Written by **Joe Wolverton, II, J.D.** on March 15, 2012

Obama Administration Seeks More Secrecy for Govt. Files

March 16 is the birthday of James Madison, known as the "Father of the Constitution." Several years ago, the American Society of News Editors initiated a program called Sunshine Week, intended to coincide with the birthday of this illustrious Founding Father. The purpose of Sunshine Week was "to educate the public about the importance of open government and the dangers of excessive and unnecessary secrecy."

Despite the forecasted clear skies, there are clouds looming on the horizon. Not surprisingly, the clouds are blowing in from the White House. Despite promises from President Obama that his election had ushered in "a new era of open government," especially regarding its response to the Freedom of Information Act, the behavior of one of his bureaucrats belies this boast.

In testimony before the Senate Judiciary Committee on Tuesday, Justice Department Director of the Office of Information Policy, Melanie Ann Pustay (pictured above), called on Congress to weaken the Freedom of Information of Act [FOIA] and strengthen the ability of the federal government to prevent the disclosure of documents deemed critical to the safety of the nation's cybersecurity and infrastructure.

Regarding the appearance of Putsay before the committee of which he is the ranking member, Senator Chuck Grassley (R-Iowa) said:

> Based on my experience in trying to pry information out of the executive branch, I'm disappointed to report that agencies under the control of President Obama's political appointees have been more aggressive than ever in withholding information from the public and from Congress. There's a complete disconnect between the President's grand pronouncements about transparency and the actions of his political appointees.

What prompted the Justice Department to recur to Congress for greater cover for their now-secret activities? Consider this explanation given in the statement read by Putsay at the Judiciary Committee's hearing:

> In Fiscal Year 2011, agencies were faced with an increase in the number of incoming FOIA requests, which rose from 597,415 in Fiscal Year 2010 to 644,165 in Fiscal Year 2011. Notably, the Department of Homeland Security experienced a 35% increase in the number of incoming requests.

A fair reading of that remark reveals that the federal government is fearful of the increased scrutiny its activities are receiving on the part of the public. If concerned citizens have their way, Sunshine Week would become Sunshine Year.

For now, the Supreme Court has sided with the public, granting greater access to documents and data sought so that the light of inquiry might be shone into the shadowy recesses of government programs.

Under provisions of the FOIA, anyone may compel agencies of the government to surrender copies of federal records. According to applicable exceptions to the law, a petitioner is entitled to receive the requested documents unless the disclosure would demonstrably negatively impact national security, violate personal privacy, or unnecessarily reveal business secrets or other confidential decision-making considerations.

Aware of the recent Supreme Court decision in the case of Milner v. Department of the Navy, that upheld these few exceptions, Putsay insists that the Congress must expand the shield of secrecy in order to "protect the vital interests that have been left exposed by the Supreme Court's Milner opinion."

In an 8-1 decision, the Supreme Court ruled that U.S.C. Section 552(b)(2)(Exemption 2) must be construed very narrowly so as not to prevent access to the so-called "High 2" category of information that relates to infrastructure data and practices.

Putsay, speaking for the Obama Administration, wants to prevent the public from requesting any information relevant to the High 2 category.

Said Putsay:

> For three decades, agencies had protected under "High 2" homeland-security and critical infrastructure information, law enforcement procedures, audit criteria, and other information that, if disclosed, would risk circumvention of the law. Although it limited the scope of Exemption 2 to matters related solely to internal personnel rules and practices, the Supreme Court was sympathetic to the policy concerns raised by the government concerning the need to protect information when its disclosure risked harm. The Supreme Court stated that it "recognize[d] the strength" of the Department of the Navy's interest in the case before it to "safely and securely store military ordinance." Indeed, the Court went on to note that "[c]oncerns of this kind—a sense that certain sensitive information should be exempt from disclosure—in part led the Crooker court to formulate the High 2 standard." The Court acknowledged that it might be necessary for the Government to "seek relief from Congress."

In order to put in context the Obama Administration's effort to seed the clouds of secrecy during Sunshine Week, a bit of background on the Milner case is appropriate.

Glen Scott Milner is a retired electrician living near Indian Island, Washington. On this small island, the United States Navy maintains a magazine in which are stored non-nuclear explosives. Twice between 2003 and 2004, Milner filed two Freedom of Information Act petitions, asking the Navy to demonstrate that the ordnance kept on Indian Island was within the legal requirements of Explosive Safety Quantity Distance (ESQD). Milner was afraid that he and his neighbors were in danger of being harmed should any of this ordnance explode.

In response to Milner's request, the Navy handed over most of the documents that Milner sought, but noticeably withheld was the ESQD information that was Milner's primary concern. The Navy defended its denial by asserting that the ESQD details could threaten the security of the depot, as well as that of the neighboring community. Specifically, the Navy claimed that the documents were exempt from disclosure under the aforementioned Exemption 2 of U.S.C. Section 552(b)(2).

The core of the question of the proper interpretation of the FOIA that faced the Supreme Court in the

Milner case is described ably in an article published by Cornell Law School:

> Some courts have interpreted Exemption 2 to cover two types of information: (i) "Low 2" information, which consists of relatively trivial internal matters and (ii) "High 2" information, which is considered more substantial and the disclosure of which would "risk circumvention of a legal requirement." The United States Court of Appeals for the Ninth Circuit held that the requested information was exempt from disclosure under the High 2 interpretation of Exemption 2. Milner argues that the High 2 Exemption is not supported by the plain text of the statute or its legislative history, and that the Navy must disclose the information. In contrast, the Navy argues that High 2 correctly expresses Congress's intentions in creating Exemption 2. This decision will determine the scope of agency disclosure in response to the public requests for information pursuant to the Freedom of Information Act.

Speaking for the majority, Justice Elena Kagan wrote that "because Exemption 2 encompasses only records relating to employee relations and human resources issues, the explosives maps and data requested here do not qualify for withholding under that exemption."

While such distinctions as "High 1," High 2," and "Exemption 2" may sound a little too much like baseball jargon, the ordinary truth of the matter is that by promoting the bifurcation of the FOIA's Exemption 2 into the High 1 and High 2 categories, the Obama Administration is trying to drape camouflage over its activities, even when, as in the case of Milner, these activities might pose a potential mortal threat to the safety of citizens.

Don't be put off by the terminology. This sort of obfuscation is an example of an attempt by agents of the federal government to muddy the clear waters of liberty with words and arguments intended to deprive the people of the right to monitor the government they created.