Obama Shuts the Door on Housing Transparency

By John Berlau

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The Obama administration swept into office promising to be the "most transparent" in history. Since that time, even supporters say the administration has fallen short of that goal. And hammering home Obama's penchant for secrecy was this recent bombshell: the Obama administration was judged by a major, mostly friendly, news service as least transparent of modern presidencies.

An analysis by the Associated Press found that "the Obama administration set a record again for censoring government files or outright denying access to them last year under the U.S. Freedom of Information Act." The AP adds that the administration "also acknowledged in nearly 1 in 3 cases that its initial decisions to withhold or censor records were improper under the law — but only when it was challenged."

But FOIA requests are just the tip of the iceberg for this administration's secrecy, much of which has nothing to do with the legitimate exception of national security. In Dodd-Frank, the administration set up the Consumer Financial Protection Bureau and the Financial Oversight Council — the constitutionality of both of which are now subject to a **lawsuit** from the Competitive Enterprise Institute and other parties — to be exempt from many open meetings and (especially with FSOC) open records requests.

But probably the most egregious example of this administration's secrecy practices concerns its management of the government-sponsored housing enterprises (GSEs) Fannie Mae and Freddie Mac. As important as the role Fannie and Freddie play in the housing market, and American Enterprise Institute financial scholar Peter Wallison's new book "Hidden in Plain Sight" convincingly fingers them as the main culprits in the mortgage bust that led to the financial crisis, it is hard for anyone to argue that their actions somehow affect national security.

Yet when asked to produce documents in litigation by Fannie and Freddie's shareholders, the

Obama administration made the unbelievable claim of "executive privilege."

According to **New York Times** financial columnist Gretchen Morgenson, "the government has invoked presidential privilege on 45 documents created either by officials at the Treasury or the F.H.F.A., the regulator charged with conserving Fannie and Freddie's assets."

Fannie and Freddie were chartered by Congress around 45 years ago as companies with private shareholders but lines of credit with the government. In September 2008, the Bush administration found that Fannie and Freddie were on the brink of failing.

Under new powers from the Housing and Economic Recovery Act passed two months earlier, it took them into a "conservatorship" in which the government took 79.9 percent of the entities' stock in exchange for bailing them out, a conservatorship that continues into the Obama administration to this day.

The series of actions now being called "Fanniegate" began in August 2012, when then–Treasury Secretary Tim Geithner issued the "Third Amendment" to the GSE conservatorship. The Third Amendment, with no authorization from the HERA law, required all of the GSEs' profits to be siphoned off to the U.S. Treasury Department in perpetuity — even after the GSEs paid back what they owed to taxpayers.

This arbitrary action has spawned more than 20 lawsuits from Fannie and Freddie's private shareholders. The suits charge the administration with everything from violating the Administrative Procedures Act to unconstitutionally taking property without just compensation.

The Third Amendment has also raised concerns that the profit sweep is leaving Fannie and Freddie with very little capital reserves, furthering the chance for more taxpayer bailouts should something go awry with the housing market again.

Cato Institute Director of Financial Regulation Studies Mark Calabria and former FDIC General Counsel Michael Krimminger have written an excellent **paper** on this point. And Rep. Marsha Blackburn, R-Tenn., has just introduced a bill, **H.R. 1673**, to require Fannie and Freddie to put aside some revenues in a "secondary reserved fund" that the Treasury Department can't touch.

But the really amazing thing is that we know very little about what prompted Obama and Geithner to pursue this highly controversial policy, because according to The New York Times' Morgenson, the Obama administration "has fought every discovery request made by the Fannie and Freddie shareholders."

Last year, one of these shareholder lawsuits — Fairholme v. United States — prompted Judge Margaret Sweeney to compel the administration to produce some of those documents in order to

satisfy a discovery request from the mutual fund plaintiff.

And a coalition **letter**, coordinated by my organization the Competitive Enterprise Institute and signed by leaders of 17 conservative and free market organizations, calls for a key oversight subcommittee to spread a little sunshine by obtaining the documents and making them public.

In the letter sent last fall to leaders of the House Financial Services Subcommittee on Oversight and Investigations, we wrote: "Not only is this Third Amendment an unprecedented power grab that violates shareholder property rights, but the process used by the Treasury Department to develop the Amendment provided neither an opportunity for public comment nor the customary transparency safeguards that permit we the people to hold our government accountable. To this day, the Amendment's provenance remains secret."

We asked the heads of the subcommittee to "demand greater transparency and accountability on this matter by requesting that the Treasury Department turn over to your committee, or otherwise make public, any and all documents shedding light on the alleged need for and legal rationale justifying the Third Amendment, as well as all documents detailing the Amendment's development and evolution, such as those customarily contained in the administrative docket for an agency rulemaking."

My CEI colleagues and I have long advocated ending the risk posed by the GSEs to taxpayers and the economy through an elimination of the taxpayer guarantee or an orderly liquidation of their assets, with no government-backed entity to replace them. Our new pro-growth congressional agenda, **"Free to Prosper,"** puts forth options on the most practical ways to move forward on such a phase-out.

As CEI founder and chairman Fred Smith **urged Congress** in 2000 — to mostly deaf ears — policy makers should "develop a divestiture or breakup plan for Fannie and Freddie." And in such a plan, as in traditional bankruptcies, the rights of both taxpayers and private investors should be sacrosanct.

But in order to have real reform, first we need transparency. It's time for the administration that promised to be the most transparent in history to open the books on its management of the two government-sponsored entities that play such a dominant role in housing and the economy. And it's high time for Congress to investigate the violations of the rule of law that festered in Fanniegate.