. And we have started receiving documents pursuant to a scheduling order in the federal court – but we know for a fact, again because of the work of this Committee, that there are thousands of documents related to the proposed regulation of citizen speech and political activities, going back several years. The IRS should not be allowed to lie with impunity to the people or their elected representatives in Congress, just as citizens cannot lie to federal agencies such as the IRS without fear of criminal prosecution.

These are recommendations that have arisen based on my experiences with the IRS over the past several years – within the administrative, rulemaking and litigation contexts.

Lois Lerner famously said that the IRS targeting scandal arose because of some 'rogue' agents in Cincinnati. That was a lie – and she should be punished for lying to the American people.

But her reference to there being rogue agents is not wrong – the IRS as a whole has gone rogue. Congress has some heavy lifting if it is to try and rein in this out-of-control agency.

I end where I began: repeal the 16th Amendment and abolish this monstrosity. But in the meanwhile, get control of the agency by firmly reinstating the rule of law within it – and removing many of the opportunities and temptations that exist under current law for the targeting scandal to happen again.

Thank you for your hard work and efforts on behalf of the American people.

ATTACHMENT 2

TESTIMONY OF CLETA MITCHELL, ESQ.
HEARING ON THE FREEDOM OF INFORMATION ACT
HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
TUESDAY, JUNE 2, 2015

Mr. Chairman, Mr. Ranking Member, Members of the Committee:

Thank you for inviting me to testify today about a subject that is of great interest to me, to my clients and to the American people. The Freedom of Information Act. "FOIA" was enacted by Congress in 1966 to give the citizenry access to information and documents that *they* have paid for.

But the reality is that federal agencies today refuse to comply with the letter or the spirit of FOIA. The USA.gov website has a downloadable brochure about the *Freedom of Information Act* that describes the Freedom of Information Act as "*the law that gives you the right to access information from the federal government.*"

The problem is, while that is what the law is supposed to do, it is *not* how federal agencies handle FOIA requests in real life.

My experience with FOIA has been on behalf of several grassroots citizens' organizations over the past several years, as these groups began to wonder why various federal agencies had either targeted them, subjected them to what they believed were violations of their rights under the statute or were proposing draconian new regulations that would impact them and others similarly situated.

And in each and every instance, the simple process outlined in the USA.gov brochure is *not* what these citizens' groups experienced. Instead, it has become clear that only by filing litigation does a federal agency begin to produce documents in its possession responsive to the FOIA request. And if the litigation is a FOIA appeal, the agency invokes one of several non-statutory exceptions to FOIA as the means of withhold responsive documents and information from the people.

Let me share some of my clients' FOIA experiences:

True the Vote / King Street Patriots / Catherine Engelbrecht. In the spring of 2013, Catherine Engelbrecht, who has testified before this Committee, filed FOIA requests with the federal agencies who had landed on her doorstep within the months immediately following her filing of applications for exempt status for two conservative grassroots organizations: a 501(c)(3) organization, True the Vote and a 501(c)(4) organization, King Street Patriots. Her requests were for documents related to the surprise audits, inspections and agency contacts to her organizations and to her family businesses. The FOIA requests were either ignored, largely redacted, or produced deliberately false responses. Note in particular the response(s) to Ms. Engelbrecht's FOIA request to OSHA which resulted in false statements from the agency. That information is attached to my testimony. Essentially, all the FOIA requests produced zero information and no documents responsive to her requests.

Fast forward, early 2015, once again, Ms. Engelbrecht filed FOIA requests with the same federal agencies, including the IRS, the Department of Justice, and the Bureau of Alcohol, Tobacco and Firearms, again seeking documents that reference True the Vote, Catherine Engelbrecht and/or King Street Patriots. As of

today, none of the agencies have produced documents responsive to these FOIA requests. A chronology of the interactions between the organization and various federal agencies over the past six months is attached to my testimony.

Two years and multiple requests have produced nothing.

National Organization for Marriage. In the spring of 2012, the National Organization for Marriage (“NOM”) became aware that its confidential donor schedule from its IRS Form 990 had been released by the IRS and posted on the website of its ideological opponent, the Human Rights Campaign. NOM immediately filed a demand with the Treasury Inspector General for Tax Administration (“TIGTA”) to investigate the illegal release by the IRS of its donor schedule, which is, by law, not a public filing. After some time passed and NOM was not provided any information about the results of the investigation, NOM requested a copy of the TIGTA investigation report through a FOIA request. What NOM received in response to its FOIA request were mostly documents NOM had provided the agencies and no documents responsive to the FOIA request. NOM filed another request seeking the specific documents pertinent to the illegal release of its Schedule B donor information. Again, no documents responsive to the FOIA request were forthcoming. Indeed, the IRS and Treasury department took the position that there were either no responsive documents or the documents that did exist could not be provided to NOM because providing such documents to NOM would violate the Section 6103 or other “privacy” rights of those being investigated for the illegal release of NOM’s confidential Schedule B. In all, there were at least three separate FOIA requests from NOM to the IRS and Treasury, seeking documents that would reveal the sources of the release of NOM’s Schedule B. And each time, both the IRS and Treasury claimed that they had produced all responsive documents and any other documents could not be released

without violating the statutory rights of the individuals who were investigated by TIGTA.

NOM ultimately sued the IRS, not as a FOIA appeal, but in a cause of action under the tax code to recover damages from the IRS for the agency's violation of the provisions of law that protect the confidentiality of NOM's donor information. The IRS in discovery in the litigation was required to produce thousands of pages of documents related to the illegal release of the NOM donor schedule...documents that it had claimed didn't exist in response to the FOIA requests seeking those same documents. Only then was NOM able to learn the true story of how its confidential donor schedule had been obtained illegally from the IRS by someone who hates the organization.

Tea Party Patriots. Tea Party Patriots filed FOIA requests in May 2013 seeking all documents from the IRS related to the group's application for exempt status for Tea Party Patriots, a 501(c)(4) organization and the application for exempt status of its companion 501(c)(3) organization, the Tea Party Patriots Foundation. As of this date, no documents have been received by either entity. Rather, a series of letters essentially every 90 days for the past two years arrive from the IRS, including the latest letter dated April 29, 2015, stating that the agency needs 'more time' to process the FOIA requests and then granting itself another 90 days to produce responsive documents. Copies of the FOIA requests and the IRS response letters are attached to my testimony.

The same circumstance arose when Tea Party Patriots filed FOIA requests with the IRS and Treasury in early December 2014, days after the IRS had issued proposed new regulations governing and restricting the political speech and association of 501(c)(4) organizations. Those proposed regulations were issued the

day after Thanksgiving 2014 and clearly had been in process for many months prior to their public release during the Thanksgiving holiday. There was no public notice of the rulemaking because the entire process was conducted 'off-plan' which means that the IRS and Treasury department did not include the development of regulations governing 501(c)(4) speech and association in the listing of regulations the agencies were developing – meaning that the rulemaking was conducted in total secrecy within the IRS and the highest levels of the Treasury department.

Because the proposed regulations would directly impact the operations and activities of Tea Party Patriots – as well as every other citizens group in America, Tea Party Patriots filed a FOIA request with both the IRS and Treasury asking for documents regarding the proposed rules. The statute requires an agency to provide responsive documents within thirty (30) days of the request, with an additional fifteen days if the agency cannot meet the 30 day deadline.

Both the IRS and Treasury responded that it would take the full 45 days to be able to respond to the FOIA request, which would have meant that the documents would be provided to Tea Party Patriots at the end of January 2014, a month before the deadline for filing comments regarding the proposed regulations.

Except that isn't how it works in real life.

The Treasury department invoked its additional fifteen day extension....and then never responded again.

The IRS invoked its fifteen day extension...and then went on to advise that the documents would not be forthcoming until early April 2014 – fully one month after the deadline for filing comments on the proposed regulations.

When the April deadline came, we received another letter from the IRS advising that it would be July 2014 before the documents could be provided.

I contacted Ms. Denise Higley, the individual who signed the FOIA letters from the IRS and asked if she could provide any information on how the agency was coming in terms of fulfilling the statutory requirements of searching, identifying and producing responsive documents.

Ms. Higley advised that after she confirms the FOIA requests, she then directs those to the appropriate agency personnel. And that she had heard nothing from anyone since. I asked, "how did you arrive at the April 2014 date?" She indicated that she had estimated that that would be sufficient time for the IRS to produce the documents. When I asked, "well, how did you then arrive at the July date in your latest letter?", she advised that she was 'estimating' as to how much additional time would be needed.

My question was, "So you just basically make up these dates because you never hear from anyone within the agency?" And she said, that was correct.

What she was telling me is that if a citizen wants information and documents from the IRS – and likely for any other federal agency, at least in this Administration – be prepared to file a federal lawsuit because if you don't, you will not get anything from the agency.

Tea Party Patriots did file suit against the IRS and Treasury department seeking to enforce its FOIA requests. That suit was filed in April 2014 and one year later, we have received monthly document productions. Here is what we have received:

- Thousands of pages of documents fully, or largely redacted so as to be completely devoid of substantive information
- Vaughn indexes that describe thousands of documents that are being withheld by both agencies and not produced at all
- Thousands of emails that are redacted, except for the dates and times of sending and *most* (but not all) of those on the email chain – to the point that no actual substantive documents have been produced in a year’s worth of rolling document productions.
- We have learned only three things in the course of seeking full disclosure of information and documents related to the 501(c)(4) regulations:
 - We have learned that the regulations were primarily the handiwork of Ruth Madrigal, an Attorney-Advisor in the Office of Tax Policy of the Treasury Department. She is responsible for advising the Assistant Secretary (Tax Policy) on all matters involving tax-exempt organizations – and she has emerged as the leader of this project, but documents related to why Ms. Madrigal undertook this project in the first place and who initiated the secret 501(c)(4) regulations have either not been produced, or the information is contained in the produced documents but is blacked out. So we know that the effort to regulate, stifle and restrict the free speech rights of citizens groups originated at the highest levels of the Obama administration. We should be able to see that information in the documents – but it has been obliterated to keep us from learning any of those specific details.

- We have learned that the original plan was for the proposed regulations to be issued on the Friday of Labor Day weekend, 2013 and, in fact, the regulations had already been sent to the Federal Register for publication on that Friday. For reasons that are blacked out in the documents we have received, the proposed regulations were withdrawn from the Federal Register and underwent another 2 ½ months of work....all of which is redacted and invisible to us...and then when the powers-that-be concluded they were in shape to be published, the IRS worked overtime to make absolutely certain that the proposed regulations were issued Thanksgiving week, and NOT the Friday before Thanksgiving in 2013.
- We have learned that the IRS does not respond to FOIA requests unless a lawsuit is filed in federal court and then, the documents that are produced are largely useless because of the manner in which the IRS invokes certain 'privileges' against disclosure.

Congress, in enacting FOIA, identified 9 exemptions to the types of records and documents federal agencies are required to provide to citizens. Those exemptions are very specific and narrow, at least when Congress envisioned them. The exemptions cover:

1. classified national defense and foreign relations information,
2. internal agency personnel rules and practices,
3. information that is prohibited from disclosure by another law,

4. trade secrets and other confidential commercial information,
5. inter-agency or intra-agency communications that are protected by legal privileges,
6. information that would invade someone's personal privacy,
7. certain information compiled for law enforcement purposes,
8. information relating to the supervision of financial institutions, and
9. geological information on wells.

The IRS and many other federal agencies have successfully persuaded various judges over the years that these narrow exemptions authorized by Congress should be much broader and all too often, federal judges have sided with the agencies, against the citizens – to the point that FOIA is neutered almost beyond usefulness.

In the Tea Party Patriots FOIA appeal, the redactions and withheld documents rely almost exclusively upon the 'deliberative process' privilege...which the IRS and Treasury contend applies to any substantive document that would provide any real information as to what the IRS and Treasury intended with their proposed regulations, why they intended it and where the regulations originated, their purpose and meaning. All the kinds of information that FOIA is supposed to guarantee to the citizens.

Copies of all the FOIA requests in Tea Party Patriots, Inc. vs the IRS and Treasury litigation and all the CD roms with the documents produced to date in the litigation have been provided to the Committee.

The 'deliberative process' privilege is used by the IRS and Treasury in our FOIA appeal to shield the agencies from providing documents to answer the basic questions about these proposed regulations that came out of nowhere, with no intervening Congressional action and which would have – and may yet – adversely impact thousands of citizens organizations nationwide.

After more than 160,000 comments were filed opposing the (c)(4) regulations, they were withdrawn, not surprisingly, late on the Thursday of the Memorial Day holiday last year...but the IRS Commissioner publicly stated that the agencies are continuing to rework the proposed regulations and plans to reissue them at some point.

Since we know the pattern of the IRS and Treasury is to spring important matters during holiday weeks and weekends – and since they weren't issued this past Memorial Day, we will be on the lookout on July 2 – as that is the next holiday weekend.

The IRS has evidenced a pattern of stealth and arrogant disregard for the statutory rights of the American people to know what their government is doing to and about them. The IRS develops these very significant regulations, suddenly releases them during holidays, withdraws them on a holiday weekend... so it should not come as a surprise to anyone that the IRS – and the Dept of Treasury – would thumb their noses at their FOIA obligations which are for the purpose of transparency, a concept that has long been vanquished from the IRS and Treasury.

Most people do not have the time or the money to file appeals in federal court when the IRS or any federal agency simply disregards their FOIA requests. And even when a FOIA appeal is filed, Tea Party Patriots experience in our FOIA appeal has resulted in our receiving reams and reams of worthless pieces of paper from which any actual information has been removed.

I must point out my personal favorite was the April document production from the Department of Treasury – in which all of these documents – ALL of them – are drafts, emails, redrafts, and revisions to ONE press release....the press release regarding the publication of the c4 regulations. The drafts and redrafts are all redacted, but the entire month's document production last month was with regard to that one press release.

The month before that, the document production was of law review articles, the Congressional Record and other public documents regarding the Internal Revenue Code and the history of exempt organizations.

The Department of Justice FOIA page on its website describes FOIA as follows:

The Freedom of Information Act (FOIA) is a law that gives you the right to access information from the federal government. It is often described as the law that keeps citizens in the know about their government

I have learned through painful experiences with and on behalf of my clients that that is high-sounding verbiage but it has long since stopped being a true description of FOIA.

FOIA is almost fifty years old. And FOIA at fifty isn't aging very well. Congress should close the loopholes that allow federal agencies to ignore FOIA requests altogether until and unless they are sued – and should plug the various loopholes that agencies have continued to expand in their never-ending quest to deny to the American people information to which we are entitled and which Congress has emphatically stated that we should have.

I am happy to answer any questions the Members of the Committee may have. Thank you again for allowing me to testify today. ###

ATTACHMENT 3

June 12, 2015

Via Electronic Mail: katy.rother@mail.house.gov

Ms. Katy Rother, Esq.
Counsel
House Committee on Oversight and Government Reform
Rep. Jason Chaffetz, Chairman
Rep. Elijah Cummings, Ranking Member

Re: Recommendations related to Freedom of Information Act
("FOIA") Reform

Dear Ms. Rother:

Thank you for allowing me to participate in the House Oversight and Government Reform Committee ("the Committee") hearings this month on transparency and the problems related to the Freedom of Information Act ("FOIA") and how it is being abused and disregarded by federal agencies, to the detriment of the public's right to receive documents paid for by tax dollars regarding the business that federal agencies are conducting. As the witnesses at the hearings disclosed, FOIA is in need of substantive reform in order to restore the principle of transparency that the law intended.

You have asked for responses to several questions and I am pleased to offer my thoughts on those questions.

1) Are there any exemptions that should or could be eliminated in their entirety?

a. If yes, which one(s)?

Yes. The 'deliberative process privilege' should be repealed. The case law regarding the deliberative process privilege is unintelligible, such that agencies can essentially decide to apply the 'deliberative process privilege' to anything they do not wish to disclose.

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Peruse the explanation and discussion of the 'deliberative process privilege' in the Guide to FOIA published by the Department of Justice in 20014. This discussion exposes the issues and problems with the privilege and also the thinking by DOJ about the use of and reliance upon the privilege, commenting negatively on court decisions that reject the privilege asserted by federal agencies.

<http://www.justice.gov/oip/foia-guide-2004-edition-exemption-5>

The deliberative process privilege is a common law principle that has now been codified, without the safeguards that initially were envisioned for invoking the privilege. The courts have expanded beyond all reasonableness the application of the privilege, such that today, as a practical matter, FOIA is the 'catch-all' excuse from federal agencies to withhold documents from FOIA requests – and the remedy to challenge the exemption is costly, time consuming federal litigation.

There should be a statutory principle which *instructs* federal agencies and judges that “in the instances of doubt as to whether a document or information is or is not subject to FOIA disclosure, the legal principle is that the public’s right to know and the obligation of transparency by federal agencies overrides withholding of documents and information”.

That legal principle must be established clearly in the statute.

Exemption 5 includes the attorney work product and attorney client privilege exemptions, as well as the deliberative process privilege. The reasons articulated by judges and agencies for protecting documents from disclosure to the citizens who paid for them under the deliberative process privilege are primarily to 'protect government decision-making'. It is that very decision-making that the citizens are *entitled* to know.

By eliminating the deliberative process privilege, agencies would still be protected from disclosing written communications between agency personnel and their counsel, as well as documents developed by agency attorneys in anticipation of or as part of litigation. Those privileges are sufficient to protect agencies from being disadvantaged in adversary proceedings.

Not only should the deliberative process be repealed, but Congress should specifically state in the statute that the common law principle of the deliberative process cannot be invoked for purposes of denying disclosure of documents otherwise responsive to a FOIA request.

There are many treatises and articles regarding all of the FOIA exemptions and the manner in which each has been expanded beyond the original intent of Congress.

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For my purposes, I am focusing on the deliberative process privilege and urging Congress to add the following three statements of principle to the FOIA statute:

1. In the instances of doubt as to whether a document or information is or is not subject to FOIA disclosure, the legal principle is that the public's right to know and the obligation of transparency by federal agencies overrides withholding of documents and information
2. The deliberative process privilege is hereby repealed as a basis for withholding documents otherwise responsive to a FOIA request.
3. The Courts are prohibited from applying the common law principle of a 'deliberative process privilege' as a means of denying or withholding documents otherwise responsive to a FOIA request.

Because the jurisprudence in this area is so extensive, so contradictory and impossible to simply interpret, the only solution is to abolish the deliberative process privilege altogether. Absent doing that, Congress will not have solved the major impediment to federal agency transparency and accountability.

- b. **If not, why not?** See above.
- 2) **Which exemptions need to be narrowed in scope?** See above.
 - a. In what ways do they need to be narrowed?
 - 3) **What do agencies need to better perform?** See below
 - a. **What kinds of consequences should agencies face for noncompliance?**

Congress should establish a systematic review of the responsiveness of agencies to FOIA requests – and should establish standards for the information that is provided to Congress. The agencies presently all publish 'puff pieces' about their commitment to transparency, all the while doing everything within their power to avoid disclosing documents to FOIA requesters. Agencies should have to report to Congress as part of their appropriations and funding requests, using a congressionally mandated standard template for requesting and receiving the information, and that information *must* be used by Congress when making funding decisions.

Congress should also zero out the public affairs budgets of every agency and reallocate those funds being spent on propaganda from the agencies to enhancing FOIA capabilities. See discussion below re: creation of a FOIA watchdog agency.

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Agency heads and individual personnel who willfully, falsely invoke a privilege or exemption in order to avoid disclosure (such as the EPA employee who suggested tagging all communications as 'attorney-client privilege' when no attorney was involved in the communication) should be subject to summary dismissal from the federal workforce, without the laborious protections now available to federal employees to avoid termination. This type of misconduct by individual federal employees must be capable of being swiftly and permanently punished.

In addition, the agencies should be forced to pay the costs of proceedings where the agency is found to have improperly asserted an exemption or privilege. Requesters should not have to pay for the costs of forcing agency compliance with FOIA when such costs are incurred because of the agency's asserting of an exemption that it is found to be inapplicable. A 'loser pays' penalty imposed on agencies might serve as a deterrent to such misconduct.

b. **What kinds of incentives could we put in place to encourage compliance?** No comments

4) What other legislative solutions should the Committee consider?

Congress should consider establishing a federal watchdog agency whose job is to receive, manage and enforce FOIA requests. Rather than allowing each agency to manage its own FOIA procedures, which results in wide variations in the manner in which FOIA requests are processed, an agency that has the responsibility for receiving all FOIA requests and functions as a quasi-judicial body whose job is to ensure compliance by all agencies with citizens' requests for information may be a step in the right direction.

An agency seeking to invoke an exemption or privilege to avoid disclosure would be required to present that proposed exemption at the outset of the FOIA process, to FOIA legal experts within the FOIA watchdog agency. The FOIA agency would be able to hear the arguments from both the requester and the agency and render an administrative decision on the application of the exemption or privilege asserted, which could be immediately appealed to the federal district court in order to test the legal sufficiency of any such privilege at the outset of a FOIA matter. The present procedure is simply untenable where documents are produced in redacted form for months or years, at the conclusion of which, the agency and the requester argue about whether the exemption(s) asserted were applicable. The sequence must be reversed.

Funding for the FOIA watchdog agency should come from the funds now being spent for public affairs departments within agencies. Congress could thus create the new agency without additional appropriations.

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The FOIA watchdog agency should report to Congress and it should function in the same manner as the Government Accountability Office. It could even be made part of the GAO. This should be an extension and a permanent part of the Congressional oversight function of federal agencies.

Finally, the time periods for responding to FOIA requests must be examined. The present time periods are simply disregarded and ignored by agencies. A reasonable time for receiving and processing requests, requiring agencies to submit documents to the FOIA watchdog tribunal with any proposed exemptions and privileges *before* agencies engage in the laborious, costly and time-consuming process of redacting and withholding documents, would expedite the process.

Conclusion: The entire FOIA process is broken and must be reviewed and revised from start to finish, with these suggestions:

1. Narrow some exemptions and complete repeal of others, such as the deliberative process privilege.
2. Create a FOIA watchdog agency that answers to Congress and enforces agency FOIA responses and procedures; fund the agency with the public affairs budgets now being spent by government agencies to deliver propaganda to the public from the agencies.
3. Reverse the procedures to ensure early determination of asserted exemptions and privileges.
4. Punish individual employees and agency heads who willfully assert inapplicable exemptions.
5. Require agencies to pay the costs of unsuccessful assertions of exemptions or privileges
6. Utilize agency FOIA responsiveness in the appropriations process to reward and punish, based on transparency and responsiveness, utilizing congressionally mandated standards rather than self-congratulatory agency puff pieces that disguise the true nature of their pattern of FOIA response and management practices.

These are my suggestions as how to address the significant problems with FOIA. The problems are both procedural and legally substantive. Only Congress can address and remedy the problems.



FOLEY & LARDNER LLP

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Thank you for the opportunity to provide these proposals. Please know that I am available to assist in any way possible to restore transparency and accountability to the federal government and its agencies.

Sincerely,

/s/ Cleta Mitchell

Cleta Mitchell, Esq.

CMI: