September 2002

RCFP WHITE PAPER

Homefront Confidential

SECOND EDITION

How the War on Terrorism Affects Access to Information and the Public's Right to Know

Prepared by

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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and the Public's Right to Know

Second Edition
September 2002

A project of The Reporters Committee for Freedom of the Press

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Key

Threat levels and color codes are based on those created by the Department of Homeland Security

SEVERE
HIGH
ELEVATED
GUARDED
LOW

Threat Level *Section*

Foreword

In the days immediately following September 11, the United States government embarked on a path of secrecy unprecedented in recent years. The atmosphere of terror induced public officials to abandon this country's culture of openness and opt for secrecy as a way of ensuring safety and security.

The administration of President George W. Bush announced a variety of actions designed to restrict information from reaching the public, including:

- A directive to agency heads by Attorney General John Ashcroft that changes the interpretation of the federal Freedom of Information Act to allow the agencies to deny access more often to public records if a claim of invasion of privacy or a claim of breach of national security can be alleged.
- Secret imprisonment of more than 1,100 non-American citizens on alleged claims of immigration violations or as material witnesses.
- Disregard of a 1992 agreement between the media and the Pentagon that provided for pooled and open coverage of military actions.
- An Executive Order governing the release of Ronald Reagan's White House records that circumvents the Presidential Records Act and illegally limits access to records.

No one has demonstrated, however, that an ignorant society is a safe society. Citizens are better able to protect themselves and take action when they know the dangers they are facing.

In the months since September 11, calmer heads have begun to prevail. Information is becoming available from government agencies. Courts have been aggressively protecting the public's right to know who is being detained by the government.

Perhaps most importantly, American citizens seem less frightened and more determined to maintain the rights and liberties they have worked so hard to achieve. They have started to object to the secret imprisonment of witnesses and immigrants. They are asking hard questions about airline security. They want to know whether Afghan civilians have been killed by American air attacks.

We live in a nation built on the concept of balance. When the government, with the best of intentions, goes too far in its efforts to shield information from the public, it is up to the public and the media to push back. Through a vibrant, information-based democratic process in our legislatures and through an independent judiciary, we as a society will come to a balance that hopefully will protect our liberties for generations to come.

The Reporters Committee's Homefront Confidential "White Paper" was first published in March 2002. This second edition published on the first anniversary of September 11 incorporates a threat assessment to the public's right to know based on the color-coded scheme used by the Department of Homeland Security. Just as the government assesses threats to the nation's security, this report assesses how government actions have affected the media's ability to provide information to the public.

We believe the public's right to know is severely threatened in the areas of changes to freedom of information laws, war coverage and access to terrorism and immigration proceedings. This report describes in detail why the public should be concerned about the information it is not getting.

The report begins with a chronology of events related to government secrecy since September 11. Major secrecy initiatives are discussed in depth later in the report, which concludes with a summary of parallel secrecy actions taken by state governments.

The Reporters Committee owes special thanks to the John S. and James L. Knight Foundation, the Scripps-Howard Foundation, the St. Petersburg Times and the McCormick Tribune Foundation for funding this project. Thanks also to our staff contributors: Gregg Leslie, Rebecca Daugherty, Ashley Gauthier, Monica Dias, Mimi Moon, Phillip Taylor, Kristin Gunderson, Kevin Capp, Jane Elizabeth, Victor Gaberman, Maria Gowen and Lois Lloyd.

– Lucy A. Dalglish
Executive Director

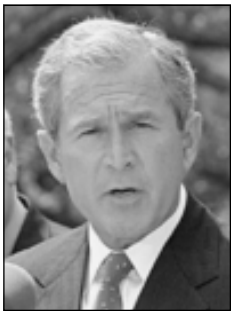
A chronology of events

SEPTEMBER

11 - On the day of the attacks, reporters and photographers take advantage of mostly open access to document the destruction and the relief efforts. But some restrictions on newsgathering follow as New York police officers begin restricting passage into the area that would be known as "Ground Zero," and the Federal Aviation Administration shuts down the entire American airspace, leaving news aircraft grounded for months.

14 - The FAA removes public information in its enforcement files including information about security violations from the agency's Web site.

21 - Chief Immigration Judge Michael Creppy issues a memorandum ordering closure of all deportation and immigration proceedings.



OCTOBER

2 - The Department of Defense asks defense firms to "use discretion" in their official statements about "even seemingly innocuous" industrial information. The department says statistical, production, contracting and delivery information can convey a "tremendous amount" of information to hostile intelligence forces, *The Washington Post* reports.

Also on this date, the Internal Revenue Service ends public access to its reading room except by appointment and with an escort.

4 - Air Force procurement officers are instructed not to discuss "any of our programs" with the media." However, the Air Force retreats from that position, according to a *Washington Post* report, and on Oct. 10 announces: "We will continue to respond to inquiries from the media."

5 - A White House directive to the CIA and FBI directors and the secretaries of State, Treasury, Defense and Justice, narrows the list of congressional leaders entitled to briefings on classified law enforcement information. The White House and Congress later compromise on the briefings.

7 - U.S. attacks on Afghanistan begin.

The U.S. military purchases exclusive rights to satellite imagery of Afghanistan from Space Imaging, a Colorado-based company, even though the government's own satellites reputedly provide much greater resolution. In February, the images become available to the public again.

Also, by this date, the Bureau of Transportation Statistics has taken down National Transportation Atlas Databases and the North American Transportation Atlas, which environmentalists had used to assess impact of transportation proposals.

The Office of Pipeline Safety has taken down the pipeline-mapping system. Over the next few months, the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, the U.S. Geological Survey, the National Imagery and Mapping Agency of NASA and other agencies remove materials from their Web sites.

10 - In a conference call with broadcast network executives, National Security Adviser Condoleezza Rice warns that videotapes from Osama bin Laden and his henchmen could be used to frighten Americans, gain supporters and send messages about future terrorist attacks.

12 - Attorney General John Ashcroft issues a memorandum revoking most of the openness instructions of a memorandum by former Attorney General Janet Reno.

In addition, at the request of the U.S. Geological Survey, the superintendent of documents asks librarians at federal depository libraries to destroy CD-ROMs containing details of surface water supplies in the United States. The Government Printing Office has never before made such a request.

16 - President Bush issues a lengthy executive order concerning the protection of the nation's critical infrastructure, the web of services and facilities that exist to keep the nation functioning, setting up a voluntary public-private partnership involving corporate and non-governmental organizations.

17 - The Reporters Committee for Freedom of the Press and others send a letter urging Defense Secretary Donald Rumsfeld to activate pool coverage, place reporters among troops and pressure allies to grant visas to American journalists covering the war.

18 - Federal FOI officers and specialists meet with co-directors of the Justice Department's Office of Information and Privacy to review the new Attorney General FOIA memo and to receive instructions on using FOIA exemptions to withhold information that agencies feel might disclose vulnerabilities to terrorists.

Defense Department employees are instructed to "exercise great caution in discussing information related to DOD work, regardless of their duties." They are told not to conduct any work-related conversations in common areas, public places, while commuting or over unsecured electronic circuits.

29 - A coalition of civil rights groups, including the Reporters Committee, file a formal Freedom of Information Act request to obtain information about more than 1,000 detainees held in the United States. Also, six members of Congress write a letter to the Justice Department, urging that the information be released.

NOVEMBER

1 - Bush signs Executive Order 13233 restricting public access to the papers of former presidents.

6 - The House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations holds a hearing concerning Executive Order 13233 and the Presidential Records Act.

8 - The Justice Department announces that it will no longer release a tally of the number of detainees held on American soil.

13 - Bush issues a Military Order, stating that suspected terrorists could be tried by military tribunals. No provision is made in the order for public access to the proceedings.

16 - *Hustler* publisher Larry Flynt files a lawsuit against Rumsfeld, claiming the Pentagon violates American journalists' First Amendment rights by denying them access to the battlefield.

26- Ashcroft says he will not release the

names of detainees because it would violate their privacy and help terrorist groups. At a news conference, Ashcroft says releasing names of detainees would provide valuable information to Osama bin Laden and would violate the privacy rights of detainees held as a result of September 11. Information on other Immigration and Naturalization Service detainees is available on an 800 telephone number.

27 - Journalists join U.S. troops in combat for the first time since the start of the war.

Also, Justice officials release information about those charged with crimes in connection with September 11 investigations and releases information about the nations of origin of immigration detainees, but still will not release names.

28 - Several civil liberties and historical groups, including the Reporters Committee, file suit against the White House in an effort to gain access to 68,000 Reagan Administration documents.

Also, Assistant Attorney General Michael Chertoff tells the Senate Judiciary Committee he knows of no specific law that would bar the release of the names of the detainees.

DECEMBER

5 - The Reporters Committee and 15 other groups file a lawsuit against the Department of Justice, alleging that it had violated the Freedom of Information Act by refusing to release information about detainees held in the U.S. The Justice Department eventually publishes a list of the names of 93 people and for the rest of 548 detainees still in custody gives places of birth, charges against them and dates of arrest.

6 - Ashcroft reiterates before the Senate Judiciary Committee that "Out of respect for their privacy, and concern for saving lives, we will not publicize the names of those detained."

Also, Marines quarantine reporters and photographers in a warehouse to prevent them from viewing American troops killed or injured by a stray bomb near Kandahar, Afghanistan.

10 - The president signs an executive order empowering the secretary of health and human services to classify information as "secret."

13 - The Bush administration allows news organizations to air videotape of Osama bin Laden boasting about terrorist attacks.

16 - Knight Ridder reports that the Department of Justice inflated its reports of terrorist activities for years for budget reasons and continued the practice even after September 11 "when attacks underscored the horror of real terrorism." Past figures included incidents of erratic mentally ill behavior, drunkenness on airlines and food riots in prisons. Rep. Dan Burton (R-Ind.) and Sen. Arlen Specter (R-Pa.) ask the General Accounting Office, the investigative arm of Congress, to audit the department's terrorism list.

In addition, the Federation of American Scientists reports that the Defense Nuclear Facilities Safety Board, an agency charged with oversight of the U.S. Department of Energy, halted all public access to technical documents it obtained from DOE.

19 - The FAA restores general aviation access to airspace above the nation's 30 largest metropolitan areas. News aircraft return to the skies.

27 - Pentagon disbands pool coverage and allows open coverage in Afghanistan.

Also, the Bush administration announces that captured Taliban and Al Qaeda fighters will be held at Guantanamo Bay, Cuba and refuses to reveal their identities or nationalities.

28 - The White House issues a statement citing "the president's constitutional authority to withhold (from Congress) information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the executive or the performance of the executive's constitutional duties" as well as the CIA director's responsibility to "protect intelligence sources and methods and other exceptionally sensitive matters."

JANUARY

3 - The National Archives and Records Administration releases about 8,000 pages of documents from the Reagan administration.

8 - A U.S. District Court judge rules against *Hustler* magazine publisher Larry Flynt, who claimed U.S. journalists have a First Amendment right to accompany troops into battle.

10 - The Pentagon orders troops to not allow photographers to transmit images of prisoners in Afghanistan.

13 - John H. Marburger III, director of the White House Office of Science and Technology policy, tells the Associated Press that the Bush administration is considering whether to restrict distribution of government documents on germ warfare. The picture of biology they present is nearly 50 years old, he argues.

The AP also reports that Dr. Harry G. Dangerfield, a retired army colonel, is preparing a report for the military calling for reclassification of 200 reports that he said are "cookbooks" for making weapons from germs.

16 - The Federal Energy Regulatory Commission issues a notice seeking public comment about how it makes public the informational filings it receives involving critical infrastructure. The notice marks FERC's concern that information it had taken off its Web site would still be available under FOI Act requests. The notice suggests measures such as nondisclosure agreements and "need to know" disclosures.

22 - American Civil Liberties Union's New Jersey chapter files suit seeking names of detainees held in New Jersey county jails.

28 - The *Detroit Free Press* files a lawsuit in federal court in Michigan to oppose the closing of deportation proceedings of a Muslim man accused of terrorism.

29 - ACLU, Rep. John Conyers (D-Mich.) and the *Detroit News* file a second lawsuit in federal court in Michigan to oppose the closing of deportation proceedings.

30 - President Bush outlines Citizen Corps, touted as a program "which will enable Americans to participate directly in homeland security efforts in their own communities." The program includes Operation TIPS — Terrorism Information Prevention System — which the administration described as enabling "millions of America transportation workers, postal workers, and public utility employees to identify and report suspicious activities linked to terrorism and crime."

FEBRUARY

2 - *The Tennessean* in Nashville reports that the U.S. Air Force base in Tullahoma, Tenn., asked the state to stop taking detailed aerial photographs the state was using to create its geographic information system.

19 - News organizations report that the Defense Department's new "Office of Strategic Influence," created to try to influence public opinion abroad, plans to plant disinformation in foreign and U.S. media.

20 - After public outcry, Rumsfeld announces that the Office of Strategic Influence will not lie to the public or plant disinformation in the foreign or U.S. media.

Also, a federal interagency group, the National Response team, begins the process of restricting public access to "sensitive" government documents that include plans for responding to releases of hazardous materials.

22 - The Government Accounting Office files suit against the White House for failing to release information to Congress about Vice President Dick Cheney's Energy Task Force.

26 - Rumsfeld closes the Office of Strategic Influence.

27 - A federal judge orders the Department of Energy to release records from Vice President Dick Cheney's task force to develop energy policy.

28 - Sen. Patrick Leahy (D-Vt.) asks the General Accounting Office to examine how federal agencies enforce the FOI Act after Ashcroft's Oct. 12 memorandum.

MARCH

4 - Rumsfeld announces that the Pentagon embedded American reporters among troops in raids in eastern Afghanistan, the first time during the war.

5 - A second federal judge orders seven federal agencies, including the Department Energy, to release records from Cheney's Energy Task Force.

Also, lawsuits filed by the Detroit News and Detroit Free Press seeking access to the Haddad hearing are consolidated into *Detroit Free Press v. Ashcroft*.

6 - A coalition of lawyers file a lawsuit in U.S. District court in New Jersey on behalf of *North Jersey Media Group Inc*. and the *New Jersey Law Journal*, challenging the constitutionality of the Creppy Memorandum regarding closed immigration proceedings.

7 - The House Government Reform Committee edits its FOI guide to reject instructions in the Oct. 12 Ashcroft memorandum and calls for "the fullest possible" disclosure.

19 - Military police seize a videotape from a Fox News cameraman shooting a traffic stop near the Pentagon. Officials said they confiscated the tape because the cameraman was on government land where photography is not permitted unless journalists have an official escort. The tape was returned the next day.

Also, White House Chief of Staff Andrew Card orders agencies to protect "sensitive but unclassified" information. Accompanying memoranda from other agencies spell out how.

21 - Secretary of Defense Rumsfeld announces rules that will be used for military tribunals.

26 - Jersey City, N.J., Superior Court Judge Arthur D'Italia orders names of federal prisoners jailed in Hudson and Passaic County jails released under the state's open records law.

APRIL

3 - U.S. District Judge Nancy Edmonds in Detroit rules that across-the-board closure of immigration hearings is unconstitutional and the detention hearings of Rabih Haddad should be open. The judge orders the immigration court to release transcripts of prior deportation proceedings against Haddad.

10 - U.S. Court of Appeals (6th Cir.) in Cincinnati issue a temporary stay of Judge Edmonds' order.

11 - Rep. Stephen Horn (R-Calif.) introduces H.R. 4187, the Presidential Records Act Amendments, to establish new procedures for the release of presidential records in response to Executive Order 13233.

18 - The U.S. Court of Appeals (6th Cir.) lifts the stay on Judge Edmonds order, finding that there is little chance that releasing the Haddad transcripts will harm national security.

Also, the Immigration and Naturalization Service issues interim rules requiring state jailers to keep secret the names of federal detainees even if the names would be open under state law.

19 - The Justice Department says it will no longer try to block the release of the Haddad immigration hearing transcripts.

30 - U.S. District Judge Shira Scheindlin in New York rules that the material witness statute may not be used to hold a witness merely to testify before a grand jury.

MAY

8 - Authorities arrest U.S. citizen Jose Padilla, who is accused of plotting to use a "dirty bomb," as a material witness.

14 - CBS airs a portion of the tape "The Slaughter of the Spy-Journalist, the Jew Daniel Pearl," despite requests from the State Department that it consider the "sensitivities of Mr. Pearl's family." Anchor Dan Rather defended the broadcast as necessary to "understand the full impact and danger of the propaganda war being waged."

17 - The Foreign Intelligence Surveillance Court issues a ruling critical of the government for a number of "misstatements and omissions" in FISA applications, and said it had violated court orders regarding information sharing between investigators and prosecutors. The secret court's secret ruling is released by senior members of the Senate Judiciary Committee in late August.

21 - Effective date of an INS rule that authorizes INS judges to issue protective orders and accept documents under seal.

28 - Pro Hosters, an Internet company in Sterling, Va., reposted the Pearl murder video with a note saying Americans should decide for themselves if they should watch it. A few days earlier, the FBI had contacted several Internet sites that posted the Pearl video and threatened obscenity charges if they did not remove it.

29 - In the *New Jersey Media Group* case, U.S. District Judge John Bissell rules that the across-the-board closure of immigration proceedings is unconstitutional.

30 - Magistrate Judge Theresa Buchanan in the Eastern District of Virginia denies a motion by the *Tampa Tribune* and *The New York Times* to unseal search warrant affidavits issued as part of the investigation of University of South Florida professor Sami Al-Arian.

JUNE

9 - President Bush signs an order identifying Jose Padilla as an "enemy combatant," allowing the government to transfer Padilla to military custody.

12 - A New Jersey appeals panel rules that new federal Immigration and Naturalization Service rules prohibiting state release of names of federal detainees trump the state's open records law, which would require disclosure.

19 - U.S. District Judge T.S. Ellis III, overseeing the case of John Walker Lindh in Virginia, issues an order noting that a "national periodical had somehow obtained access to information relating to this case that the Court had placed under seal and ordered not to be disclosed" and orders the government to investigate the leak.

20 - Rep. Porter Goss (R-Fla.) and Sen. Bob Graham (D-Fla.) — chairmen of the House and Senate intelligence committees — ask Attorney General John Ashcroft to investigate the leak to CNN and other media of classified information from a congressional panel's closed-door meeting with National Security Agency officials.

28 - The U.S. Supreme Court issues a stay of Judge Bissell's order in the *New Jersey Media Group* case without an opinion, leaving "special interest" immigration cases closed until a final decision is issued.

JULY

10 - Federal prosecutors say they have ordered the Justice Department's inspector

general to investigate whether government officials leaked to *Newsweek* e-mails concerning the case against American Taliban John Walker Lindh.

11- U.S. District Judge Michael Mukasey in New York rules that the government may detain material witnesses during investigations, contradicting Judge Scheindlin's April 30 order.

12 - U.S. District Judge T.S. Ellis III in Alexandria, Va., orders CNN free-lance reporter Robert Young Pelton to testify in a hearing for John Walker Lindh. The order becomes moot on July 15, when Lindh pleads guilty to two charges of aiding the Taliban and carrying explosives. In a written order that can be used as precedent, Ellis says Lindh's argument that Pelton was acting as a government agent when he interviewed Lindh is "non-frivolous."

Also, Defense Secretary Rumsfeld tells his staff in an internal memo that government leaks of classified information provide al Qaeda with information and puts American lives at risk. The memo was written a week after *The New York Times* reported on a classified military document that discussed a possible U.S. attack on Iraq. The day before the memo, *USA Today* wrote about a draft Iraqi invasion plan calling for using up to 300,000 U.S. troops.

Also, guards and a federal agent detain *National Review* reporter Joel Mowbray for 30 minutes after a State Department briefing and demand that he disclose a source and answer questions about his reporting on a classified diplomatic cable.

Also, the government moves to intervene in *Mariani v. United Airlines*, a personal injury suit against the airlines involved in the September 11th attacks, and claims that it should have the opportunity to review the discovery documents that the airlines turn over to plaintiffs and have the power to withhold any documents that the government believes are "sensitive" to national security interests.

Also, the U.S. Court of Appeals (4th Cir.) invalidates a U.S. District Court judge's ruling granting access to legal counsel to Hamdi, a military detainee who was held incommunicado and without any hearing.

16 - Sen. Charles E. Grassley (R-Iowa) and Rep. Dave Weldon (R-Fla.) write Secretary of State Colin Powell and demand a full accounting of how and why security guards at the State Department detained reporter Mowbray on July 12.

19 - The Air Force Office of Special Investigations begins an investigation into who leaked a document to *The New York Times* outlining how the U.S. might attack Iraq.

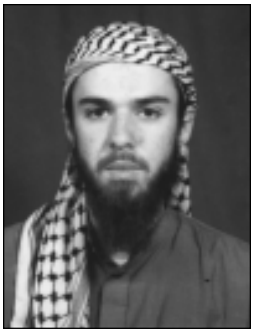
22 - Defense Secretary Rumsfeld tells reporters that he wants Pentagon workers to help catch the person who leaked information from a classified planning document about an attack on Iraq to *The New York Times*.

23 - Senators Patrick Leahy (D-Vt.), Carl Levin (D-Mich) and Robert Bennett (R-Utah) agree to compromise language to mitigate blanket confidentiality requirements in the Homeland Security bill drafted by the Bush administration.

24 - A state court judge in New York grants the government's request to intervene in *Mariani v. United Airlines*, a wrongful death action.

25 - Attorney General Ashcroft defends Operation TIPS to the Senate Judiciary Committee. Ashcroft said TIPS would merely refer terrorism tips to the appropriate law enforcement agencies; information would not be collected in a central database; and TIPS volunteers would not spy on ordinary people. He did not say what law enforcement agencies would do with the information.

26 - U.S. House passes Homeland Security Bill, calling for confidentiality voluntarily submitted information on homeland security, exempting it from Freedom of Information Act requirements and calling for criminal penalties for disclosure. The bill also prohibits programs such as Operation TIPS. House Majority Leader Dick Armey, (R-Texas), says the bill is intended to prevent citizens from spying on each other.



29 - *U.S. News & World Report*'s "Washington Whispers" column reports that parking lot guards are stopping every 30th car leaving the Pentagon to ask if anyone is smuggling out classified documents. The column also reports that the CIA suspended two contractors in June for talking to the press.

AUGUST

2 - By this date, the FBI has questioned nearly all 37 members of the Senate and House intelligence committees in its probe of leaks of classified information related to the Sept. 11 attacks, *The Washington Post* reports. Most lawmakers told the FBI they would not take a lie detector test. The FBI also has questioned about 100 employees on Capitol Hill and dozens of officials at the CIA, National Security Agency and Defense Department.

Also, President Bush signs legislation that permits families and victims of September 11 to watch the Moussaoui trial via closed-circuit television.

Also, U.S. District Court Judge Gladys Kessler in Washington, DC, orders the Justice Department government to release the names of an estimated 1,200 detainees.

5 - U.S. District Judge Jed S. Rakoff in New York agrees to unseal records in the case of Abdallah Higazy, who was detained as a material witness after the September 11 attacks because a security guard at the Millennium Hilton Hotel in New York falsely claimed that he found a pilot's radio in Higazy's hotel room.

8 - U.S. District Judge Gerald Bruce Lee in Alexandria, Va., rejects accused spy Brian Regan's attempt to compel *New York Times* reporter Eric Schmitt to testify about confidential sources.

9 - Justice Department scales back Operation TIPS. Potential tipsters with access to private homes will not be asked to join. The revised plan will ask truckers, dock workers, bus drivers and others to report what they see in public places and along transportation routes.

12 - At the same time that Defense Secretary Rumsfeld is denouncing leaks, reporters covering the Pentagon are meeting tighter requirements for unescorted access to the building. Only those reporters who work full-time within the Pentagon or who visit at least twice a week are allowed unescorted access to the Pentagon. Other reporters must have an escort.

15 - Federal district court Judge Gladys Kessler stays her order to the government to release names of detainees within 15 days so that it can appeal.

21 - *USA Today* asks Judge Leonie Brinkema in U.S. District Court in Virginia to publicly release any cockpit voice recordings and transcripts introduced at the trial of Zacarias Moussaoui.

22 - Senior members of the Senate Judiciary Committee release copies of a previously secret Foreign Intelligence Surveillance Court ruling from May 17 criticizing the government's behavior in applying for FISA warrants.

26 - U.S. Court of Appeals (6th Cir.) issues an opinion in the *Haddad* case, finding that the across-the-board closure of immigration proceedings is unconstitutional.

27 - The Justice Department appeals the May 17 ruling of the FISA Court that it said "unnecessarily narrowed" new anti-terror laws that allowed for wider berth in conducting electronic surveillance and in using information obtained from wiretaps and searches. Major portions of the appeal documents are redacted.

Covering the war

SEVERE
SEVERE RISK
TO A FREE PRESS

Despite improvements in access to battlefields abroad in the United States' war on terrorism, military officials continue to keep journalists at a long arm's length from the action. The result: A war carried on in the name of the American people with the possibility of little public accountability either now or in years to come.

"We are in a whole new world here," Assistant Defense Secretary Victoria Clarke told Washington bureau chiefs during a Sept. 28 briefing.

The war in Afghanistan and the all-encompassing American campaign against terror, political leaders have said, hardly epitomize the typical global conflict. While the past century saw one international alliance stifle Nazism during World War II and another liberate Kuwait scarcely a dozen years ago in the Persian Gulf War, the first war of the new century promises something different.

Even before the first deployment of American troops to the Middle East last fall, Defense Secretary Donald Rumsfeld cautioned the press and the public that this war would be waged against an often unseen enemy.

"The public may see some dramatic military engagements that produce no apparent victory, or may be unaware of other actions that lead to major victories," he said.

Amid the absence of conventional warfare, there has been a considerable lack of openness. Even a year after the September 11 attacks that spurred the United States to action against terrorism, military officials continue to keep journalists at bay.

Defense officials praise many aspects of the war, claiming that Afghanistan no longer harbors and trains terrorists, the Afghan people enjoy renewed freedoms and terrorists are on the run.

Despite news coverage that for a time blanketed the nation's airwaves and newspapers, do Americans really know much about wartime Afghanistan and the United States' involvement in the conflict?

Consider:

• The escalation of U.S. forces before the Oct. 7 attacks on Afghanistan generally occurred without a media presence. When bombing strikes began, reporters watched from afar, with only a few enjoying a vantage point within Afghanistan itself and none with troops in active combat.

• Pentagon officials denounced reports of a late-night Oct. 19 raid involving U.S. Army Rangers and other special forces near Kandahar, particularly an account from Seymour Hersch in a *New Yorker* article that detailed the mission as a glorified failure. Yet officials still decline to offer details.

• Press restrictions early in the war constrained coverage enough that American reporters learned secondhand about the fall of Mazar-e-Sharif, a strategic city because of its airfields and roads to Uzbekistan, where U.S. troops were based. Other raids and victories transpired without independent witnesses.

• The Defense Department continually refuses to field difficult questions concerning the Jan. 24 raid at Oruzgan, where Afghan residents claim U.S. Special Forces beat, shot and killed men without giving them a chance to surrender. Some say fighters were abused even though they claimed support for the American-backed Hamid Karzai, an interim Afghan leader.

• Ten American soldiers have lost their lives in Afghanistan and, according to a July 21 *New York Times* report, several hundreds of Afghan citizens have lost their lives, including several dozen at a wedding ceremony. But the U.S. military refuses to offer estimates of the death toll.

Defense officials describe the war on terrorism as a different kind of war, one the Pentagon often described as a war with multiple battles along multiple fronts and possibly against multiple and sometimes unknown enemies.

For journalists, that's become code for "restricted access."

"We are in a whole new world here," Assistant Defense Secretary Victoria Clarke told Washington bureau chiefs during a Sept. 28 briefing. "We're trying to figure out the rules of the road. We are trying to figure out how to work with you, how to make sure you get what you need . . . while protecting the national security and the safety of the men and women in uniform."

Journalists have heard this talk before, more than 11 years ago as American forces limited press access during parts of the Persian Gulf War. Corralled into pools and daily briefings, reporters later said they felt the Gulf War was remarkably uncovered.

As with the Persian Gulf, this new war arena — the deserts and mountains of Afghanistan — offered little hope of easy access to those reporting the war to the world.

Compromises with the Pentagon during peacetime have not stuck. A post-Gulf War agreement — a nine-point statement of principles forged in 1992 — designated open coverage, not pools, as the default coverage system during wartime.

If journalists hoped that such an agreement would stand, they were quickly disappointed.

Despite personal assurances from Rumsfeld that the war in Afghanistan would not go without press coverage, the U.S. military launched a full-scale attack on terrorist camps and bunkers in the heart of Afghanistan without acknowledging the 1992 agreement or crafting a new formal arrangement to take its place.

Even today, a full year after the September 11 attacks, the rules remain unclear.

Like their predecessors in the Persian Gulf War and the invasions of Panama and Grenada, the press covering the war on Afghanistan continually finds itself at the mercy of the Pentagon.

Obstacles to coverage

Perhaps surprisingly, American reporters have always been free to go into Afghanistan, although at the risk of being captured or killed by the Taliban.

But the Pentagon did not improve reporting conditions much during the opening months of the war by offering pool transportation to military units, by creating information centers or by embedding reporters with U.S. troops, all goals detailed in the 1992 agreement.

The buildup of American and alliance forces along the Afghanistan border following September 11 generally occurred without the media. When America unleashed its first wave of attacks on Oct. 7, only a handful of journalists enjoyed a vantage point within Afghanistan. Although the Pentagon officials allowed 40 journalists to join military forces on the *USS Enterprise* and two other warships, they had placed them on ships incidental to the strikes at hand and imposed restrictions on what they could publish.

In effect, most American broadcasters and newspaper reporters scratched out coverage from Pentagon briefings, a rare interview on a U.S. aircraft carrier or a humanitarian aid airlift, or from carefully selected military videos or from leaks. Although they persuaded military officials to boost briefings to as many as a dozen a week, they seldom scored interviews with troops or secured positions near the front during the early months of the war.

The truth is, the American media's vantage point for the war rarely has been at the front lines with American troops.

On the occasions that reporters neared the battlefield, they reported that they were threatened with arrest, confiscation or even death, sometimes even by American troops.

For example, *Washington Post* reporter Doug Struck claimed that an unidentified U.S. soldier threatened to shoot him if he went near the scene of a U.S. Hellfire missile strike in Afghanistan in mid-February.

Defense officials denied that a troop leader would knowingly threaten an American citizen, stating that it was likely the officer was merely trying to protect the reporter.

In interviews, Struck called such a story "an amazing lie" and evidence of the "extremes the military is going to keep this war secret, to keep reporters from finding out what's going on."

The administration has not been completely truthful about other incidents, either. For example, White House officials have since backed away from a story they spread on September 11 about threats to Air Force One to justify President George W. Bush's delayed return to Washington, D.C., that day.

The Defense Department continually either avoids answering questions or offers misleading answers about completed missions, including an Oct. 19 Army Rangers raid on Kandahar or a Jan. 24 Special Forces raid at Oruzgan or an estimated death count of Afghan citizens.

After the start of bombing, the Pentagon limited access to U.S. troops so much that journalists had to base reports on the fall of Mazar-e-Sharif and other Taliban strongholds on secondhand reports.

Perhaps the most outrageous slight to press access came on Dec. 6 when Marines locked reporters and photographers in a warehouse to prevent them from covering a story about American troops killed or injured by a stray bomb north of Kandahar. The Pentagon later apologized but the damage had been done. The press had to resort to accounts filtered through military sources.

In other situations, the press accused U.S. military officials and soldiers of encouraging Afghan fighters to seize photos and digital images

The truth is, the American media's vantage point for the war rarely has been at the front lines with American troops.

Journalists fear that too much of the most important details of the war unraveled outside the view of independent observers and, thus, might never be revealed to the public.

from photographers and occasionally deceiving the public about military operations.

Journalists faulted the Pentagon for ignoring the 1992 agreement. In an Oct. 17 letter to Rumsfeld signed by a variety of journalism organizations, including the Reporters Committee for Freedom of the Press, journalists urged him to activate pool coverage, place reporters among troops and pressure allies to grant visas to American journalists covering the war.

Journalists finally got a break on Nov. 27 when reporters from the Associated Press, Reuters and the Gannett newspaper chain became the first to accompany U.S. troops in the war. The reporters followed a Marine unit to a military airstrip in southern Afghanistan.

On Dec. 13, Assistant Defense Secretary Clarke unveiled "The Way Ahead in Afghanistan," a memorandum that is the Pentagon's closest statement to acknowledging the 1992 agreement.

The "Way Ahead" memo briefly outlined the Pentagon's effort to open three Coalition Press Information Centers in Mazar-e-Sharif, Bagram and Kandahar. Each center was to have between five and 10 staff members charged with helping journalists get interviews, photographs and other information covering the war.

A short time later, the Pentagon declared the end of pool coverage on Dec. 27.

For early war coverage, though, that was too little too late. Most reporters and troops had already left Mazar-e-Sharif and Bagram. And there remains poor access to troops stationed in Uzbekistan and Pakistan because the Pentagon cites "host country sensibilities."

At the end of February, the Pentagon quietly began allowing a handful of American journalists to join U.S. ground troops in active combat. Reporters joined the troops in eastern Afghanistan so they could witness assaults on suspected al-Qaida and Taliban fighters who had regrouped near the town of Gardez.

The reporters joining the operation agreed to withhold filing their reports until U.S. military officials gave them permission, Rumsfeld announced on March 4.

By then, the war was 149 days old.

But even those efforts have not gone without hitches.

Some Washington bureau chiefs expressed concern that military officers in the field often felt inclined to withhold approval much too long, particularly when much of the information was made public outside of the battlefield long before.

American correspondents rarely traveled with American soldiers even after March 4, a marked difference from coverage in past wars. Without cooperation from the U.S. military, the reporters have resorted to traveling on their own into exceptionally dangerous areas or securing passage with Afghan commanders.

Even as military officials allowed open coverage, reporters said they continued to face harassment from U.S. troops. Craig Nelson of Cox News Service reported that he was thrown off the base in Kandahar after writing about the arrival of Australian special forces. E.A. Torriero of the *Chicago Tribune* said he was forced to lie down in the dirt when he walked into restricted areas near Gardez

American and foreign reporters continue to complain about heightened restrictions on coverage of about 500 detainees at the Guantanamo Bay Naval Base in Cuba. Last April, U.S. military officials transferred the captives to a new, permanent prison that is far from view of journalists on the base.

At Camp X-Ray, the original detainee prison camp, journalists could view the detainees in their chain-link cells and often write about their detention. But at the new Camp Delta, journalists have no contact or view of detainees.

For months, numerous complaints about the detention conditions surfaced, contentions ranging from extremely poor living arrangements to beatings and torture.

Military officials deny such claims. But there has been little independent verification from outsiders about the living conditions of those detained and none from journalists.

Development of war coverage

Many Pentagon officials consider the Persian Gulf War to be among the best-covered wars in history, noting considerable real-time coverage from CNN and pages and pages of news during the two-month conflict.

But it took months and sometimes years of persistent questioning and research by the press for Americans to learn that most U.S. casualties during the war were due to friendly fire and that the so-called "smart bombs" were successful less than one out of five times.

Real-time coverage surfaced again during the Afghan war. But journalists fear that too much of the most important details of the war unraveled outside the view of independent observers and, thus, might never be revealed to the public.

Journalists often make convincing arguments about the importance of coverage and the right to know what the U.S. government is doing in the name of the American citizens. The Department of Defense, too, has recognized the importance of informing the public and, as official policy, requires its officials to provide maximum access to the press whenever security concerns allow it.

But the actual practice of granting access developed informally over the years, mostly evolving with each new conflict and rarely changing in peacetime.

During World War II, censorship ran ram-

pant, but journalists enjoyed incredible access to troops and commanders, often wearing uniforms and traveling with active units. The Office of War Information and Office of Censorship gave explicit instructions on what journalists could not include in their reports, including troop size, location and movement.

The military lifted almost all journalistic restrictions during the Vietnam War and regularly provided transportation to reporters and photographers. But for the military, the war turned into a public relations nightmare, leaving officials to swear that they would never let reporters enjoy as much freedom covering combat again.

The Oct. 5, 1983, invasion of Grenada dramatically changed the media-military dynamic.

When troops invaded the island, journalists were not there to document it. The Pentagon restricted all access to Grenada for 22 more days even though the actual invasion lasted fewer than 48 hours.

The treatment irked the press corps, which demanded immediate changes. A commission, led by retired Maj. Gen. Winant Sidle, determined that while open coverage of conflict would be the preferred method, a pool of reporters would be acceptable and, at times, desirable in covering early stages of combat or surprise attacks.

The 1989 invasion of Panama offered few assurances that things had changed. The Pentagon activated the press pool too late to cover the launch of attacks and then hemmed in reporters for the first two days of action in that conflict, keeping them from the front lines.

After the Persian Gulf War, reporters demanded more changes.

The resulting nine-point statement of principles signed by the Pentagon and news media representatives on March 11, 1992, stated that "open and independent reporting will be the principal means of coverage of U.S. military operations."

The new principles allowed the Pentagon to establish credentials for journalists, organize pools in limited and extreme circumstances and eject those who fail to adhere to ground rules. The principles also called for the military to provide transportation and information centers for the press whenever possible.

But it was clear that the agreement was tenuous.

In signing the agreement, Pentagon officials stated that the department "believes that it must retain the option to review news material, to avoid the inadvertent inclusion in news reports of information that could endanger troop safety or the success of a mission."

The press, in turn, wrote: "We will challenge prior security review in the event that the Pentagon attempts to impose it in some future military operation."

Legal precedent

For the most part, the conflicts between the media and the military avoid the courtroom. Perhaps that is best for the press, for in the few instances such matters came before a judge, the results were not amenable to forcing the Pentagon to accept journalists on the battlefield.

The first notable case, *Flynt v. Weinberger*, came more than eight months after the Grenada invasion. *Hustler* publisher Larry Flynt challenged the Pentagon's decision to prohibit press coverage during the initial stages of the invasion.

But a federal judge granted the Pentagon's motion to dismiss on June 21, 1984, determining that the case was moot because the open coverage Flynt sought was granted by Defense officials on Nov. 7, 1983.

The judge also refused to impose an injunction on future efforts by the Pentagon to restrict coverage. The judge wrote that the invasion of Grenada, like any other military event, is unique and that Flynt could not show that such a press ban would be imposed in the future.

And court action, the judge suggested, might raise separation of powers issues if the judicial branch attempted to restrict the executive branch on conflicts yet to occur.

"An injunction such as the one plaintiffs seek would limit the range of options available to the commanders in the field in the future, possibly jeopardizing the success of military operations and the lives of military personnel and thereby gravely damaging the national interest," the court wrote. "A decision whether or not to impose a press ban is one that depends on the degree of secrecy required, force size, the equipment involved, and the geography of the field of operations."

The U.S. Court of Appeals in Washington, D.C. (D.C. Cir.) remanded the decision with instructions to the district court that it simply deem the matter moot. The lower court did so.

Another federal district court in New York City on April 16, 1991, similarly dispensed with a lawsuit brought by the *Nation*, *Village Voice* and other media plaintiffs concerning restrictions imposed during the Persian Gulf War.

Although the *Nation* plaintiffs filed the lawsuit on Jan. 10, 1991, before the actual war began, the court decided the case after the Pentagon lifted press restrictions on March 4, 1991.

But in rendering the case moot, the court said "the issues raised by this challenge present profound and novel questions as to the existence and scope of a First Amendment right of access in the context of military operations and national security concerns."

This was not the case to determine the answers to those questions, it said.

Most recently, a federal court in the D.C. Circuit decided on Jan. 8 not to impose a restraining order against the Pentagon for its press restrictions.

"We conclude that this Court cannot now determine that some limitation on the number of journalists granted access to a battlefield in the next overseas military operation may not be a reasonable time, place, and manner restriction, valid under the First and Fifth Amendments," the court wrote.

Most recently, a federal court in the D.C. Circuit decided on Jan. 8 not to impose a restraining order against the Pentagon for its press restrictions. The lawsuit, *Flynt v. Rumsfeld*, was the *Hustler* publisher's second war-related suit against the Pentagon.

The court said Flynt "was not likely to suffer irreparable harm" and that he and other publishers enjoyed some access to the war despite the restrictions. The court noted, too, that circumstances had changed since Flynt filed his lawsuit and that open coverage was in place in Afghanistan.

Again, the court said such an injunction might be justified in another case.

Such a case would likely have to involve major news organizations, such as the Associated Press or *The New York Times*, seeking satisfaction after being excluded from press pools or other coverage. Perhaps news organizations that actively maintain a foreign bureau system or Pentagon correspondent even during peacetime would fare better in the courts.

But news organizations historically bargain with the Pentagon at the onset of invasions to avoid rolling the dice in courts or alienating the officials who maintain the pool.

News organizations historically bargain with the Pentagon at the onset of invasions to avoid rolling the dice in courts or alienating the officials who maintain the pool.

Perhaps the strongest case for the press on military matters is *New York Times v. United States*, the Supreme Court case holding that the publication of the so-called Pentagon Papers could not be restrained by the government on national security grounds.

But the case is one on prior restraint, not right of access. Presumably, if the press gained access to the battlefield and collected information, the government would bear the burden of showing that strong and compelling national security issues require halting publication.

Concerning a right of access, the courts have not historically recognized that the press enjoys such a privilege. The First Amendment spares the press from prior restraint; it may not guarantee it can gather information in the first place.

The Supreme Court itself said in the 1971 case *Pell v. Procunier*: "It is one thing to say that the government cannot restrain the publication of news emanating from certain sources. It is quite another to suggest that the Constitution imposes upon the government the affirmative duty to make available to journalists sources of information not available to members of the public generally."

Indeed, attempts to make the argument about rights of access place a strong burden on the press, not the government.

The press lost an argument on military access in 1996 before a federal district court and then before the U.S. Circuit Court of Appeals in Washington, D.C. (D.C. Cir.).

In *JB Pictures Inc. v. Department of Defense*, a group of photographers and veterans contested restrictions the Defense Department placed on picture-taking at Dover Air Force Base, the main military mortuary for soldiers killed abroad. The court agreed to hear the case because the policy is ongoing, not temporal, such as restrictions during wartime.

The court determined that the government had sufficient interest to limit access to the base to reduce the hardship of grieving families and to protect their privacy. The court further stated that it could not rule on whether the policy prohibited groups from speaking on base because the plaintiffs did not raise such a claim.

Pentagon reports and codes

Case law aside, the press can cite the Pentagon's reports and regulations as compelling arguments for open coverage at war time.

The Sidle Panel Report released on Aug. 23, 1984, documented the findings of a Pentagon-sanctioned committee studying press restrictions in Grenada and recommended the creation of a press pool. As a result, the Pentagon established the Department of Defense National Media Pool, a cadre of journalists from the leading news organizations ready to cover the early stages of conflicts provided they agree to security restrictions and share their reports with non-pool members.

After the invasion of Panama, the Pentagon commissioned Fred Hoffman, a former Pentagon correspondent for the Associated Press, to review press restrictions in that conflict. Hoffman found that an excessive concern for secrecy by the Pentagon and then-Secretary of Defense Dick Cheney destroyed the effectiveness of the pool and slowed the transition from pooled to open coverage.

The 1992 agreement drafted after the Persian Gulf War was codified first on March 29, 1996, and then again on Sept. 27, 2000, by the Defense Department with minor rewrites as part of its policy on "Principles of Information."

With this in mind, press advocates could argue that the Pentagon violates its own regulations in keeping reporters from conflicts.

But because agreements between the media and the Pentagon seem tenuous at best, perhaps the answer for access is legislation. Congress itself felt the brunt of Bush secrecy early in the war as the White House declined to reveal details of homeland security and some matters of the war.

Persuading Congress to recognize a media

right of battlefield access would not be easy but an argument would be quite compelling.

Some important points:

Security issues. Pentagon officials and Congress should note that journalists have a long history of keeping secrets. During World War II, a dozen journalists joined the Allied forces for the Normandy invasion, agreeing to conditions that they not file their reports until after Gen. Dwight Eisenhower declared the invasion a success. A *New York Times* reporter later in the war rode with the bombing squadron on its way to Hiroshima and waited three days before offering his account of the mission.

During the Vietnam War, the Pentagon reported fewer than a dozen serious national security violations because of journalists and most of those violations were from foreign journalists. None caused the death of American troops.

During the Persian Gulf War, journalists knew of the United States' infamous "left hook" invasion plan but never revealed that the amphibious attack planned for Iraq's Gulf shore was merely a ruse.

Even during the present war, reporters, knowing an initial strike was evident in early October, never leaked the news.

Reporter safety. The Pentagon repeatedly raises reporter safety as an issue whenever it declines to allow journalists access to the battlefield. In this war in particular, military officials say the combat is too dangerous for the kind of embedding that occurred in Vietnam and World War II.

"It is not a set of battle lines, where Bill Mauldin and Ernie Pyle can be with troops week after week after week as they move across Europe or even across islands in the Pacific," Rumsfeld said on March 4. "This is a notably different activity. It's terribly untidy."

But war correspondents understand "untidy." In conflict after conflict they willingly risk their lives to tell the world the truth about events, as the tragic deaths of *Wall Street Journal* reporter Daniel Pearl and eight other journalists during this war show.

Open coverage logistics. A new war brings news rules and concerns. The Pentagon claimed in both the Persian Gulf War and the current war that the unique circumstances of modern warfare preclude open coverage in the early stages of a conflict.

But one only has to look at the intermediate conflicts in Somalia, Haiti and Kosovo, to see that open coverage can and does work. And few reporters and military officials, if any, complained about coverage or the treatment of the news media during those conflicts.

Benefits of independent verification. Throughout the war in Afghanistan and the subsequent imprisonment of captured fighters at Guantanamo Bay, the U.S. military has come under fire for failed air raids and poor detention conditions.

Assurances from military officials hardly quell the criticism. But the presence of reporters for independent observation certainly boosts the veracity of their claims.

For example, the Pentagon itself referred to published news reports as evidence that the U.S. military did not cover up evidence from a July 1 air strike in Afghanistan that locals say killed dozens of people celebrating a wedding in the province of Uruzban.

Military spokesman Roger King said: "The only shrapnel and bullets and blood samples that were picked up by U.S. forces were picked up by the fact-finding team that we had a reporter with, who reported that we picked up shell casings and shrapnel and blood."

Right to know. The American people have a right to know what is being done on behalf of the U.S. citizenry. They have a right to see the atrocities of war, not for a sick fascination, but for the benefit of understanding what this war in Afghanistan entails and, if they wish, to change their minds about supporting it.

And it is journalists, not government officials, that have pieced together for the public how 19 hijackers assembled and completed their September 11 mission. Reporters, too, revealed details on how and why the military and the CIA failed to capture Osama bin Laden in Afghanistan. And again, the journalists are the ones working to keep the public informed about the trials of detained foreign nationals and Taliban fighters.

Without this right to know, the real casualty of war is knowledge — whether we will really ever know what happened in Afghanistan and in the war on terrorism.

And it is journalists, not government officials, that have pieced together for the public how 19 hijackers assembled and completed their September 11 mission.

Military tribunals

HIGH
HIGH RISK TO A FREE PRESS

A year after the September 11 attacks, the United States has yet to initiate a military tribunal. But the paperwork and guidelines are in place. And open government advocates worry that should the White House embark on the tribunal option to try suspected terrorists, another casualty would be openness.

On Nov.13, 2001, President George W. Bush signed a Military Order stating that suspected terrorists could be tried in military tribunals rather than regular courts. The order has raised concerns about not only fair trial rights, but whether there will be public and press access to the tribunals' records; whether the identities of the participants will be released; and whether gag orders will be issued on participants.

On March 21, Secretary of Defense Donald Rumsfeld announced rules that would be used for military tribunals. As discussed in more detail below, the rules state that the proceedings may be open, but they may also be closed under many circumstances.

The Senate has considered, but not passed, legislation that would authorize the tribunals, but the legislation has not addressed press-related issues.

Because a tribunal has not yet been used in the war on terrorism, it is difficult to evaluate how the military will treat the press. The military has begun to hold detainees designated as "enemy combatants," and those cases may provide an example of how open the military is willing to be.

The history of tribunals

Military tribunals have been used occasionally in U.S. history. They were used to try American citizens a handful of times, and occasionally to try foreign nationals who were accused of committing war crimes. The Supreme Court has addressed the issue of tribunals several times and has permitted them to be used, but only in limited circumstances.

The first Supreme Court case to consider the use of a military tribunal was *Ex Parte Vallandigham* in 1863. Clement Vallandigham was a U.S. citizen living in Ohio during the Civil War. Maj. Gen. Burnside, commander of the Ohio militia, had declared that any person who expressed "sympathies for the enemy" would be tried for treason. Vallandigham was arrested for saying that the war was "wicked, cruel and unnecessary," and that it would "crush liberty" and establish "despotism." He was tried by military tribunal, convicted and imprisoned.

Vallandigham appealed to the Supreme Court. He argued that the military tribunal had no jurisdiction to try him. The Court denied review, finding that it did not have the authority to hear the case for procedural reasons, even if it thought that the military had acted improperly.

A different result was achieved in *Ex Parte Milligan* in 1866. Milligan was a U.S. citizen living in Indiana. Gen. Hovey ordered that Milligan be arrested and tried for his membership in an organization known as the Sons of Liberty. Hovey believed that the group, including Milligan, conspired to overthrow the U.S. government and that Milligan gave aid to insurgents. Milligan was convicted and sentenced to be hanged. He then sought a writ of habeas corpus and argued that the military had no jurisdiction to try him.

The Court began by noting that emotions had run high during the war and that improvident decisions had been made. "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discus-

sion so necessary to a correct conclusion of a purely judicial question," the court wrote.

The Court said the Constitution governs "equally in war and in peace." It found that the use of a military tribunal was improper.

The Court noted that during the War of 1812, American "officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal."

At the end of the Civil War, however, a group of insurgents conspired to assassinate President Abraham Lincoln and other government officials. The accused conspirators were tried by military tribunal, despite the ruling in *Milligan*.

As a practical matter, it seems that military tribunals were used despite the questions as to their constitutionality. Their use was again questioned before the Court during World War II in the case of *Ex Parte Quirin* in 1942.

In *Quirin*, a group of Nazi saboteurs attempted to sneak into the United States to destroy strategic domestic targets. They were captured almost immediately and tried by military tribunal. Defense lawyers argued that the accused spies were entitled to a speedy and public trial by an impartial jury, as well as the other constitutional protections contained in the Bill of Rights. The attorney for the spies, relying on *Milligan*, argued that the Constitution applied even during war.

By the time the case was appealed to the Supreme Court, there was a great deal of political pressure to uphold the convictions. The *Quirin* decision upheld the use of a military tribunal as used under the specific circumstances of that case, because the accused spies were "unlawful belligerents."

Nevertheless, many experts argue that it does not provide blanket authorization for the use of military tribunals.

The Court entered a brief order upholding the tribunals shortly after the arguments, but did not issue a full opinion until many months later. Scholars say some justices, particularly Harlan Stone and William Douglas, later regretted the ruling.

In writing the opinion, Stone admitted that "a majority of the full Court are not agreed on the appropriate grounds for the decision." The Court also recognized that some offenses cannot be tried by a military tribunal because they are not recognized by our courts as violations of the law of war or because they are in the class of offenses constitutionally triable only by a jury.

Although the *Quirin* decision appears to authorize military tribunals for "unlawful belligerents," the court failed to articulate specific criteria that must be present in order for a military tribunal to be valid.

The Court said, "We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here . . . were plainly within those boundaries." The Court narrowed its decision to avoid any sweeping statement regarding military jurisdiction and provided little guidance for application to future cases.

In 1946, the Court ruled in *Application of Yamashita* that military commissions may be used during war to try enemies captured overseas for violations of war laws. The Court therefore upheld the conviction by military tribunal of a Japanese military officer during World War II.

Justice Francis Murphy, however, wrote a dissenting opinion in which he expressed concern that military tribunals were improper because they failed to provide an accused with the procedural protections required in American courts.

Later that year in *Duncan v. Kahanamoku*, the Court ruled that military tribunals could not be used to try citizens, even when martial law had been declared in Hawaii after Pearl Harbor had been attacked. The Court found that due process protections of American courts were still necessary.

In *Hirota v. MacArthur*, the Court considered habeas corpus petitions from citizens of Japan who were being held in custody pursuant to the judgments of a military tribunal in Japan after World War II. The tribunals had been set up by U.S. Army Gen. Douglas MacArthur, but his actions had been authorized by the Allied Powers and the tribunals were condoned by all of the Allied nations. Many of the judges, in fact, came from other Allied nations.

The Court ruled that it had no jurisdiction to hear the petitioners' claims because the tribunal was "not a tribunal of the United States." It was an international tribunal in which the United States happened to play a lead role.

In 1950, the Court's decision in *Johnson v. Eisentrager* again confirmed the use of military tribunals. In *Johnson*, a group of Germans who had been captured in China during World War II challenged their trial and conviction by military tribunal. The Court held that non-resident aliens have no right of access to American courts during wartime, and, therefore, they may be tried by military tribunal.

A few years later, the Court upheld the conviction of an American citizen who was tried for murder by a military tribunal. In *Madsen v. Kinsella*, the Court ruled that the wife of an American soldier could be tried by military commission for murdering her husband while in U.S.-occupied Germany after WWII.

However, in a later case, *Reid v. Covert*, the Court ruled that the military could not try de-

Because a tribunal has not yet been used in the war on terrorism, it is difficult to evaluate how the military will treat the press.

pendents of American soldiers in military courts, at least in capital cases. The *Reid* case also involved the trial of an American woman who was charged with allegedly killing her husband, a member of the U.S. military.

The late-1950s cases of *Reid* and *U.S. ex rel. Toth v. Quarles* expressed a certain distrust of the military and found it an unsuitable forum for fair trials.

In *Toth*, the Court held that a person who was in the military but who has since been discharged may not be subject to trial by court-martial, even if the alleged crime occurred while the accused was in the military. The Court noted that the federal court system was constitutionally preferable to a military court and did not want to expand the jurisdiction of the less-preferred system.

Such distrust of military justice was confirmed in *O'Callahan v. Parker*. *O'Callahan* involved an ordinary court-martial rather than a military tribunal. The Court held that a crime must be related to military service to come under military jurisdiction. Although the defendant was a member of the armed forces, the alleged crime was committed off base and while off duty. The Court recognized that military discipline has its proper place, but the "expansion of military discipline beyond its proper domain carries with it a threat to liberty."

The Supreme Court has never directly addressed whether the press or public should have a right of access to military tribunals, but history shows that the press has had access to many of them.

The Supreme Court has never directly addressed whether the press or public should have a right of access to military tribunals, but history shows that the press has had access to many of them.

Military tribunals were used during the Civil War to prosecute dissidents. These tribunals were secret and failed to follow any established procedures. But when the Supreme Court invalidated the tribunal used in *Ex Parte Milligan*, it derided the numerous constitutional violations that had occurred, including the violation of the right to a speedy and public trial.

Most of the World War II tribunals were open to the press and public. The tribunal that tried Yamashita permitted the press to attend most of the proceedings, and the Nuremberg tribunal that prosecuted Nazi war criminals was open to the press as well. And in both the Nuremberg and Tokyo tribunals, the identities of the judges were known.

The only World War II tribunal that was closed was the trial of the eight German saboteurs that resulted in the *Quirin* decision. It is likely, however, that the *Quirin* case was closed because the government was trying to keep secret the fact that the saboteurs were caught only because two of the Germans turned themselves in, and not because the government knew about their sabotage plan.

Since the *Quirin* case, many of the participants have expressed their doubts and concerns about the wisdom of both the use of a military tribunal as well as the propriety of the closure of the case. While the other World War II-era trials were perceived to be legitimate justice, the *Quirin* case has been questioned and ridiculed.

Proposed rules

On March 21, Secretary of Defense Donald Rumsfeld announced rules that the military would use in the event a military tribunal takes place. The rules provide for many of the protections granted in American courts, such as the presumption of innocence and the right to cross-examine witnesses.

With regard to openness, the rules state that proceedings will be open "unless otherwise decided" by the presiding officer. The presiding officer may decide whether to permit the public or press to attend. Photography, video and audio recording will be prohibited.

The rules allow closed trials to protect classified or sensitive information, the physical safety of participants, law enforcement sources or methods, or national security interests.

The rules also permit protective orders to limit disclosure of information, and secret evidence may be used. The rules allow witnesses to testify anonymously, but do not address whether the panel members may be anonymous. The rules do not discuss procedures for gag orders.

In general, it appears that the presiding officer will have great discretion in determining what portions, if any, of a trial will be open and who may attend. There are no clear procedures for how the press might challenge closure orders in a military tribunal.

Tribunals and the law

Generally, under modern law, military courts are open. Rule for Courts-Martial 806(b) states that military courts are presumptively open to the public. However, they may be closed if classified evidence is used or if there are other security concerns.

Military courts have also acknowledged that there is a First Amendment right of access to military proceedings. In *U.S. v. Grunden*, a 1977 case decided by the Court of Military Appeals, the court ruled that, in order for a military court to close a courtroom, the judge must hold a preliminary hearing to determine whether the prosecution has met the stringent burden of proving that the grounds for excluding the public are of "sufficient magnitude" to outweigh "the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy."

Furthermore, in *Courtney v. Williams* in 1976, the military court held that the party in a military court who seeks to impose a rule different from

the rule in civilian court bears the burden of proving that a different rule is necessary. Thus, in general, military courts apply rules similar to the rules used in civilian courts.

Since then, the Supreme Court has ruled in favor of public access to military court records and proceedings in a number of cases. Lower courts have imposed similarly strict standards for closure orders. Thus, if the military courts continue to follow the *Courtney* case, the courts should assume that proceedings will be open, that records will be available, that the identities of the participants will be known and that gag orders will not be routinely imposed.

Military courts are supposed to provide protections similar to those used in civilian courts, unless a party can prove that a different rule is necessary. Civilian courts, like military courts, presume that proceedings will be open to the public, and the civilian courts have established standards and tests to ensure that First Amendment rights are preserved. Military courts may, therefore, adopt the same tests to ensure that First Amendment rights are protected.

In *Richmond Newspapers v. Virginia*, the Supreme Court established a First Amendment right of access to criminal proceedings. Since then, the Court has consistently overruled closure orders in almost all aspects of criminal trials.

Although there is a presumptive right of access to court proceedings, a judge may close a courtroom under certain circumstances. If a court is going to close a courtroom, it must follow the requirements set forth in *Press Enterprise v. Superior Court ("Press Enterprise II")* in 1986.

Under that test, a court must first determine whether there is a presumptive right of access to the proceedings, using the "experience and logic" test.

"Experience" means that the type of proceeding has historically been open to the public. Since military tribunals do not have much history, it is difficult to determine whether the court would rely on the presumptive openness of courts-martial as an example of "history" or whether they would look to battlefield tribunals as an example.

The court must also ask whether, logically, it would make sense to keep the proceedings open. The question is whether openness would play a positive role in the functioning of the process. Again, it is not clear how the court would rule. On one hand, openness helps prove that the trial is fair, like in any criminal proceedings. On the other hand, some argue that secrecy is necessary for "national security" or the use of classified evidence.

If the court determines there is a presumptive right of access, the next question is whether there is an interest that would require closure. If there is a presumptive right of access: "Proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"

If the interest that supports closure is the defendant's Sixth Amendment right to a fair trial, there must be specific findings that show a "substantial probability" of prejudice to a fair trial, that closure would prevent such prejudice, and that reasonable alternatives would be insufficient.

If there is some other interest at issue, such as national security or the use of classified material, the court would still have to find that closure is essential and that the order is narrowly tailored. That may mean that a limited closure could be used while classified information is discussed, but the remainder of the trial would be open.

There is also, in general, a presumptive right of access to court records. Courts should not seal records unless there is a "higher" interest to protect and the order is narrowly tailored. The U.S. Court of Appeals in Denver (10th Cir.) followed this rule in the Timothy McVeigh-Oklahoma City bombing case, *U.S. v. McVeigh*.

In general, trial transcripts, pleadings and evidence should be available for inspection by the public and press. In terrorism trials, there may be some "classified" evidence or other materials that the court may not wish to make public. Any sealing order should not be entered unless the court first makes a determination that sealing is necessary to protect an interest such as national security or the safety of a witness. However, the order should also be narrowly tailored, which means that the court should redact only the potentially dangerous portions of the document and permit the release of the remainder of the document.

Traditionally, the names of judges and jurors are part of the public record. In a military tribunal, there would not be jurors, but the identities of the panelists should be available to the public.

The Supreme Court has not yet issued specific rules regarding gag orders on trial participants. However, most courts agree that gag orders should not be entered unless some or all of these requirements are met: (1) the public and press has been given notice and an opportunity to be heard, (2) the judge holds a hearing to determine whether a gag order is necessary, (3) there is evidence that a gag order is necessary to preserve the defendant's right to a fair trial or some other compelling government interest, (4) there are no less restrictive alternatives to the gag order, (5) the gag order is narrowly tailored and (6) the judge makes specific, on-the-record findings of fact that demonstrate the necessity of the order.

With regard to military tribunals, a gag order should not be imposed on trial participants unless the court provides similar procedural safe-

Military courts have also acknowledged that there is a First Amendment right of access to military proceedings.

guards and substantive evaluations of the facts as would be expected in civilian court.

As noted above, the rules proposed by the government for military tribunals do not appear to conform to the ordinary standards of openness, and it is not clear what procedures should be used to challenge closure orders. Media lawyers will have to consider whether to try to intervene in the military proceeding or seek a collateral order from a federal court.

If government officials seek to close access to military tribunals or courts, the press should make every effort to challenge the closure orders.

Military Detainees

Two American citizens, Yasser Hamdi and Jose Padilla, have been labeled "enemy combatants" and are being held indefinitely without charges in military brigs. So far, they have been denied access to a lawyer or a chance to challenge their detentions. Although a federal judge in Virginia ordered the government to permit Hamdi to consult with a lawyer, an appellate court reversed that decision and ordered the trial judge to consider other evidence.

Frank Dunham, a federal public defender in Virginia, filed a motion asking to represent Hamdi. He also challenged Hamdi's status as an "enemy combatant." Hamdi's father also filed a petition seeking "next friend" status to challenge his son's detention.

In May, U.S. District Court Judge Robert Doumar granted Dunham permission to represent Hamdi and ordered the military to permit Dunham to meet with Hamdi.

On June 11, Doumar granted "next friend" status to Hamdi's father for the purpose of challenging Hamdi's detention. The government appealed these decisions to the U.S. Court of Appeals in Richmond (4th Cir.). The Fourth Circuit on July 12 invalidated Doumar's ruling granting counsel to Hamdi and remanded the case, stating that Doumar must consider more evidence before making a decision. The appellate court gave great deference to the military's designation of Hamdi as an enemy combatant, but stopped short of saying that there was no possibility of court review. The court found that Doumar's decision was procedurally flawed because he had issued a ruling before the government had filed opposing briefs.

In response to the appellate court ruling, Doumar asked the government for more evidence to demonstrate that Hamdi should be classified as an "enemy combatant." Doumar asked for copies of Hamdi's statements, notes of interviews and information about the interrogators. The government refused to provide the information, claiming that only the executive branch can evaluate a prisoner's status and that it violates the separation of powers for a judge to review their determination. The government argued that courts should not review any government designation of an "enemy combatant."

Doumar had scheduled a hearing for Aug. 8 to consider evidence regarding Hamdi's classification as an "enemy combatant," but the hearing was postponed to August 13. At the hearing, Doumar questioned the government lawyers about whether an affidavit by a government official declaring Hamdi to be an "enemy combatant" was sufficient evidence to detain him indefinitely. A ruling is expected soon.

Jose Padilla, who is also known as Abdullah al-Muhajir, is an American citizen who is accused of trying to plan an attack in the United States with a "dirty bomb." He was originally detained in Chicago on May 8 as a material witness. He was taken to New York to testify before the grand jury investigating the terrorist attacks, but he refused to cooperate.

Prosecutors then attempted to obtain evidence to charge Padilla with a crime, but *The Washington Post* reported that prosecutors were unable to build a case before the June 11 hearing on Padilla's detention as a material witness. President Bush signed an order on June 9 identifying Padilla as an "enemy combatant," allowing the government to transfer Padilla to military custody.

On July 31, U.S. District Judge Michael Mukasey in New York considered a *habeas corpus* petition submitted by attorney Donna Newman on behalf of Padilla. Newman says that Padilla has been held incommunicado and all requests for access to him have been denied. The government has argued that the court in New York does not have jurisdiction over the case and that once Padilla was designated an "enemy combatant," he is no longer eligible for habeas relief.

Mukasey had not yet issued a decision in the case at press time.

In both the Hamdi and Padilla cases, the government has argued that the military should be able to designate persons as "enemy combatants" and that designation should not be subject to judicial review.

One court, however, has disagreed with the government's claim that it may impose labels without review, at least outside of the military context. In mid-June, U.S. District Judge Robert M. Takasugi declared unconstitutional a 1996 law that allows the government to designate groups as "terrorist" and prosecute persons who support those groups. Takasugi ruled that the statute was unconstitutional on its face because it does not allow groups to challenge the "terrorist" designation.

The case before Takasugi in Los Angeles involved seven American supporters of The People's Mujahedin, a group that opposed clerical rule in Iran and is listed as a "terrorist" organization by the U.S. The ruling will not directly affect other cases, but it demonstrates that some courts

might not accept the government's argument that it may make designations without judicial review.

Recommendations

To further enhance credibility of military tribunals and to ensure compliance with constitutional requirements, journalists must seek openness with regard to all trials. They must request any military tribunal to release the names of the judges or panel members who issue judgment; to allow public access to the trial; to release all nonclassified information without delay; to hold public hearings prior to the issuance of any sealing order or closure order; and to prepare a transcript of any closed proceedings to be sealed and released at a later date.

With regard to military detainees, there is no presumptive right of access to prisons or to military facilities. However, the press should make every effort to attend the detainees' court proceedings. If those detainees become subject to military tribunals, the press must try to challenge any closure orders.

The Constitution was designed to protect against abuses of power, even abuses taken for seemingly legitimate reasons. The founding fathers knew that power could be taken incrementally, used properly at first, but resulting in injustice when not checked. To prevent abuse and injustice, Americans must adhere to the principles in the Constitution even when — perhaps especially when — they are contrary to instinct.

If government officials seek to close access to military tribunals or courts, the press should make every effort to challenge the closure orders. This may be done by intervening in cases for the limited purpose of challenging orders, by seeking appeals or writs of mandamus from appellate courts, or by filing separate suits in federal court to challenge the proceedings.

Although these proceedings may be time consuming and expensive, the press should not give up its rights and risk establishing a precedent where the press is excluded from proceedings of extreme public interest and importance.

Access to terrorism & immigration proceedings

SEVERE
SEVERE RISK TO A FREE PRESS

Traditionally, hearings involving immigrants and material witnesses operated under a presumption of openness. But post-September 11, secrecy stands as the default status for access, making it difficult — if not impossible — for the American public and the press to learn about detainees and material witnesses.

Since September 11, government officials have detained hundreds of people, some on criminal charges, some for immigration violations and some as material witnesses.

Those charged with immigration violations are being held under an unprecedented amount of secrecy. The immigration proceedings — normally open to the public — have been closed, and little information about the detainees has been released.

Secrecy has also surrounded material witness detentions, search warrant affidavits and other terrorism-related cases.

Closure of immigration proceedings

The Immigration and Naturalization proceedings are handled by INS administrative courts rather than federal district courts. The administrative regulations provide that the proceedings "shall" be open to the public, but allow for closure if necessary for national security or privacy reasons. Also, the administrative judge may limit attendance due to space constraints, but preference is given to the press.

On Sept. 21, 2001, Chief Immigration Judge Michael Creppy issued a memorandum to all immigration judges and court administrators, explaining that "the Attorney General has implemented additional security procedures for certain cases in the Immigration Court."

Among other procedures, judges are supposed to "close the hearing to the public" and avoid "disclosing any information about the case to anyone outside the Immigration Court." The rule also restricts immigration court officials from confirming or denying whether any particular case exists on the docket.

Although court closure may be permitted when necessary for security reasons, each case should be evaluated on its own merit to determine whether closure is necessary. The across-the-board closure policy stated in the Sept. 21 memorandum violated this principle.

Two different courts have ruled that the Creppy Memorandum is unconstitutional. However, those cases are currently on appeal.

On Jan. 28, the *Detroit Free Press* and the *Ann Arbor News* filed a lawsuit in federal court in Michigan challenging the closure of immigration proceedings. The next day, the American Civil Liberties Union filed another lawsuit in Michigan to challenge the closure of immigration proceedings. The ACLU's lawsuit was filed on behalf of two newspapers, *The Detroit News* and the *Metro Times*, and Rep. John Conyers (D-Mich.). Conyers and the two papers complained because they had been excluded from the deportation hearing of Rabih Haddad, a Muslim community leader suspected of raising money for terrorist activities.

Both lawsuits, filed in federal district court in Detroit, allege that the immigration proceedings relating to Rabih Haddad should be open to the public. The *Free Press*' suit asks for access to all future proceedings and for copies of transcripts of all past proceedings. On March 5, the two lawsuits were consolidated into *Detroit Free Press v. Ashcroft*.

The lawsuit focuses on Creppy's order to close all immigration proceedings. The plaintiffs argued that there is a presumptive right of access to such proceedings, and the policy stated in Creppy's order is unconstitutional. Elizabeth Hacker, the immigration judge in the Haddad case, allegedly relied upon Creppy's order to close the Haddad proceeding. The defendants in

the case are Attorney General John Ashcroft, Creppy and Hacker.

A federal district judge in Detroit ruled April 3 that across-the-board closure was unconstitutional and the proceedings of Rabih Haddad should be open. Judge Nancy G. Edmunds wrote in her opinion: "Openness is necessary for the public to maintain confidence in the value and soundness of the government's actions." Edmonds ordered the immigration court to release transcripts of the deportation proceedings against Haddad.

On April 10, a federal appeals court temporarily halted the order to release transcripts. A three-judge panel of the U.S. Court of Appeals (6th Cir.) in Cincinnati issued a temporary stay of Edmonds' order to give it more time to consider the appeal. However, on April 18, the Sixth Circuit ruled that there was little chance that releasing the information would harm national security. It lifted the stay.

On April 19, the government said that it would no longer try to block the release of the Haddad transcripts, but government attorneys continue an appeal of the ruling that hearings should be presumptively open. The Sixth Circuit heard arguments in the case on Aug. 6.

On August 26, the Sixth Circuit issued an opinion strongly affirming the trial court ruling, finding that the across-the-board closure of immigration proceedings was unconstitutional. The court found that the First Amendment requires a presumption of openness that must be applied to immigration proceedings.

The court noted that democracy requires openness: "The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty."

The court chastised the government over the secrecy of the "special" immigration proceedings: "Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them "special interest" cases. The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors."

In the opinion, written by Judge Damon Keith, the court acknowledged that the executive branch has broad powers to create immigration policies, but the court ruled that such power is limited to substantive rules, such as the standards for permitting immigrants or deporting violators. The court found that the government cannot avoid basic constitutional protections that form the basis of our democratic procedures. "We hold that the Constitution meaningfully limits non-substantive immigration laws and does not require special deference to the Government."

The court found that even though immigration proceedings are "administrative" rather than "judicial" proceedings, they have substantial judicial characteristics and, therefore, the constitutional protections applied to judicial proceedings, such as openness, must also be applied to immigration courts. The court found that the First Amendment right of access to judicial proceedings set forth in the 1980 Supreme Court case *Richmond Newspapers v. Virginia* should be applied to immigration cases. *Richmond Newspapers* requires courts to apply a presumption of openness that may be overcome only where there is evidence of a compelling need for closure and the closure order is narrowly tailored. An across-the-board closure would not meet such a test.

The Sixth Circuit stated that the desire to protect national security may be a "compelling interest" but the immigration judge had failed to make particularized findings to justify closure, and the Creppy Memorandum also failed to specify particular facts requiring closure.

Most importantly, the court found that the Creppy Memorandum was not "narrowly tailored." "The government offers no persuasive argument as to why the Government's concerns cannot be addressed on a case-by-case basis."

The government is considering an appeal to the U.S. Supreme Court.

A coalition also battled the blanket closures on immigration hearings in New Jersey.

On March 6, a coalition of lawyers filed a lawsuit in federal court in New Jersey on behalf of North Jersey Media Group Inc. and the *New Jersey Law Journal*. Like the ACLU lawsuit in Michigan, the New Jersey suit challenges the constitutionality of Creppy's order.

On May 29, U.S. District Judge John Bissell ruled that the across-the-board closure of immigration proceedings was unconstitutional. Bissell found that the First Amendment right of access was infringed by a blanket closure order and declared that proceedings should not be closed unless there is a showing of a particular need on a case-by-case basis.

Bissell's ruling has been appealed to the U.S. Court of Appeals in Philadelphia (3rd Cir.), which will hear arguments in the case in September 2002. The Third Circuit, however, refused to issue a stay on Bissell's ruling, meaning that courts would be required to open proceedings until the appellate court issued a ruling.

The Department of Justice appealed the denial of the stay to the U.S. Supreme Court, asking the Court to issue a stay to prevent any immigration courts from opening immigration proceedings until all appeals of Bissell's decision were exhausted. The government argued that if proceedings were opened, "terrorist organizations

Although court closure may be permitted when necessary for security reasons, each case should be evaluated on its own merit to determine whether closure is necessary.

will have direct access to information about the government's ongoing investigation."

The Supreme Court issued the stay without an opinion on June 28. Thus, "special interest" cases will remain closed until a final decision is issued.

Individual detainees may be challenging the blanket closure order, as well.

On Feb. 28, Malek Zeidan filed a complaint in federal district court in New Jersey challenging the Creppy Memorandum as it applied to his removal proceedings. *(Zeidan v. Ashcroft)*

Zurofsky argued that the closure orders violate due process rights because they prevent detainees from defending themselves.

Zeidan is a Syrian with an expired visa. He had been living in New Jersey but was detained on Jan. 31 by the INS. A closed hearing was held three weeks later. His lawyer, Bennet Zurofsky, challenged the rule during the hearing. When the immigration judge refused to open the case, Zeidan's suit was filed in federal court.

The complaint alleged that the closure of his case violated his due process rights and was contrary to protections in INS regulations and the Administrative Procedures Act. In March, after the suit was filed, the government removed the "special interest" designation from his case. Because the issue was deemed to be moot, the Zeidan case was dismissed on April 16. Zeidan was released on bail.

Zurofsky filed an amicus curiae brief in the North Jersey Media Group case with Bissell. Zurofsky argued that the closure orders violate due process rights because they prevent detainees from defending themselves. The *New Jersey Law Journal* reported that Zurofsky's client wanted his cousin to attend the proceedings as a witness, but the secrecy order prevented it.

The Justice Department has defended the Creppy Memorandum, claiming that it is necessary for national security. However, the detainees' lawyers argue that because their clients have not been charged with terrorism, the national security concerns are not so strong.

Although there have been at least 600 — and possibly more than 750 — secret immigration proceedings, few of the detainees have been identified.

The *Village Voice* reported on the case of Muhammad Qayyum, a Pakistani citizen who was detained in a raid on a mosque, held for three months without legal representation and questioned by various government agencies. He finally obtained lawyers who, after four months of appeals, were able to get him released on a bond. Qayyum's hearings were closed.

The *Daily Illini* reported that former University of Illinois student Ahmed Bensouda was arrested by the INS for having an outdated visa. His case was designated "special interest," his hearing was closed, secret evidence was used at the hearing and, reportedly, no transcript of the proceeding was made.

In Phoenix, Zakaria Soubra, a Lebanese student known for speaking out on behalf of Islamic causes, was arrested by the INS because he had too few college credits to maintain his student visa. Immigration judge Scott Jeffries closed the hearing and issued a gag order preventing anyone from speaking about the hearing or disclosing any information presented.

For the hundreds of detainees who have been arraigned or deported, justification for their detention has mostly been kept secret.

Because of the high level of secrecy involved, a coalition of groups filed a Freedom of Information request with the INS, asking for the names of the detainees. When the INS refused to release the information, the groups, including the Reporters Committee, filed a lawsuit in federal court in D.C. asking the court to rule that the names must be released. On August 2, District Court Judge Gladys Kessler ordered the government to release the detainees' names, but the order has been stayed pending appeal. The FOI Act case is discussed more fully in this report's section on Freedom of Information.

Legal issues regarding access to immigration proceedings

According to INS regulations, immigration proceedings should be presumptively open to the public. The U.S. Supreme Court has never determined whether there is a right of access to immigration proceedings. However, the court should apply the same analysis from previous access cases, such as *Richmond Newspapers* and *Press Enterprise v. Superior Court ("Press Enterprise II")*.

In *Richmond Newspapers v. Virginia*, the Supreme Court established a First Amendment right of access to criminal proceedings. Since then, the Court has consistently overruled closure orders in almost all aspects of criminal trials. However, the high court has not ruled on whether this presumption extends to civil or administrative proceedings.

Although there is a presumptive right of access to court proceedings, a judge may close a courtroom under certain circumstances. If a court is going to close a courtroom, it must follow the requirements set forth in *Press Enterprise II*, as explained in the section of this report on military tribunals.

Regardless of whether a particular proceeding is open or closed, due process requires that each case be evaluated on its own merits. The Creppy Memorandum is unusual in that it provides for across-the-board closure of proceedings without regard to the circumstances of any particular case. Such an across-the-board ban on access would seem to contradict all of the Supreme Court's prior rulings regarding openness.

The Sixth Circuit opinion in *Detroit Free Press*

v. Ashcroft, discussed above, followed the *Richmond Newspapers* standard and agreed that the due process protections must be applied.

The Reporters Committee encourages all news media to challenge closure orders in any proceeding, particularly the secret immigration proceedings of post-September 11 detainees. If closure orders are left unchallenged, the court system will lack any effective oversight and the courts will establish a precedent for permitting blanket closures of certain proceedings.

Material Witness Proceedings

An unknown number of detainees have been held as material witnesses. Material witnesses are entitled to a hearing before a judge to evaluate the validity of their detention.

Shortly after the terrorism investigation began, Chief Judge Michael Mukasey of the Southern District of New York stated that all material witness hearings would be closed because they are related to the grand jury investigation of the September 11 attacks. On Sept.18, 2001, the *New York Law Journal* reported that about 30 people had been detained as material witnesses, and at least two people had tried to challenge their detention. The paper also noted that federal agencies declared that they would no longer announce how many people were being detained.

However, there have been two open cases involving the detention of material witnesses — one of which was decided by Mukasey — and the judges have come to different conclusions about the law. The issue in those cases was whether the government may jail material witnesses while they wait to testify before a grand jury.

On April 30, U.S. District Judge Shira Scheindlin ruled that the material witness statute could not be used to hold a witness merely to testify before a grand jury. She suggested that the material witness statute was misused. The case involved allegations that college student Osama Awadallah lied about his connection to terrorists.

On July 11, Mukasey ruled that the government *could* detain material witnesses during investigations. In that case, a detainee identified only as "John Doe" claimed that he should not be held because all the government wants from him is testimony about another person's political views. Doe's lawyer, Neil S. Cartusciello, claims that holding him solely because he listened to another person's views are a violation of his First Amendment rights. Mukasey rejected that argument.

Media organizations have challenged secrecy in at least two material witness cases.

In response to a request by *The New York Times*, Mukasey agreed to unseal the records in Doe's case after giving both sides the opportunity to redact information. The government redacted many of its arguments, but the documents were released on July 26.

Also, *The Denver Post* and the *Rocky Mountain News* challenged the July 26 closure of James Ujaama's hearing. Ujaama was arrested on July 22 as a material witness. Government officials claim that Ujaama took computer equipment to an al-Qaida camp and may have trained there. Officials also allege that Ujaama was part of a plan to set up a terrorist training camp in Oregon. Ujaama was also the subject of a pending grand jury investigation in Virginia.

The federal magistrate in Denver, Craig Shaffer, denied the newspapers' request for access to Ujaama's material witness hearing because of the pending grand jury investigation. Dan Sears, Ujaama's lawyer, would not comment on the hearing because the proceedings were under seal. After the hearing, Ujaama was moved to Virginia, presumably to testify before the grand jury. The newspapers' lawyer, Steve Zansberg, had argued that the material witness proceedings should be open because it was unlikely that any secret grand jury information would be revealed.

On Aug. 23, a federal court in Virginia held another hearing on the validity of Ujaama's detention. The hearing was closed, but various media groups sought access. The judge allowed the media to challenge the closure, but ordered that the media's hearing would be closed. After protests from the media groups, including the Reporters Committee for Freedom of the Press, the media's access hearing was opened to the public. However, the media was then denied access to Ujaama's hearing. The outcome of the hearing was not revealed, but Ujaama was indicted on Aug. 29 for conspiracy to engage in terrorism-related activities.

The judge allowed the media to challenge the closure, but ordered that the media's hearing would be closed.

Sealing orders

Judges have issued sealing orders in many terrorism-related cases to keep secret various records or evidence.

In May, the Executive Office for Immigration Review issued an interim rule that would permit immigration judges to keep documents from the public. The rule, which became effective on May 21, created a new section to the Code of Federal Regulations that would authorize INS judges to issue protective orders and accept documents under seal. It would also amend an existing section to permit judges to close hearings when sealed information is considered.

The provision is designed to "ensure that sensitive law enforcement or national security information can be protected against general disclosure, while still affording full use of the information by the immigration judges, Board of Immigration Appeals, the respondent, and the courts." The rule describes the "mosaic" theory — that terrorists can piece together seemingly innocuous bits of information — as justification

for the need to hide all kinds of information.

As written, the proposed rule would permit a protective order where there is "a substantial likelihood that disclosure or dissemination will harm the law enforcement or national security interests of the United States." The rule also allows INS judges to issue gag orders to prevent an immigrant from disclosing anything he has learned from the protected information.

The Reporters Committee for Freedom of the Press submitted comments to the INS, arguing that any provision for protective orders or sealing orders must comply with the constitutional requirements for sealing orders used in ordinary courts. In particular, the Reporters Committee urged that the public and press should be given notice and an opportunity to be heard on the issue, and a sealing order should be issued only if there are specific findings of fact that demonstrate a necessity for such an order.

The rule is also designed to prevent the immigrant being tried from disclosing the information to third parties. Part of the rule provides consequences to immigrants and their attorneys if either of them violate the protective order. If either the immigrant or the attorney violates the order, the court may then deny all discretionary relief to the immigrant and the attorney may be barred from practicing before the immigration courts.

Part of the rule provides consequences to immigrants and their attorneys if either of them violate the protective order.

Documents have been sealed in some high-profile terrorism cases.

In a terrorism-related criminal case, the plea agreement of Semi Osman was sealed. Osman, who is from Tacoma, Wash., pleaded guilty to illegally posessing a firearm. He had also been charged with attempting to fraudulently obtain citizenship documents, but those charges were dropped. Osman also has been linked to James Ujaama, Abu Hamza al-Masri, and the alleged al-Qaida training ranch in Oregon.

The *Seattle Post-Intelligencer* reported on speculation that Osman may have agreed to help the government in its efforts to get Abu Hamza, who is one of the primary wanted terrorists. The paper quoted University of Washington law professor Lis Wiehl, who claimed that the sealed plea agreement indicated some cooperative arrangement because "it's something that the prosecution would not want to advertise."

Meanwhile, in Virginia, U.S. District Judge T.S. Ellis III sealed many of the documents filed in the case of John Walker Lindh. The judge issued an order on June 19, noting that a "national periodical had somehow obtained access to information relating to this case that the Court had placed under seal and ordered not to be disclosed."

The judge ordered the government to file a pleading addressing the issue of whether the documents were disclosed. The Office of the Inspector General reported that it was investigating the leak.

Lindh later entered into a plea agreement. In preparation for the trial, prosecutors had designated various documents as "classified" and sought to limit public access to those documents. The government also requested permission to have some witnesses, particularly military personnel, testify without revealing their true identity.

The trial of Zacarias Moussaoui, scheduled to begin January 6, 2003, may include transcripts of the cockpit voice recorder of Flight 93, which crashed in Pennsylvania. Prosecutors have requested permission to play the tape at trial, but they have also petitioned the court to seal the transcript of the recording.

Family members of the flight's passengers were permitted to hear the recording, but they were prohibited from making a tape, and the Associated Press reported that family members stated that they were instructed not to discuss details of the recording because it "could jeopardize the trial of Zacarias Moussaoui." However, Lisa Beamer, the wife of Todd Beamer, who died on flight 93, has published a book entitled "Let's Roll" that describes the contents of the tape in great detail.

USA Today has filed a motion with Judge Leonie Brinkema asking that the transcript not be sealed if the tape is played for the jury.

Also, Judge Brinkema had originally sealed all of Moussaoui's handwritten pleadings, but later issued an order allowing Moussaoui's briefs to be available via Internet.

On Aug. 5, U.S. District Judge Jed S. Rakoff of the Southern District of New York agreed to unseal records in the case of Abdallah Higazy. Higazy had been detained as a material witness after the September 11 attacks because a security guard at the Millennium Hilton Hotel in New York claimed that he found a pilot's radio in Higazy's hotel room.

While detained, Higazy was forced to take a polygraph exam, and prosecutors claimed that he confessed to owning the transceiver. In January, Higazy was charged criminally with making false statements.

However, a few days later, a pilot who had been staying at the hotel returned to claim the receiver. The FBI later determined that the security guard had lied about the receiver and dismissed the case against Higazy. The polygraph examiner was also questioned about his procedures.

Rakoff ordered the FBI to complete an investigation into the improper charges against Higazy and to report back to him by Oct. 31. Rakoff also stated that he would unseal the records in Higazy's case, pursuant to a request by Higazy's lawyer, Robert Dunn, and *The New York Times*. However, the government's letter of June 28

regarding the investigation of the polygraph examiner will remain sealed.

Also, as noted above, Mukasey unsealed documents in the "John Doe" material witness case pursuant to a request by *The New York Times*.

At least one judge has made it clear that she will not seal documents unless the government can meet a high standard of proof. U.S. District Judge Gladys Kessler in Washington, D.C., is assigned to the case against the Texas-based Holy Land Foundation for Relief and Development. The foundation has been accused of being a fund-raising front for the terrorist group Hamas. On April 22, Kessler stated she was not inclined to automatically keep classified information secret, and she wanted evidence to be public and on the record unless the law is "crystal clear" that it should not be. The case is still pending.

Courts have sealed terrorism-related search warrants, preventing the public from learning about the basis for searches.

On May 30, Magistrate Judge Theresa Buchanan in the Eastern District of Virginia denied a motion by the *Tampa Tribune* and *The New York Times* to unseal search warrant affidavits issued as part of the investigation of University of South Florida professor Sami Al-Arian. Al-Arian has been a controversial figure because he has allegedly expressed strong support for Islamic causes.

Also, as part of a state anti-terrorism law, the Michigan Legislature cut off access to search warrant affidavits at the courthouse. New Jersey is considering a similar rule.

Even without official court orders, some documents have been kept secret.

For example, the New York Fire Department obtained tapes of discussions between firefighters in the World Trade Center before it collapsed but has refused to release it. The *New York Post* reported that fire officials listened to the tapes but are keeping the contents secret at the request of Moussaoui's prosecutors.

One of the stranger requests for secrecy was raised in the wrongful death lawsuits filed by families of September 11 victims against the airlines.

On July 12, the government moved to intervene in *Mariani v. United Airlines*, and claimed that it should have the opportunity to review the discovery documents that the airlines would turn over to plaintiffs and have the power to withhold any documents that the government believes were "sensitive" to national security interests.

On July 24, the court granted the government's request to intervene and also consolidated all the other lawsuits against airlines arising from the September 11 attacks for the purpose of pre-trial issues, such as discovery. The court ordered that the government must prepare a proposal by Sept. 13, outlining the security procedures it wishes to use during the discovery process. It is not clear whether such proposed procedures will be implemented.

To date, the only high-profile terrorism case in which a gag order has been issued is the case of Richard Reid, accused of trying to blow up an American Airlines flight from Paris to Miami with a shoe bomb. U.S. District Judge William Young in Boston issued a broad gag order that prevents Reid's lawyers from repeating anything Reid says. Reid's public defender, Owen Walker, has argued that the gag order essentially prevents him from defending Reid because he cannot confer with other lawyers or investigate any of Reid's factual contentions. The government has asked for the gag order due to "national security" concerns.

Camera Coverage of Terrorism trials

The case of Zacarias Moussaoui, alleged to be a co-conspirator in the September 11 attacks that shocked the American public and sparked the war in Afghanistan, reignited another hot-button issue: Why aren't cameras allowed in federal courtrooms?

Moussaoui was arrested on immigration charges a short time before the attacks. The FBI had been tipped off about him by flight school operators suspicious that he wanted to learn how to fly a plane once it was in the air but did not want to learn how to take off or land. Moussaoui was eventually indicted and will be tried on six counts of conspiracy for his alleged involvement in planning for September 11.

Court TV and C-SPAN petitioned the federal district court in Alexandria, Va., for permission to provide gavel-to-gavel coverage of the trial. However, federal court rules bar any audio-visual coverage of a trial. The cable companies argued that such a per se ban is unconstitutional. Several media organizations, including the Reporters Committee for Freedom of the Press, filed a brief in support of Court TV and C-SPAN, supporting the argument that a ban on televised trials is unconstitutional.

U.S. District Judge Leonie Brinkema denied Court TV's request to televise the trial, expressing concerns about security and fair trial issues.

With the development of film, video and television, the American public's appetite for news and information has grown. While there is a recognized right of the public to attend trials, space within a courtroom is limited. It would seem only natural for cameras to provide access to anyone who is unable to attend. But not all judges feel that cameras fit naturally inside courtrooms. Thus, for nearly 40 years, the battle over cameras in the courtroom has been waged everywhere from the U.S. Senate to the U.S. Supreme Court.

In 1965, the landmark case *Estes v. Texas*

At least one judge has made it clear that she will not seal documents unless the government can meet a high standard of proof.

U.S. District Judge Leonie Brinkema denied Court TV's request to televise the trial, expressing concerns about security and fair trial issues.

reached the U.S. Supreme Court. *Estes* centered on a high-profile swindling case in which both the pretrial hearing and the trial itself were televised.

The Court ruled that the televising of the trial was a violation of the due process clause of the Fourteenth Amendment. The Court believed that the cameras were disruptive and prevented the defendant from receiving a fair trial. However, the court did not enact a *per se* rule banning the broadcasting of trials. The court noted that television broadcasting was an evolving medium, leaving room for coverage to be permitted with the advancement of technology.

Because *Estes* did not establish a constitutional ban on the broadcasting of trials, the Supreme Court later permitted each state to establish its own rules regarding cameras in the courtroom.

In *Chandler v. Florida*, the Court found that Florida's experiment with cameras in the courts was permissible. The case, brought before the Court in 1981, arose from a televised 1977 trial in which a group of Miami police officers were convicted of breaking into a house.

An appellate court upheld the conviction, as did the U.S. Supreme Court, on the grounds that there was no empirical data to establish that the presence of cameras in the court had an adverse effect on the outcome of the trial. The court ruled that "there is no reason for this court, either to endorse or to invalidate Florida's experiment."

Since *Chandler*, states have gradually permitted cameras in courts. Currently, all 50 states permit audio and visual coverage in some circumstances.

But camera coverage in state courts has had its ups and downs, especially after the 1994 trial of O.J. Simpson.

Televising that trial gave the public a long view into court proceedings on a national scale, but it also had negative effects. For example, a 10-year experiment with televising civil and criminal trials in New York lasting from 1987 to 1997 stopped, as one legislator put it, because of the "circus-like nature" surrounding the Simpson proceedings. The sponsor of a Maryland bill that would have allowed criminal trials to be televised decided to withdraw the bill for similar reasons.

The setbacks in New York were somewhat overcome after the successful airing of the Amadou Diallo trial in 2000. Justice Joseph Teresi in Albany ruled the ban was unconstitutional after Court TV filed a motion asking that the trial of four police officers who shot an unarmed man be televised.

But Teresi's ruling does not grant camera access to all trials, and the decision was never taken to an appellate court. The Diallo trial, nevertheless, prompted Gov. George Pataki to urge the state Assembly to pass a bill that would establish a two-year experimental period allowing cameras back into state courts.

In the fall of 2000, Florida, which arguably has the nation's most open courtrooms, allowed camera coverage of court hearings on how and if the presidential ballot recount in the Bush-Gore election should proceed.

In late 2001, South Dakota and Mississippi were the last two states to establish rules for cameras in its courts. South Dakota established a pilot program subject to an annual review for its supreme court, while the Mississippi Supreme Court began permitting audio Web casts on its official site. Although rules for camera coverage vary from state to state, all states now allow at least some coverage.

Federal courts, however, are still averse to camera coverage.

In 1989, the Judicial Conference of the United States convened the Ad Hoc Committee on Cameras in the Courtroom to review its stance on television coverage in federal courts. Since 1972, the conference's code of conduct for U.S. judges has generally barred camera coverage of federal court hearings. In 1983, it was proposed that the conference permit coverage, but this proposal was quickly rejected by a congressionally appointed commission.

In 1989, the Ad Hoc Committee decided to lift the ban on cameras in federal courts, agreeing that individual judicial conferences should make the decision. This agreement led to a pilot program lasting from 1991 to 1994. The experiment was limited to civil cases in six district courts and two appellate courts. Following the end of the program in June 1994, the Federal Judicial Center Report was released by the Federal Judicial Conference, a judicial body that creates administrative rules for federal courts. The report found no obvious adverse effect from cameras.

Nevertheless, the federal trial courts are still not permitted to allow cameras into courtrooms. But federal appellate courts may decide whether to allow cameras on a case-by-case basis.

Another effort to open federal courts to camera coverage was made in 1997 by Reps. Charles Schumer (D-N.Y.) and Steve Chabot (R-Ohio) when they proposed the Sunshine in the Courtroom Act. The bill, if passed, would have permitted the electronic recording, photographing and televising of federal trials.

After the Sunshine Act failed, Chabot proposed an amendment to the Judicial Reform Act of 1997 designed to permit cameras in federal trial courts on a three-year experimental basis. The amendment also gave federal judges discretion over whether they would allow cameras in the courtroom. The House Judicial Committee approved the amendment by a 12-to-6 vote, but it died in the Senate.

A similar proposal in June 2000 was offered as an amendment to the Federal Courts Improve-

ment Act, which was approved by the House in late May of the same year. The bill was, once again, introduced by Chabot.

While the amendment made little progress in the Senate, Chabot and Charles Grassley (R-Iowa) in June 2001 reintroduced the Sunshine in the Courtroom Act, citing, among other things, the successful audiocast of the U.S. Supreme Court case *Bush v. Palm Beach County Canvassing Board* the year before.

Although tape-delayed, the *Bush* case marked the first time the Court broadcast oral arguments. The Supreme Court has never granted cameras access to its proceedings, despite the efforts of legislators to enact bills such as one proposed in September 2000. If it had passed, the bill would have allowed cameras in the court if a majority of justices found that coverage did not violate due process.

Currently, only two federal appellate courts permit cameras to record civil matters and administrative agency proceedings. Since April 1996, the Second Circuit in New York City and the Ninth Circuit in San Francisco have allowed camera access.

Other federal appellate courts have refused to permit camera coverage in trials. In June 2000, the 10th Circuit in Oklahoma City vacated the order of a district judge to allow camera coverage of the pre-trial hearing of Oklahoma City bomber Timothy McVeigh's accomplice Terry Nichols. However, McVeigh's execution, in an unprecedented decision by Attorney General John Ashcroft, was made available via closed circuit TV for the families of the victims in 2001.

In the most recent effort to get cameras into a federal courtroom, Court TV's and C-SPAN's effort to televise Moussaoui's trial, Brinkema stated in her Jan. 18 ruling that "any societal benefits from photographing and broadcasting these proceedings are heavily outweighed by the significant dangers worldwide broadcasting of this trial would pose to the orderly and secure administration of justice."

Court TV and C-SPAN had argued that the ban on cameras is unconstitutional because it discriminates between print and television media, a distinction no longer valid. In the mid-1900's, televising a trial created a disruption because the equipment was bulky and obtrusive. But with modern technology, such problems no longer exist. Press advocates argued in their friend-of-the-court brief that televised proceedings would allow the public to observe the trial and feel a sense of resolution regarding the September 11 attacks.

Brinkema ruled that the ban on camera coverage was constitutional. She found that the right of access was satisfied because some members of the media and public could attend the proceedings. Also, transcripts of proceedings would be made available electronically within three hours of the close of each's court session.

Brinkema wrote, "Contrary to what intervenors and amici have argued, the inability of every interested person to attend the trial in person or observe it through the surrogate of the media does not raise a question of constitutional proportion. Rather, this is a question of social and political policy best left to the United States Congress and the Judicial Conference of the United States."

The court also said that even if the rule were unconstitutional, it would still be acceptable to ban cameras in this case because of security concerns. Brinkema was concerned that witnesses might be intimidated by the prospect of televised coverage of their testimony. The judge admitted that cameras were now unobtrusive, but that witnesses could be afraid that "his or her face or voice may be forever publicly known and available to anyone in the world." She also expressed a concern that the safety of the court and its personnel might be compromised by broadcasting photographic images of the physical layout of the court and of court personnel.

Finally, the judge determined there was a risk of "showmanship," evidenced by Moussaoui himself, who behaved erratically at his arraignment.

On Aug. 2, President Bush signed legislation that would permit families and victims of September 11 to watch the Moussaoui trial via closed-circuit television. Trial Judge Brinkema will have discretion to determine where the simulcasts will be held. The trial is scheduled to begin January 6, 2003.

Brinkema's rulings to date have been consistent with previous court decisions on this topic. Although the U.S. Supreme Court has not yet ruled on the issue of a constitutional right to cameras in the courtroom, federal appellate courts have rejected the notion that a First Amendment right supersedes the rule against camera coverage of federal trials.

In *Westmoreland v. CBS* in 1984, the U.S. Court of Appeals in New York (2nd Cir.) found that even though both parties consented to camera coverage of the trial of their case, the media had no right to bring cameras into the courtroom. While the court acknowledged that the public had a presumptive right of access to the proceedings generally, it refused to find that the right of access implied a right to record the proceedings.

Thus, while state courts may permit camera coverage, the federal courts have thus far refused to permit camera coverage, even when both parties agree to coverage.

Technically, Congress has the power to establish courts and regulate them. And at this time, it appears likely that cameras will not be permitted into federal courts unless Congress

The judge determined there was a risk of "showmanship," evidenced by Moussaoui himself, who behaved erratically at his arraignment.

passes a law requiring federal courts to permit camera coverage.

But legislation has not passed, partly because some legislators are concerned that the issue should be decided by federal judges, not Congress. However, Brinkema's decision itself notes that Congress should clarify the issue if it wishes to permit cameras in the courts.

Arguably, if families of victims are permitted to watch the trial via closed-circuit television, there is no reason why others should not be permitted to watch. Surely, the attacks did not affect only the immediate families of the victims.

The news media should continue to question the constitutionality of excluding cameras from courtrooms, although it is unlikely that a federal court will permit cameras absent congressional legislation requiring such coverage be permitted. It seems clear that those who wish to get camera coverage of federal trials should focus efforts on persuading Congress that camera coverage would not harm the right to a fair trial, emphasizing years of studies especially with the federal and New York experiments with cameras, and that it would not be beyond its authority to require federal courts to allow it.

Domestic coverage

GUARDED
GUARDED RISK TO A FREE PRESS

After facing sporadic restrictions on domestic newsgathering after September 11, reporters stateside have enjoyed mostly restraint-free coverage in the last few months.

While covering Russian President Vladimir Putin's visit last fall to the United States, a Russian reporter wondered why President George W. Bush asked American news outlets to refrain from broadcasting or printing statements from videotapes of Osama bin Laden.

Why, the reporter asked during a Nov. 13 news conference, did Bush simply not order the press not to run the tapes?

"Whoever thinks I have the capability and my government has the capability of reining in this press corps simply doesn't understand the American way," Bush responded.

But it has not always been for the Bush administration's or the government's lack of trying. As reporters battle restrictions in covering a war on terrorism that started in Afghanistan and may stretch to other parts abroad, they have faced several obstacles, albeit sporadic, in covering news events stateside after the terrorist attacks.

Twice, the government strongly discouraged the broadcast of war-related video — first, videotaped messages of Osama bin Laden soon after the attacks and, later, a graphic video displaying the murder and beheading of *Wall Street Journal* reporter Daniel Pearl. Government officials also tried restricting the use of satellite images and the gathering of video and photographs on government property and at the attack sites themselves.

An improved public image of the news media coincided with such restrictions, according to the Pew Research Center for the People & the Press. A Pew Research Center survey from November showed the public giving the press an incredible 73 percent rating as "highly professional" and a 69 percent rating for "patriotism."

But the center reports that its latest survey, released on Aug.4, shows Americans taking a dim view of the press once again. The news media's rating for patriotism dropped from the November all-time high to 49 percent, while their "highly professional" rating dipped to 54 percent.

The new poll comes after American journalists again enjoyed their usually restraint-free coverage.

Newsgathering without government interference, however, was not necessarily the case after the attacks.

In the immediate aftermath of September 11, police cordoned off the blocks around the site of the former World Trade Center towers, restricting access not only to tourists but to photographers and reporters. Several photographers landed in jail on trespassing charges, including four in New York City who apparently got too close to the wreckage and two in Pennsylvania who walked near the United Airlines crash site.

Stephen Ferry, on assignment for *Time* magazine, was charged with criminal impersonation after firefighters found him on the day of the attacks wearing New York City Fire Department coveralls and a hard hat and carrying a firefighter's toolbox. Two days later, Ferry was charged with criminal possession of a forged instrument. Ferry eventually pleaded guilty to the charges and, as part of a plea agreement, anonymously donated to the Library of Congress all of the photographs from 28 rolls of film seized from him during his arrest.

In Pennsylvania, photographer William Wendt and his assistant Daniel Mahoney were arrested for defiant trespass while working for *New York Times Magazine*. The two men lost their way to the press tent and were arrested after walking 50 yards off course and into a restricted area.

Two weeks after the attack, New York police began enforcing a ban on all amateur photography near the tower ruins. Signs warned passersby that they risked prosecution if they violated the order.

All five major broadcast news organizations agreed not to air unedited, videotaped statements from bin Laden or his followers and to remove language the government considers inflammatory.

But if a theme developed with stateside bans, it had to do with restricted images.

Most significantly, perhaps, were the debates over the broadcasting of two videos: Osama bin Laden's first taped interview following the attacks and the videotape of Pearl's murder.

In a conference call with broadcast network executives on Oct. 10, National Security Adviser Condoleezza Rice warned that videotapes from bin Laden and his henchmen could be used to frighten Americans, gain supporters and send messages about future terrorist attacks.

All five major broadcast news organizations — ABC News, CBS News, NBC News and its affiliate MSNBC, Fox News and CNN — agreed not to air unedited, videotaped statements from bin Laden or his followers and to remove language the government considers inflammatory. This marked a rare moment when all of the networks decided on a joint agreement limiting prospective news coverage.

In a press conference, White House spokesman Ari Fleischer said the Bush administration fears that the tapes are a way for bin Laden to send coded messages to other terrorists.

"The means of communication in Afghanistan right now are limited," Fleischer said. "One way to communicate outside Afghanistan to followers is through the Western media."

The administration two months later didn't interfere with broadcasters when they aired a videotape of bin Laden boasting about terrorist attacks.

This spring, the government applied pressure on CBS News when it announced that it would air portions of the Pearl videotape, a propaganda piece created by his captors and titled "The Slaughter of the Spy-Journalist, the Jew Daniel Pearl."

Officials at the State Department issued a statement confirming that "at the request of the Pearl family, the Department contacted CBS News to confirm whether CBS intended to broadcast parts of the videotape made by the killers of Daniel Pearl and to ask that in consideration of the sensitivities of Mr. Pearl's family CBS reconsider the decision."

CBS declined, and anchor Dan Rather defended the May 14 broadcast as necessary to "understand the full impact and danger of the propaganda war being waged."

In the meantime, the FBI contacted several Internet sites that posted the Pearl video and threatened obscenity charges if they did not remove it. Pro Hosters, an Internet company in Sterling, Va., that hosted a Web site that posted the video, complied at first. Later, Pro Hosters reposted the video with a note saying Americans should decide for themselves if they should watch it.

And there were more government attempts to halt the distribution of video and photographs.

On March 19, Pentagon police officers seized a videotape from a Fox News cameraman shooting a traffic stop on a Virginia highway that runs along the northern side of the Pentagon building. Officials said they confiscated the tape because the cameraman had been on government land where photography is not permitted unless journalists have an official escort.

Police handcuffed the cameraman, who held security clearances and credentials to film at the Pentagon, after he refused to turn over the tape.

Although the tape-seizing incident happened in late March, Pentagon officials and Washington bureau chiefs continued to hash out new policies concerning newsgathering on military property for several more weeks.

In general, the journalists and military officials agreed that reporters and camera operators should seek an escort before gathering news on military property. But in the case of breaking news, the journalists should be able to gather the news and be willing to allow military officials to review photographs and videos afterward.

The government did not even entertain any discussions about satellite images.

Although several government agencies reportedly boast of the ability to take detailed satellite photos — considerably more detailed than anything available commercially — the U.S. military brokered a deal with a Colorado-based imaging company to secure the exclusive rights to the company's satellite images of Afghanistan.

The exclusive deal with Space Imaging, the only American company offering precision satellite images, effectively blocked news organizations from purchasing the same images for 60 days. Normally, news organizations could purchase the pictures, which could show objects as small as one square meter in detail, for about $500 each.

Closer to the ground, many television stations could not use news helicopters after the Federal Aviation Administration grounded aircraft. Even after the FAA began restoring the nation's airspace, the agency's restrictions kept the helicopters out of the sky.

After two months of halted flights for newsgathering and traffic watches, many helicopters returned to the air on a limited basis in early December. On Dec. 19, the FAA restored general aviation access to airspace above the nation's 30 largest metropolitan areas.

While restrictions stifled news helicopter flights, they did not apply to student pilots, such as the Florida teenager who died Jan. 5 after ramming a stolen plane into the Bank of America building in Tampa.

And a year after September 11, broadcasters still have not gotten an explanation as to why news helicopters were among the last aircraft to return to the sky.

The reporter's privilege

ELEVATED
Elevated Risk To A Free Press

A recent court decision and the development of a national terrorism watch program heighten worries that law enforcement and judges might become more likely to treat journalists as government agents.

American journalists face an increasing likelihood that courts will treat them as government agents with no constitutional right to keep sources confidential or to withhold unpublished materials from prosecutors.

One federal judge already has written that such an argument is "non-frivolous." Buried in his July 12 ruling ordering CNN free-lancer Robert Pelton to testify at a hearing for American Taliban fighter John Walker Lindh, U.S. District Judge T.S. Ellis III wrote:

"There is no doubt that Pelton's testimony is material to Lindh's non-frivolous argument that Pelton was acting as a government agent at the time he interviewed Lindh, an assertion that Pelton . . . strongly denies."

Ellis' refusal to reject Lindh's argument should worry all journalists.

The news media have a long history of fighting subpoenas, especially when those subpoenas seek unpublished material or the names of confidential sources. Reporters fight subpoenas because they do not want to become tools of government. War correspondents fight subpoenas because they do not want their sources in combat zones to believe that they are agents for any government.

Lindh's argument, and the judge's willingness to consider that argument, damages the independence of the press.

Worse, characterizing journalists as government agents endangers the lives of all reporters in war zones. War correspondents deal daily with suspicions that they are spies. Michael Ware, *Time*'s reporter in Kabul, Afghanistan, wrote in the magazine's Aug. 12 issue: "In Afghanistan, every Westerner is a spy until proven otherwise. . . . Sensitive questions can provoke accusations of espionage."

Ellis, who presides in Alexandria, Va., is not the only judge to dismiss a reporter's claim that being forced to testify against a suspected war criminal could risk the safety of other journalists in war zones.

A U.N. war-crimes tribunal did not give any credence to that argument on June 7 when it ordered former *Washington Post* reporter Jonathan Randal to testify in the trial of a former Serb nationalist accused of genocide and other crimes in the Bosnian war. The tribunal brushed off Randal's concern for other reporters with an abrupt statement: "He does not explain how this would happen in the present case if he is forced to testify." *(Prosecutor v. Brdjanin)*

Other government actions pose threats to newsgathering.

The Bush administration's Operation TIPS — which asks truckers and other workers to report suspicious behavior in public places — makes government agents out of ordinary citizens. While journalists were not included on the list of people who might be asked to participate, the program has troubling implications for reporters. At the very least, Operation TIPS will create an atmosphere of suspicion that could make it more difficult for reporters to win the trust of potential sources. At the worst, Operation TIPS lends support to arguments in court that journalists can be government agents.

A more obvious threat to journalists is the government's effort to root out the sources of leaks of information to the news media. No major publication or news network has reported that it has received a government subpoena seeking the names of confidential sources, but it may be only a matter of time before government agents descend on newsrooms with subpoenas for confidential sources, unpublished notes and video outtakes.

So far, the only subpoenas that the media have received related to the war on terrorism have come from criminal defendants.

Subpoenas

Two criminal defendants in terrorism cases subpoenaed journalists over the summer, with

"In my view, there is no privilege, and I don't see the First Amendment as giving newsmen a testimonial privilege that other citizens do not enjoy," Ellis said.

one defendant specifically seeking the reporter's confidential sources. The federal judges who heard the cases ruled differently. One judge ordered the reporter to testify; the other said a reporter's testimony would not be relevant to the case.

In the first case, federal prosecutors wanted to use CNN free-lancer Robert Pelton's videotaped interview with American Taliban fighter John Walker Lindh as evidence in Lindh's terrorism trial. Pelton interviewed the injured Lindh in December 2001 in Afghanistan before Lindh was taken into U.S. custody and charged with crimes including conspiring to murder U.S. citizens and contributing services to terrorist group al-Qaida.

Lindh subpoenaed Pelton on June 27 to testify in a hearing to suppress the videotaped interview as evidence. Lindh argued that Pelton was acting as an agent of the U.S. government during the interview, and Lindh was not notified of his right to remain silent, so the videotape was not admissible at trial.

U.S. District Judge T.S. Ellis III in Alexandria, Va., ordered Pelton to testify. The order became moot on July 15 when Lindh pleaded guilty to two charges of aiding the Taliban and carrying explosives.

Nevertheless, Ellis' published ruling can be used as precedent in future subpoena cases against reporters. In addition to calling Lindh's argument that Pelton was a government agent "nonfrivolous," Ellis rejected the argument of The Reporters Committee for Freedom of the Press and other media organizations that the subpoena would label Pelton as a spy and would endanger the lives of war correspondents.

"It isn't the subpoena that puts him in danger. It's the argument that the defendant makes, and the defendant is entitled to make that argument," Ellis said during the July 12 hearing on Pelton's motion to quash the subpoena.

"Nor do I think that the subpoena here creates some risk that foreign correspondents will be killed by terrorists and thugs on the ground that they are government agents. They don't need excuses like that."

Ellis ruled that reporters are not protected from testifying when they are not protecting confidential sources or are not a victim of government harassment.

"In my view, there is no privilege, and I don't see the First Amendment as giving newsmen a testimonial privilege that other citizens do not enjoy," Ellis said. *(United States v. Lindh)*

In the second subpoena case, U.S. District Judge Gerald Bruce Lee was more sympathetic to the media's concerns. Lee, who with Ellis also presides in Alexandria, Va., rejected on Aug. 8 an accused spy's attempt to compel a reporter for *The New York Times* to testify about confidential sources.

Brian Regan, who is accused of espionage, did not show that *Times* reporter Eric Schmitt had relevant evidence about the charges against Regan, Lee ruled.

"(Regan's) suspicions are insufficient for the court to sanction a fishing expedition," Lee said in court.

Regan, a retired Air Force master sergeant, was arrested in 2001 and charged with trying to sell classified information from American satellites to China, Libya and Iraq. Federal prosecutors are seeking the death penalty.

Regan wanted Schmitt to testify about his sources for a July 5 story that described military plans for a possible attack on Iraq. The story relied on confidential sources.

Regan's attorneys wanted to know whether the sources for Schmitt's story were government officials. Their theory was that the U.S. government could not put Regan on trial for divulging military secrets to Iraq when the federal government might be doing the same thing by leaking its war plans for Iraq to the *Times*.

Regan's attorneys said they would not ask Schmitt to name the sources. But they wanted to know whether a government official gave him the military document or authorized publication of it. Lee said he did not see how that was any different from asking for the identities of Schmitt's sources.

Regan's attorneys also wanted to know whether Schmitt was given classified information and whether government officials have asked Schmitt to name the person who leaked the document.

Lee agreed with *Times* attorney Floyd Abrams, who argued that Schmitt's article had no connection to Regan's case. But Lee said he was not sure that he agreed with Abrams' argument that Schmitt had a First Amendment privilege to protect his sources.

Nina Ginsberg, an attorney for Regan, told the judge that journalists have no privilege to protect the commission of a crime. She suggested that Schmitt may have participated in a crime if he received classified information.

Abrams responded that it is not a crime for a public official to disclose classified information to a journalist, and a journalist does not commit a crime by publishing it. Lee did not address the issue. *(United States v. Regan)*

Operation TIPS

The Terrorism Information and Prevention System (TIPS) is part of President Bush's idea for a Citizen Corps, a project that is supposed to"engage ordinary Americans in specific homeland security efforts in their own communities," according to a State Department fact sheet.

As initially proposed, TIPS would ask millions of transportation workers, postal workers

and public utility employees to identify and report suspicious activities linked to terrorism and crime.

Civil liberties groups attacked the idea as a plan for creating a nation of spies. Lawmakers had problems with the proposal, too. Sen. Patrick Leahy, chairman of the Senate Judiciary Committee, compared it to an FBI informant program under J. Edgar Hoover in the 1960s, when FBI agents hired neighbors of suspected political protestors to spy on them.

"It was a very, very sorry time in our history," Leahy (D-Vt.) told Attorney General John Ashcroft at a Judiciary Committee hearing on July 25.

The U.S. Postal Service refused to join the program. The House version of the Homeland Security Bill that passed on July 26 would ban Operation TIPS. (*H.R.5005*)

The Justice Department responded by modifying Operation TIPS to exclude snoops in people's homes. Instead, Operation TIPS will use workers who "are in a unique position to see potentially unusual or suspicious activity in public places," the Citizen Corps Web site says. Dock workers, truckers, bus drivers and others who can monitor public areas and transportation routes can still volunteer.

Operation TIPS, which was supposed to begin in August, probably will be launched this fall.

By asking ordinary citizens to spy on each other, Operation TIPS indirectly damages news-gathering and raises questions about how the justice system will view the independence of the press. When journalists are subpoenaed to reveal confidential sources or to turn over unpublished notes or video outtakes, one of their main arguments to the courts is that the First Amendment shields them from becoming tools of law enforcement.

But Operation TIPS in effect deputizes ordinary citizens to make them an arm of government.

The war on leaks

Leaks of sensitive information to the news media have angered government officials, prompting them to order investigations. Except in the brief — and unsuccessful — questioning of a *National Review* reporter in July, investigators have not demanded that reporters give up their confidential sources to expose the source of the leaks. Instead, investigators appear to be following rules set down by most federal courts — and the attorney general's guidelines on subpoenaing the news media — which require that alternative sources of information must be exhausted before the government can subpoena a reporter.

But reporters are not immune from questioning. Among the leak investigations:

• Rep. Porter Goss (R-Fla.) and Sen. Bob Graham (D-Fla.), chairmen of the House and Senate intelligence committees, asked Ashcroft on June 20 to investigate the leak of classified information from a closed-door meeting of a joint congressional intelligence panel with the National Security Agency.

NSA officials told the panel that they had intercepted al-Qaida phone conversations on Sept. 10. The conversations included these statements: "The match is about to begin," and "Tomorrow is zero hour." However, the NSA did not translate the messages until Sept. 12.

In June, CNN and other media reported the intercepted messages and the NSA's failure to translate them before the September 11 tragedy. Those reports prompted an angry phone call from Vice President Dick Cheney to Goss and Graham, who ordered the investigation into who leaked the information.

By early August, the FBI had questioned nearly all 37 members of the Senate and House intelligence committees, 100 congressional staffers, and dozens of officials at the CIA, NSA and Defense Department, according to *The Washington Post*.

The FBI asked congressmen whether they would be willing to submit to lie-detector tests. Most said they would not.

Journalists could be questioned as well. Goss refused to exempt reporters from the investigation, although the Associated Press reported that Goss noted the "time-honored tradition" of reporters protecting sources when he was asked whether reporters would be questioned about the leaks.

But, Goss told the AP: "I think when we're dealing with national security it is useful for reporters to cooperate with people who are conducting bona fide investigations."

• The Justice Department is investigating whether government officials leaked the e-mail messages of federal attorneys involved in the John Walker Lindh prosecution to *Newsweek*. The magazine reported that the attorneys, in their e-mail messages, worried that interrogations of Lindh might not be admissible in court.

Ellis, the federal judge presiding over Lindh's case, asked the government in June to investigate the leak of the e-mail messages, which he had sealed. In July, government officials told the judge that several Justice Department employees who had access to the messages had been questioned, the *San Francisco Chronicle* reported.

• An angry Defense Secretary Donald Rumsfeld lashed out against press leaks over the summer.

During a July 22 press briefing, Rumsfeld urged Pentagon employees to reveal the name of an official who leaked an alleged U.S. plan to invade Iraq to *The New York Times*.

"I think that anyone who has a position where they touch a war plan has an obligation to not leak

Civil liberties groups attacked the idea as a plan for creating a nation of spies.

it to the press or anybody else because it kills people," Rumsfeld said during the press briefing. "It's inexcusable, and they ought to be in jail."

The Air Force Office of Special Investigations is looking into who leaked the information to the *Times*.

In a July 12 memo attached to an unclassified assessment of war-related leaks prepared by the CIA, Rumsfeld denounced the improper disclosure of classified information and encouraged Defense staff members to put an end to them.

"I have spoken publicly and privately, countless times, about the danger of leaking classified information," Rumsfeld wrote. "It is wrong. It is against the law. It costs the lives of Americans. It diminishes our country's chance for success."

The CIA's report, in part, determined that al-Qaida relied heavily on public information and press reports to help it evade U.S. intelligence operatives.

"A growing body of reporting indicates that al-Qa'ida planners have learned much about our counterterrorist intelligence capabilities from U.S. and foreign media," the report said. "Information obtained from captured detainees has revealed that al-Qa'ida operatives are extremely security conscious and have altered their practices in response to what they have learned from the press about our capabilities."

By late July, parking lot guards were stopping every 30th car leaving the Pentagon to ask if anyone was smuggling out classified documents, and the CIA had suspended two contractors for talking to the press, according to *US News & World Report*.

The CIA's report, in part, determined that al-Qaida relied heavily on public information and press reports to help it evade U.S. intelligence operatives.

While they have not yet been subpoenaed, reporters have not been untouched by the crackdown on leaks.

Joel Mowbray, a reporter for the *National Review*, was detained for 30 minutes on July 12 after a State Department briefing. Guards and a federal agent demanded that Mowbray answer questions about his reporting on a classified cable concerning the U.S. system of issuing visas to Saudis. The guards who stopped Mowbray wanted to know who gave him the cable. Mowbray denied having the confidential cable and was not searched. He was released without explanation after his editors contacted the State Department.

Sen. Charles E. Grassley (R-Iowa) and Rep. Dave Weldon (R-Fla.) have demanded an explanation from Secretary of State Colin Powell. In a July 16 letter, Grassley, a senior member of the Senate Judiciary Committee, and Weldon, chairman of the House Government Reform Subcommittee on Civil Service, asked Powell to explain who made the decision to detain and question Mowbray, to name the officials involved and to state whether they were armed.

"We have concerns that government agencies not take inappropriate actions that cast a shadow over our free press," the letter said. "We are troubled that the actions of State Department security officials effectively chilled the work of the media and the whistleblowers who are so vital to exposing problems in our government."

A month after sending their letter, Grassley and Weldon were still waiting for a reply.

At the same time that Rumsfeld was denouncing leaks, reporters covering the Pentagon were meeting tighter requirements for unescorted access to the building. Only those reporters who work full-time within the Pentagon or who visit at least twice a week are allowed unescorted access to the Pentagon. Other reporters must have an escort.

"This clearly is an onerous and arbitrary standard which substitutes the judgment of the Defense Department for that of bureau chiefs, assignment desks and editors," John Aubuchon, president of the National Press Club, wrote Rumsfeld and Defense Department spokeswoman Victoria Clarke on Aug. 12.

The policy "creates roadblocks to coverage of military affairs, distorts the assignment process within news organizations and discriminates against smaller news organizations," Aubuchon wrote.

Recommendation

The most effective way to fight the Bush administration's current thinking — that everyone should be a government tipster, that the flow of information to the public must be stopped by plugging leaks — is for journalists to defend their rights.

If the federal government subpoenas a reporter or news organization, the news media must vigorously insist that the government meet its burden to overcome a reporter's privilege to protect confidential sources. Prosecutors must show that the information is relevant to the government's case. They must show that the information cannot be obtained from an alternative source. And they must show that the government has a compelling and overriding interest in the information.

If the subpoena comes from the Justice Department, journalists must insist that the agency follow the Attorney General's Guidelines for Subpoenaing Members of the News Media. (28 C.F.R. § 50.10)

Those guidelines do not carry the force of law. But they require that news media subpoenas identify particular relevant information that cannot be obtained any other way. In most cases, the Justice Department must negotiate first with the news media before seeking a subpoena.

Journalists will not win every case. But a journalism community that does not zealously guard its First Amendment rights risks losing them altogether.

The USA PATRIOT Act

GUARDED
Guarded Risk To A Free Press

It is still unclear how or when the FBI's expanded wiretapping powers will affect journalists, but the Justice Department has shown that it intents to use its powers aggressively, notwithstanding a rare public rebuke by a secret court that almost always approves the department's warrant requests.

The USA PATRIOT Act's impact on newsgathering is still largely unknown nearly a year after Congress rushed to enact the law.

Journalists should be concerned about certain provisions of the law, which grants broad new powers to government agents to investigate terrorism.

Congress enacted the law with little debate just six weeks after the terrorist attacks on the World Trade Center and the Pentagon. President Bush signed the USA PATRIOT Act into law on Oct. 26, 2001.

The awkwardly named law — the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 — expands the FBI's ability to obtain records through secret court orders. The law also gives government investigators greater authority to track e-mail and telephone communications and to eavesdrop on those conversations.

Although aimed at trapping terrorists, those provisions of the law could ensnare journalists.

Secret court orders

A recent decision by a mostly secretive court tipped the Justice Department's hand on how it wants to use the broad new powers of the USA PATRIOT Act. And while it's efforts to allow criminal prosecutors greater influence in intelligence-gathering were rebuffed by the court, the department still has greater scope over what types of materials it can obtain under the law.

The law allows the FBI to obtain an order from a secret court that would require the production of "any tangible thing" for investigations involving foreign intelligence and international terrorism. (50 U.S.C. § 1861)

The secret court is a creation of the Foreign Intelligence Surveillance Act (FISA), which governs procedures for foreign intelligence investigations. (50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862) The Foreign Intelligence Surveillance Court's 11 judges, who come from different federal circuits, meet twice a month in Washington, with three judges always available in Washington. The Patriot Act increased the number of judges to 11 from the previous 7. The court's proceedings are confidential.

Previously, federal law allowed the FBI to apply for a court order for access only to the records of common carriers, public accommodations providers, physical storage facility operators and vehicle rental agencies.

Under the USA PATRIOT Act, the FBI can seek an order requiring the production of "any tangible thing" — which the law says includes books, records, papers, documents and other items — from anyone. (50 U.S.C. § 1861)

The law states in broad terms the types of investigations under which the FBI can seek these items. If the investigation does not concern a "United States person" — meaning a U.S. citizen, resident alien, U.S. corporation or something similar — the investigation must be one "to obtain foreign intelligence information." Otherwise, the investigation must be one "to protect against international terrorism or clandestine

intelligence activities," but the investigation of a U.S. person cannot be conducted solely on the basis of the person's First Amendment activities. For example, the FBI cannot seek records under this section if it is investigating someone solely because that person protested against U.S. policies.

Unlike other provisions of the USA PATRIOT Act that deal with foreign intelligence investigations, government agents do not have to show the court that the person under investigation is an agent of a foreign power.

Secrecy permeates the process of obtaining the court order. The court that issues the order meets in secret. The court order cannot disclose that it is part of an investigation involving foreign intelligence, international terrorism or clandestine intelligence activities. And the person or business receiving the order cannot tell anyone that the FBI sought or obtained the "tangible things."

The court's secrecy remained intact from its inception in 1979 until now, when a conflict between the court and the Justice Department was disclosed to the Senate Judiciary Committee. The court balked at Justice's attempts to apply PATRIOT Act provisions to FISA in such a way as to allow criminal prosecutors to actually control or direct foreign intelligence investigations.

FISA provisions required strict limits on such power-sharing because intelligence investigations are not required to follow the same strict constitutional safeguards as criminal prosecutions, and prosecutors were not allowed to use FISA to circumvent those protections.

The surveillance court rejected the federal government's argument that under the USA PATRIOT Act, the primary purpose of foreign intelligence surveillance was criminal prosecution. The court scaled back the information-sharing regulations, still allowing prosecutors to consult with intelligence investigators on how to "preserve the option of a criminal prosecution" and to benefit from information obtained during a FISA investigation, but not allowing them to steer those investigations to further prosecutions.

Although aimed at trapping terrorists, those provisions of the law could ensnare journalists.

The May decision was released to the Senate Judiciary Committee in August. Meanwhile, the Department of Justice has decided to appeal the court's decision to a special review panel created by FISA.

While Congress was drafting the USA PATRIOT Act, the American Library Association objected to the potential intrusion into its patrons' personal information, including reading habits and the Web sites they viewed. The group described the law as a threat to patrons' privacy and First Amendment rights. In response, the library association posted guidelines on its Web page advising libraries to avoid creating and retaining unnecessary records.

How do FISA and the PATRIOT Act affect journalists?

For journalists, the big question is whether the provision for secret court orders will allow a newsroom search for "any tangible thing" related to a terrorism investigation. Could a government agent use the law to gain access to a reporter's notes and confidential sources?

Theoretically, the USA PATRIOT Act allows a newsroom search. However, another federal law, the Privacy Protection Act of 1980, spells out when newsroom searches are forbidden and the limited exceptions in which they are allowed. (42 U.S.C. 2000aa)

Nothing in the USA PATRIOT Act expressly preempts the Privacy Protection Act.

The Privacy Protection Act states that, "notwithstanding any other law," federal and state officers and employees are prohibited from searching or seizing a journalist's "work product" or "documentary materials" in the journalist's possession. A journalist's work product includes notes and drafts of news stories. Documentary materials include videotapes, audiotapes and computer discs.

Some limited exceptions under the Privacy Protection Act allow the government to search for or seize certain types of national security information, child pornography, evidence that a journalist has committed a crime, or documentary materials that must be immediately seized to prevent death or serious bodily injury.

Documentary materials may also be seized if there is reason to believe that they would be destroyed in the time it took government officers to seek a subpoena. Those materials also can be seized if a court has ordered disclosure, the newspaper has refused and all other remedies have been exhausted.

The Privacy Protection Act gives journalists the right to sue the United States or a state government, or federal and state employees, for damages for violating the law. The law also allows journalists to recover attorneys fees and court costs.

No one knows exactly how often the USA PATRIOT Act has been used to obtain records, although libraries already have received visits from FBI agents. Of 1,020 public libraries surveyed earlier this year by the Library Research Center at the University of Illinois, 85 reported that they had been asked by federal or local law enforcement officers for information about patrons related to September 11, the Associated Press reported in June.

The House Judiciary Committee, which oversees how the Justice Department enforces the USA PATRIOT Act, asked the Justice Department for a more detailed accounting. On June 13, committee chairman Rep. F. James Sensenbrenner Jr. (R-Wis.) and ranking member Rep. John

Conyers Jr. (D-Mich.) sent a list of 50 detailed questions to Attorney General John Ashcroft.

Question 12 asked, "Has the law been used to obtain records from a public library, bookstore or newspaper? If so, how many times?"

In a written response on July 26, Assistant Attorney General Daniel J. Bryant conceded that newspapers were not exempt from the secret court orders.

"Such an order could conceivably be served on a public library, bookstore, or newspaper, although it is unlikely that such entities maintain those types of records," Bryant wrote.

He declined to state the number of times the government has requested an order or the number of times the FISA court has granted an order. That information is classified, his letter said.

Electronic surveillance

The USA PATRIOT Act does not make it easier for the government to wiretap a reporter's phone. As was the case before the law passed, investigators still must have probable cause to believe a person has committed a crime before they can bug that person's phone.

However, it is now easier for investigators to eavesdrop on a terrorist suspect's telephone calls and e-mail communications with so-called "roving" wiretaps. Because of that change, reporters may run a heightened risk of having their telephone or e-mail conversations with sources intercepted by government agents if those sources are deemed "agents of a foreign power."

At least one proposal that would have hurt newsgathering was jettisoned from the final law. A House version of the bill could have punished journalists who disclosed the names of intelligence agents. The Senate did not include that provision in its version of the bill, so the bill did not become law.

Journalists should become familiar with the electronic surveillance features of the new law because those provisions pose a potential threat to newsgathering.

Understanding the law requires a basic familiarity with the tools government investigators use in conducting electronic surveillance: wiretaps, pen registers and "trap and trace" devices. The following is an explanation of those procedures, when they are used and how they changed under the USA PATRIOT Act.

What is a wiretap?

A wiretap allows government officials to intercept and listen to wire, oral and electronic communications. The procedures for getting approval for a wiretap differ depending on whether officials are seeking the wiretap for domestic law enforcement purposes or whether foreign intelligence surveillance is involved.

If investigators are seeking the wiretap for domestic law enforcement, they must show a court that there is probable cause to believe the target of the wiretap is committing, has committed or is about to commit one of several specifically listed crimes in the U.S. Code. (18 U.S.C. § 2518 (3) (a))

The USA PATRIOT Act added several terrorism offenses to the list of crimes for which a wiretap order could be granted. The added crimes are chemical weapons offenses, use of weapons of mass destruction, violent acts of terrorism transcending national borders, financial transactions with countries that support terrorism, and material support of terrorists or terrorist organizations. (18 U.S.C. § 2516)

The procedures are less strict if the wiretap will involve foreign intelligence, meaning information that relates to the ability of the United States to protect against attacks, sabotage or clandestine intelligence activities by a foreign power or an agent of a foreign power, or that relates to national defense, national security or U.S. foreign affairs. (50 U.S.C. § 1801)

The presence of foreign intelligence information triggers procedures under the Foreign Intelligence Surveillance Act (FISA).

Unlike wiretapping conducted under domestic law enforcement procedures, FISA allows electronic surveillance without a showing of probable cause of criminal activity. Instead, FISA requires only a finding of probable cause that the target of the surveillance is a foreign power or an agent of a foreign power. (50 U.S.C. § 1805)

If the target is a "United States person" — meaning a U.S. citizen, resident alien or U.S. corporation — there must be probable cause to believe the person's activities involve a crime, that the person knowingly engaged in sabotage or international terrorism, or that the person entered the United States under a false identity on behalf of a foreign power while already in this country. (50 U.S.C. § 1801 (b)(2))

Sen. Mike DeWine (R-Ohio) has proposed changing the law to make it easier to wiretap a non-U.S. person. DeWine's proposal would discard the probable cause requirement, substituting a "reasonable suspicion" standard. His bill would allow the government to bug the phones and e-mails of foreign tourists, immigrants and other non-citizens if there was a "reasonable suspicion" that the target of the surveillance was a foreign power or an agent of a foreign power. (S.2659)

DeWine's bill would not change the USA PATRIOT Act's rules for surveillance of a U.S. person.

Unlike ordinary wiretaps, a secret court grants FISA wiretaps. (50 U.S.C. § 1803) This is the same secret court that issues the orders that can force libraries, bookstores, businesses — and possibly newspapers — to produce "any tangible

For journalists, the big question is whether the provision for secret court orders will allow a newsroom search for "any tangible thing" related to a terrorism investigation.

By contacting someone who is the target of foreign intelligence surveillance, the reporter might be vulnerable to having a pen register or trap-and-trace device placed on the reporter's phone and e-mail accounts.

thing" for terrorism investigations.

Also unlike ordinary wiretaps, in which authorities must report what they heard on the wiretap to the court that allowed the surveillance, FISA wiretaps do not require government authorities to report their findings to the secret court.

What is a roving wiretap?

The USA PATRIOT Act expanded the reach of FISA surveillance by allowing "roving" wiretaps.

Previously, wiretaps were issued for a particular phone or specific communication device, such as a computer. The USA PATRIOT Act allows authorities acting under a FISA order to intercept phone conversations and e-mail communications on any phone or computer that a target of surveillance uses.

This expanded power applies only to foreign intelligence surveillance, not ordinary law enforcement activities.

Previously, every time a target of surveillance switched phones or e-mail accounts, government investigators had to return to the secret FISA court for a new order to change the name of the third party whose help was needed to install the wiretap, the Congressional Research Service explains in its analysis of the USA PATRIOT Act. Now, the secret court can issue a generic order requiring anyone to help investigators tap any phone, computer or other communication device the suspect might use.

What are pen registers and trap-and-trace devices?

A pen register tracks outgoing calls by identifying the numbers dialed from a particular phone.

A trap-and-trace device tracks incoming calls, by phone number, made to a particular phone.

Probable cause of criminal activity is not required for law enforcement to obtain a court order to install the devices. Instead, a lower standard is applied. For domestic law enforcement, the government official seeking to install a pen register or trap-and-trace device must certify to a court that the information likely to be obtained is relevant to an ongoing criminal investigation. (18 U.S.C. § 3122 (b)(2))The law does not require the target of the surveillance to be a suspect in the investigation.

Under FISA, the agency seeking permission to install the devices must certify that they are likely to reveal information relevant to a foreign surveillance investigation. (50 U.S.C. § 1842(c)(2))

The USA PATRIOT Act allows the devices to be installed on cell phones, Internet accounts and e-mail to gather dialing, routing, addressing and signaling information — but not content. For example, a government investigator with a court order could install the device on a person's e-mail account and get a list of all the e-mail addresses flowing in and out of the account, but the investigator could not read the contents of the e-mail.

What does this mean for journalists?

Lee Tien, senior staff attorney at the Electronic Frontier Foundation, imagines this scenario:

A reporter contacts a foreign student or a member of a foreign political organization who would meet the definition of "agent of a foreign power" under the Foreign Intelligence Surveillance Act.

Unknown to the reporter, the source is the subject of a roving wiretap authorized under the USA PATRIOT Act.

Because the roving wiretap gives government officials the power to eavesdrop on the suspect's phone and e-mail communications, the government is hearing and recording the reporter's conversation with the source.

As was the case before the USA PATRIOT Act passed, government investigators could not wiretap the reporter's phones and e-mail accounts unless they had probable cause that the reporter had committed or was about to commit a crime.

But by contacting someone who is the target of foreign intelligence surveillance, the reporter might be vulnerable to having a pen register or trap-and-trace device placed on the reporter's phone and e-mail accounts. Remember, the government agent has to certify to a secret court only that the information likely to be obtained would be relevant to an ongoing foreign intelligence investigation. Once approved, the devices give investigators a list of every e-mail address and phone number the reporter is contacting, although not the contents of those communications.

And because all of this goes on in secret, the reporter may never know that his or her communications have been under government surveillance.

How likely is this to happen?

No one knows. In their July letter to Ashcroft seeking information on how the Justice Department was implementing the USA PATRIOT Act, Reps. Sensenbrenner and Conyers of the House Judiciary Committee asked how many times the department had obtained permission for roving wiretaps, pen registers and trap-and-trace devices. The congressmen did not ask how many times journalists had been caught up in such investigations.

Bryant, the assistant attorney general who responded to the letter, did not provide the information to Sensenbrenner and Conyers. In-

stead, he wrote them that the information on roving wiretaps was classified; he did not respond at all to the question on pen registers and trap-and-trace devices but indicated that a response would come later.

Reporters do have a measure of protection in the Attorney General's Guidelines for Subpoenaing Members of the News Media, which have been in place since the Nixon Administration. Those guidelines, which do not carry the force of law, require that news media subpoenas identify particular relevant information that cannot be obtained any other way. The guidelines also call for negotiations between the Justice Department and the reporter when the agency seeks a subpoena against the news media. (28 C.F.R. § 50.10)

The Bush administration has shown that it will ignore those guidelines if it believes the reporter might have information that could help a criminal investigation.

The Justice Department violated the guidelines in 2001 when it subpoenaed the telephone records of Associated Press reporter John Solomon. The agency was trying to discover the reporter's confidential source for information about a now-closed investigation of Sen. Robert Torricelli (D-N.J.).

Solomon did not learn until late August 2001 about the subpoena, which covered his phone records from May 2 to 7, 2001. The Justice Department did not negotiate with Solomon or his employer, did not say why the reporter's phone records were essential to a criminal investigation, and did not explain why the information could not be obtained any other way.

Also, the Justice Department ignored a provision in the guidelines that allows no more than a 90-day delay in notifying a reporter about a subpoena. The department missed that deadline in the Solomon case.

The Solomon subpoena was issued before September 11 and before Congress enacted the USA PATRIOT Act. But it could be a bellwether event in gauging the willingness of the Bush administration to use journalists as a tool of surveillance.

Freedom of Information

SEVERE
SEVERE RISK TO A FREE PRESS

Federal FOI Act officers now act under directions from the Attorney General to give strong consideration to exemptions before handing out information, and from the White House to protect "sensitive but unclassified" information. Federal Web sites have come down. And a measure to protect "homeland security" records could be passed soon.

Since September 11, 2001, the media have had to contend with a new reluctance on the part of federal and state governments to release of information. Rollbacks to access are diverse from names of terrorism-suspect detainees to library information on bodies of water. The change in attitude can be traced straight back to the top, as seen in the policy statement released by the Attorney General in October, 2001.

The Ashcroft memorandum

A month and a day after the events of September 11, Attorney General John Ashcroft revoked what had been a seemingly permissive Clinton-era Freedom of Information Act instruction to federal agencies. He issued his own: a hard-nosed missive that promised agencies that if there were any "sound legal basis" for withholding information from FOI requesters, the Justice Department would support them.

Only if a lawsuit might jeopardize the government's ability to withhold other information in the future would the department fail to come to the aid of agencies legally denying information, he said. The standard regurgitated a policy first introduced in 1981 by then-Attorney General William French Smith, a Reagan appointee.

The instruction angered some members of Congress. Sen. Patrick Leahy (D-Vt.) in late February asked for a General Accounting Office audit of the effects of the memorandum, and the House Government Reform Committee edited its popular "Citizen's Guide" to FOI to specifically refute Ashcroft's instruction.

The new instruction canceled and replaced a pro-disclosure directive issued in 1993 by then-Attorney General Janet Reno, a Clinton appointee and the daughter of newspaper people, who openly endorsed disclosures of government information and appeared personally before a government-wide training session of FOI officers and specialists to tell them so.

The Reno memorandum had instructed agencies not to use discretionary exemptions to the federal act unless they could point to a "foreseeable harm" that would occur from disclosure. The Ashcroft directive made clear that is no longer the standard.

Dan Metcalfe, co-director of the department's Office of Information and Privacy, said the change in instructions from Reno to Ashcroft did not represent a "drastic" shift in the government's FOI policies as many have claimed. But it is "certainly a shift in tone," he said.

In fact, even throughout the Reno years, the government rarely regarded exemptions for privacy or business information as "discretionary" and agencies increasingly withheld information on named individuals as a matter of course, a trend not likely to be reversed.

But the automatic use of exemptions for internal records such as staff recommendations, drafts and comments on drafts was all but eliminated during the Reno years and now it is back. (*Exemption 5*)

Furthermore, when the Office of Information and Privacy called FOI staffs of agencies together to discuss the new memorandum Oct. 18 in a closed session, it called up a 1989 opinion it issued that an exemption to protect records related "solely to the internal personnel rules and practices of an agency" should be used to protect

information on "vulnerabilities."

Certainly that exemption would apply to protect computer security programs, but it could be used to keep secret other government-held information that might expose weakness to terrorists. (*Exemption 2*)

And that notion has been increasingly controversial since September 11. If weaknesses are withheld from terrorists, they are closed to the public as well. A strong FOI tradition suggests that the public is entitled to learn about the fallibility of its government — where weakness exists, an informed public can clamor for change. As the 1989 legal memorandum suggests, "sensitive information in the wrong hands can do great harm."

But on the other hand, an uninformed public can do no good.

On the agenda also was discussion of the Electronic FOI Act of 1996, which encouraged agencies to post information on their Web sites.

Calling for a new study, Leahy, the Senate's strongest advocate of open government, wrote to the GAO, the investigative arm of Congress, that the new memorandum replaces a policy that "favored openness" and "encouraged a presumption of disclosure" with a policy that encourages denials even when "there is doubt whether an exemption applies" and there is "no foreseeable harm" from disclosure.

The Ashcroft memorandum encourages agencies to disclose information protected under the act "only after full and deliberate consideration of the institutional, commercial and personal privacy interests that could be implicated," Leahy wrote.

The senator asked the GAO to assess the impact of the new policy on agency responses to FOI requests, agency backlogs of requests, litigation involving federal agencies for withholding records and fee waivers for requests from news media.

The request concerning fee waivers for news media follows recent initial refusals by the Department of Justice to grant "representative of the news media" status to a researcher for *American Lawyer Magazine* and to a reporter for a newsletter for tax professionals.

In each of those cases, agencies granted journalists the fee benefits but only after asking them to respond to written questions and to reveal how they intended to use the requested material. In 1986, when the fee benefit for reporters was added to the FOI Act, Leahy said it should have a broad application.

The senator also asked the GAO to review agency policies under the Electronic Freedom of Information Act of 1996 and to determine if agencies were accepting electronically filed FOI requests, particularly since the anthrax threat following September 11 has compromised mail delivery. The act did not require agencies to accept electronic requests, but agencies could help fulfill their FOI responsibilities if they did, Leahy said.

The House committee with FOI oversight on March 7 edited its guidebook for FOI users to specifically reject the Ashcroft memorandum. Rep. Henry Waxman (D-Calif.), ranking minority member of the House Government Reform Committee, proposed the changes, and the committee's chairman Rep. Dan Burton, (R-Ind.) approved them. The guide says "Contrary to the instructions issued by the Department of Justice on October 12, 2001, the standard should not be to allow the withholding of information whenever there is merely a 'sound legal basis' for doing so."

The introduction to the 81-page publication already admonished: "Above all, the statute requires Federal agencies to provide the fullest possible disclosure of information to the public."

The committee also added other language:

"The history of the act reflects that it is a disclosure law. It presumes that requested records will be disclosed, and the agency must make its case for withholding in terms of the act's exemptions to the rule of disclosure.

"The application of the act's exemptions is generally permissive — to be done if information in the requested records requires protection — not mandatory. Thus, when determining whether a document or set of documents should be withheld under one of the FOIA exemptions, an agency should withhold those documents only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.

"Similarly, when a requestor asks for a set of documents, the agency should release all documents, not a subset or selection of those documents." (*A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974*)

The Card Memorandum

Reviving the contentious phrase "sensitive but unclassified information," White House Chief of Staff Andrew Card Jr. in late March ordered federal agencies to withhold information for national security reasons even when the Freedom of Information Act's exemption for national security does not apply.

He told federal agencies to reexamine how they safeguard information that could be exploited by terrorists and report the results of their efforts to the Office of Homeland Security within the next 90 days.

He solicited advice from the government's chief FOI Act and classification authorities and included their guidance with his instructions. Those authorities also urged government officials to carefully consider the need to protect

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It directs agencies to classify such information if it has never been classified, no matter how old it is, so long as it has not been disclosed to the public under proper authority.

sensitive information from inappropriate disclosure.

A memorandum directs agencies to consider protection of information "on a case-by-case" basis and to evaluate sensitivity "together with the benefits that result from the open and efficient exchange of scientific, technical and like information."

The authors of this section, Richard Huff and Dan Metcalfe, co-directors of the Justice Department's Office of Information and Privacy, emphasize that FOI requests for this information should only be processed in accordance with Attorney General John Ashcroft's Oct. 12 memorandum "by giving full and careful consideration to all applicable FOIA exemptions."

They specifically suggest that Exemption 2 can be used to protect information about the "critical infrastructure" where disclosure of internal agency records might cause a risk that laws or regulations could be circumvented. They also suggest that information voluntarily provided to the government by the private sector might fall under Exemption 4, which protects certain business information.

Sections of Card's memo involving the classification of records appear to deal more narrowly with information involving weapons of mass destruction. The author of these provisions is Laura Kimberley, then acting director of the Information Security Oversight Office.

The instruction tells agencies to keep classified information that is already classified and that might "reveal information that would assist in the development or use of weapons of mass destruction" even if it is older than 10 years. The current classification order generally requires declassification of documents after 10 years but provides for extensions of up to 25 years when there is a need to keep that information classified.

The memorandum also directs agencies to use loopholes in the classification order to protect such weapons information that is more than 25 years old.

It directs agencies to classify such information if it has never been classified, no matter how old it is, so long as it has not been disclosed to the public under proper authority. And it directs reclassification of sensitive information concerning nuclear or radiological weapons if, although it had been declassified, it had never been disclosed under proper authority.

The first exemption to the FOI Act protects records that are "properly classified" under an executive order. The order that is in effect was created in October 1995 in the hope that it would help alleviate problems of excessive classification. It requires that where there is any "significant doubt about the need to classify information, it should not be classified.

In late August, officials at the Office of Management and Budget were contemplating new guidance for the anticipated Department of Homeland Security that would address "sensitive but unclassified" information.

Access to the Detainees' Names

In early August a U.S. District Judge in Washington, D.C. ordered the Department of Justice to disclose the names of the more than 1,100 non-U.S. citizens detained at some point in connection with the September 11 tragedy. "Secret arrests are a concept odious to a democratic society," she wrote. (*Center for National Security Studies v. Department of Justice*)

The names had still not been released in late August, however, because she stayed her order at the government's request, allowing it to appeal her ruling.

Substantial numbers of unidentified prisoners were still in jail and most of their names had been secret since shortly after the events of 9/11.

Judge Gladys Kessler's ruling specifically did *not* open up information about the detainees' arrests, detentions and release. Those issues were being litigated in state courts. A significant state appeals court decision in New Jersey condoned secrecy about the jailings under a new set of regulations issued by the Justice Department's Immigration and Naturalization Service. The new rules prohibit state jailers from releasing information on federal prisoners housed there. Those rules trump requirements for disclosure in that state's open records law, they ruled.

In the federal decision, Judge Kessler rejected the government's claim that it must withhold names of most of the detainees for privacy or safety reasons. She balanced public and privacy interests. She acknowledged that some legitimate government concerns exist about the safety of individual detainees. But she ruled that, except where individuals themselves choose to "opt out" from disclosure for privacy or safety reasons, the names must be released.

There are broad public interests in disclosure Judge Kessler wrote. "The government's power to arrest and hold individuals is an extraordinary one," she said, noting that the groups who requested the names had "grave concerns" over the abuse of this power, ranging from denial of counsel and consular notification, to discriminatory and arbitrary detention, to the failure to file charges of mistreatment in custody for long periods of time.

The judge rejected entirely the government's claim that release of the names could interfere with its investigation. She said the government failed to show that disclosure of the names could deter cooperation or enable terrorist groups to map its investigation or help terrorists create false and misleading evidence.

She rejected the government's claim that

"grand jury secrecy interests" justify withholding names of material witnesses. The government did not show that disclosure of the identities would reveal some "secret aspect of the grand jury's investigation."

Finally she rejected the broad withholding of names under court order. If names are withheld under court order, the specific order would have to be shown her, she said.

Attorney General John Ashcroft had sworn early on that the Justice Department would not develop a detainee blacklist by releasing their names.

"It would be a violation of the privacy rights of individuals for me to create some kind of list," he said at a Nov. 26 press conference, adding that "the law properly prevents the department from creating a public blacklist of detainees that would violate their rights."

Such a list, he said, also would help Osama bin Laden.

Reporters at that press conference were hard-pressed to find how the law prevented disclosure to protect detainees' privacy, and still are. Although the Justice Department has faced widespread derision over its claim that it protects detainees' privacy, it has never recanted.

There is no constitutional right of privacy guaranteeing that arrested or detained people are entitled to anonymity. In fact, civil rights groups question whether secret arrests and detainments jeopardize real constitutional rights such as free speech and a fair and open trial.

The Privacy Act is a long shot for providing any benefit to these detainees. Under that 1974 act, the government may not disclose information retrieved from its files by name or personal identifier of citizens and lawfully admitted aliens. Most of the detainees have questionable immigration status.

Also there are numerous exemptions to the Privacy Act, notably one requiring release of information subject to the FOI Act. The FOI Act itself embodies exemptions to protect personal privacy but they do not kick in if there is an overriding public interest served by disclosure.

At a hearing in late November before the Senate Judiciary Committee, Assistant Attorney General Michael Chertoff said: "I need to be clear. I don't know that there is a specific law that bars disclosure of the names."

On the eve of the hearing, the Department of Justice disclosed some information, including names of 93 persons facing criminal charges. And, although it still refused to tell who they were, it made public charges against 548 other immigration detainees along with their country of origin. It said 104 individuals had been arrested on federal criminal violations and of that group 55 remained in custody, comprising part of a total 603 individuals still being held.

Those disclosures were not in response to any FOI request.

The Washington, D.C.- based Center for National Security Studies and 27 other civil rights and public interest organizations, including the Reporters Committee for Freedom of the Press, in late October filed an FOI request with the Justice Department and some of its components, including the INS. The Justice Department disclosures did not make the request moot. Much of the information the center sought was still secret.

The center tallied what it still did not have. It said the Justice Department gave no information on 11 of the individuals held on federal criminal charges; that it withheld names of the detainees and of their lawyers; that it provided no information on where they were detained or where they were currently held.

It also gave no information on persons held as material witnesses; no information on those detained on state or local charges; no information on the relevant dates; no information on courts where secrecy orders have been requested; no information on the secrecy orders themselves; and no policy directives other than an INS order regarding sealing of proceedings. It only provided partial information on people who had been detained and then released.

In early December, 16 signatories to the FOI request, including the Reporters Committee for Freedom of the Press, filed suit for the information in U.S. District Court in Washington, D.C., before Judge Kessler. They received little information in response to their FOI request. Although the department agreed to expedite its review of it, some Justice agencies did not respond at all.

The FBI expedited processing of its part of the request and denied records, saying their release would interfere with law enforcement proceedings. In response to an administrative appeal filed by the requesters, the department's Office of Information and Privacy added that records were also exempt because release would intrude upon the personal privacy of the detainees.

In late January, the Justice Department released other information in response to the lawsuit, including a major list of detainees showing the status of their cases but with most information blacked out, including the names of all the detainees except those criminally charged.

In court papers, the requesters have called the disclosures "incomplete and inaccurate" but note that the revealed information suggests that for many of the detainees, any link to terrorism has actually been rejected. (*Center for National Security Studies v. Department of Justice*)

In its court papers, the Justice Department said the FOI Act did "not purport" to require disclosure that would "disrupt a federal terrorism task force investigation" with "important public

"It would be a violation of the privacy rights of individuals for me to create some kind of list," Ashcroft said at a Nov. 26 press conference.

safety implications," and so, it said, several arms of the exemption for law enforcement records would apply. Release could jeopardize the investigation, could lead to potential threats to the health and safety of the public, and could invade the personal privacy of the participants in an investigation.

Access to Information on Detainees

When a New Jersey trial court ordered authorities to release under the state's open records law information on federal detainees held under contract in two county jails, the government appealed. To bolster its case, and to make sure other states fell in line, it also adopted rules designed to prohibit states from giving out information on jailed detainees even if state access laws would require it.

The federal government's nationwide sweep of aliens who might in any way be connected to the events of September 11 led to the lock-up of anyone thought to be a material witness and hundreds of other non-citizens on visa or other violations. It paid local jailers to house and keep them in their jails.

The greatest number may be in York, Pa. Substantial numbers are in New Jersey and New York. A *St. Paul Pioneer Press* reporter seeking data on detainees jailed there received a three page list of blacked-out identities from the INS. But for the most part, citizens have no idea if persons connected with federal offenses are housed in their communities.

In late March, a New Jersey trial court ordered the jailers in Hudson and Passaic Counties to release the names of federal prisoners detained in their jails. The state's open records law required disclosure, it said. The federal government appealed.

In late March, a New Jersey trial court ordered the jailers in Hudson and Passaic Counties to release the names of federal prisoners detained in their jails.

And before the appeals panel ruled, the INS in April issued an interim rule (a rule that became effective on publication rather than after public comment) prohibiting states from releasing any information about federal prisoners held under contract in their jails. In a news release it claimed that more than half of 19,000 INS detainees are held in state and local facilities while facing removal and immigration court proceedings.

An appellate panel in New Jersey heard the appeal. It was not argued by the counties, whose records were sought, but by a representative of the U.S. Attorney's Office.

In mid-June, the appeals court ruled that an INS regulation, as a federal regulation, would pre-empt a state law like the open records law. The new rules were appropriate, the appeals panel said. They were adopted quickly "for good cause." *(ACLU v. Hudson County)*

The appellate panel cited the federal government's claims that release could cause harm. For instance, detainees might not want their names released because the information might endanger their families. The Justice Department had also argued that the names would be useful to terrorist organizations.

The court did not address the communities' interest in knowing who was jailed there.

A privacy claim figured heavily when a federal district judge in Springfield, Ill., ruled in mid-February that a DeWitt County sheriff could not release the names of any federal inmates housed in his jail to a reporter because disclosure would "stigmatize the individuals and cause irreparable damage to their reputations."

The sheriff released the names of state inmates serving time because the state's FOI Act required disclosure. But the federal government told him he could not release the names of federal inmates.

The reporter sued for the records in the local county court under the Illinois FOI Act, but the federal government intervened and forced the case into federal court.

The case did not turn entirely on privacy. Even if there were no privacy interest, the federal judge said, the names should be withheld for safety reasons because inmates have "gang ties, interest in escape and motive for violence against informants and rivals."

The Bloomington, Ill., *Pantagraph* reporter who sought records from the sheriff did not know if detainees were among the federal inmates at the jail. She hoped to report to the community what kinds of criminals were brought into it through the jail's rental program.

During the course of the litigation, a federal prisoner who once had claimed that God told him to kill doctors who perform abortions escaped from the DeWitt County jail by springing a lock with a comb and wriggling through a roof drain.

Pantagraph reporter Edith Brady-Lunny said that many of the federal inmates in the local jail eventually spend time in federal prisons. If the community is going to take risks to hold such inmates, it needs to know who they are dealing with, she said. (*Brady -Lunny v. Massey*)

Concealing the 'Infrastructure'

Congress and the Bush Administration were taking a long look at what could happen to the nation's critical infrastructure and how to protect it long before September 11. But when the country identified real terrorists, government concerns increased. The question of how to protect the transportation, energy, communications, health and other systems that are part of the infrastructure became one of how to protect the infrastructure from terrorists.

The terrorist attacks of September 11 fueled already existing fears of an information meltdown. Congress and the executive branch stepped

up their attempts to make information offered voluntarily from outside the government immune from disclosure under the Freedom of Act when it was in government hands.

By August, the fight for new protections of the information had centered on the President's push for a new Department of Homeland Security. The forum for FOI battles was now concerned with the language in that legislation. When Congress took its August break, the House and Senate had very different measures up for consideration.

In its fervor to exchange critical infrastructure information with private industry, the government has been willing to curb public access to information submitted by private businesses, even when the information could reveal wrongdoing.

It wants badly to exchange information with private industry so that it can protect information systems for major or "critical" industries — and, ultimately, services — and the physical assets that support them. The administration wants to protect information voluntarily submitted by persons outside government about "vulnerabilities." That information might prove useful to terrorists who could exploit vulnerabilities if they knew about them.

Industry representatives have been vocally cold to the idea of sharing, claiming that their information could become public under the FOI Act. They contend that they must have better legal assurance of secrecy or they will not share. Even if they stand to benefit from better, more informed protection of the information systems they depend on, they do not want the government to have that information without mandatory confidentiality written into the law.

Citizen activist groups and environmental groups have insisted that the FOI Act already protects against any legitimate risk of harmful disclosure. They maintain that government has used the existing exemptions regularly and well and the courts have given broad protection to industry information. In addition, a Reagan-era executive order already requires agencies to let industry review FOI requests for much of its information before disclosing it. They also contend that the dangers of ignorance of these vulnerabilities, ignorance that prohibits any demand that they be fixed, trumps any danger of terrorist exploitation.

The administration's proposal to create the Homeland Security department carried with it special language keeping the FOI Act from applying to voluntarily submitted information.

The House of Representatives passed the President's recommendations in the Homeland Security Bill essentially as it was written by the administration. Not just critical infrastructure information submitted to the department, but any outside information, would be immune from FOI Act requests. Criminal sanctions would lie against anyone in government who revealed the information.

Rep. Jan Schakowsky (D-Ill.) tried to change the FOI Act provisions of the House measure, offering an amendment she said would prevent "the Department of Homeland Security from becoming the 'department of homeland secrecy.'" She said that she and the House Committee on Government Reform, on which she sits, had repeatedly asked proponents of the exclusion from the FOI Act "for even one single example of when a Federal agency has disclosed voluntarily submitted data against the express wishes of the industry that submitted that information."

"They could not name one case," she said. "Instead we are told that the FOIA rules just are not conducive to disclosure, that corporations are not comfortable releasing data needed to protect our country, even if we are at war."

Schakowsky's amendment lost in the House but it gained surprisingly substantial support.

Key senators reached accord on language in the Senate in late July.

Sen. Robert Bennett (R-Utah) along with Sen. Jon Kyl (R-Ariz.) had introduced a measure in September 2001 to protect critical infrastructure information, but it encountered strong objections from groups outside industry, and Bennett's staff was still working to change the measure in ways that might ensure protections without closing off too much information.

Longtime FOI advocate Sen. Patrick Leahy (D-Vt.), along with Sen. Carl Levin (D-Mich.) and Bennett worked together to hammer out an amendment to the Bush proposal in markup in the Government Affairs Committee. Levin and Bennett offered it on July 24 and Bennett vowed that he would stand by the compromise as the Senate considers the Homeland Security measure.

The amendment would only protect records submitted by the private sector to the Department of Homeland Security if they pertain to vulnerabilities of the critical infrastructure. The administration proposals had covered any information about technologies and structures such as dams, roads, bridges or computer networks submitted to any federal agency.

It would limit the coverage to information that is submitted "voluntarily" and not in the pursuit of a government benefit or grant.

The new Senate measure also does not criminalize disclosure of critical infrastructure information as does the House measure and the Bush proposal.

Bennett's Critical Infrastructure Information Security Act introduced last September contained elements of a House bill entitled the Cyber Security Information Act, which was introduced by Rep. Tom Davis (R-Va.) and Rep. Jim Moran

By August, the fight for new protections of the information had centered on the President's push for a new Department of Homeland Security.

Numerous public interest groups wrote senators in December saying that, however lofty the goals of the bill, it would have serious aftereffects if enacted.

(D-Va.), congressmen who actively pushed a similar measure in the last Congress.

Numerous public interest groups, including the Reporters Committee for Freedom of the Press, wrote senators in December saying that, however lofty the goals of the bill, it would have serious aftereffects if enacted:

- It would bar the federal government from disclosing information on spills, fires, explosions and other accidents without obtaining written consent from the company that had the accident.
- It would give the manufacturing sector unprecedented immunity from the civil consequences of violating the nation's environmental, tax, fair trade, civil rights, labor, consumer protection and health and safety laws.
- And, it would sweep aside record-keeping and disclosure requirements under federal laws other than the Securities Exchange Act.

President George W. Bush in October 2001 issued an executive order on critical infrastructure protection, setting up a board to provide continuous efforts to protect information systems for telecommunications, energy, financial services, manufacturing, water, transportation, health care and emergency services and the physical assets that support those services and gave it classification authority. The order also set up an advisory council to bring private entities into the planning process.

Anticipating that critical infrastructure legislation will pass, the order parses out responsibilities for carrying out that law. It directs the board to set up various committees, including one to address records access and information policy.

The president did not directly address confidential treatment of information in that order.

Taking Down Web Sites

The Nuclear Regulatory Commission was one of the first federal agencies to offer the public a useful reading room. Its Freedom of Information office once actually invited user groups in to talk about how they might be better served. Its record for openness was not perfect but, among agencies, it has traditionally enjoyed a strong reputation for being responsive to the public.

Shortly after September 11, NRC removed its entire Web site following a request from the Department of Defense that it do so.

"It was disappointing to us," Victor Dricks, a public affairs officer at the agency, said at the time. "We have made a strong effort to put information up and we feel strongly about that mission."

By early March, the agency had gone a long way toward restoring information on its Web site. Dricks said that some information would never be restored, but he was able to describe clear guidelines for what would not be returned. If information would be of specific use to terrorists and was not widely available anywhere else, NRC would not re-post it.

OMB Watch, a public interest organization in Washington, D.C., that monitors information resources at agencies, tracked the Web site removals following September 11. Although no other agencies removed their entire Web sites, OMB Watch found information removed from the Department of Energy; the Interior Department's Geological Survey; the Federal Energy Regulatory Commission; the Environmental Protection Agency; the Federal Aviation Administration; the Department of Transportation's Office of Pipeline Safety and its Bureau of Transportation Statistics' Geographic Information Service; the National Archives and Records Administration; the NASA Glenn Research Center; the International Nuclear Safety Center; the Internal Revenue Service; the Los Alamos National Laboratory; and the National Imagery and Mapping Agency.

Many of the agencies posted notices that the information had been removed because of its possible usefulness to terrorists.

Missile defense and secrecy

While federal spending may be relatively flat on President Bush's watch, one exception is the defense budget, swollen with money for testing and deployment of a missile defense system.

But top White House military officials have made it clear this year that the public won't have enough information to determine whether that money is well-spent.

The fiscal year 2003 defense appropriations budget of $355.4 billion — a 12 percent increase over the previous year — approved by the Senate in August includes $7.7 billion for missile defense, along with $878 million that the Pentagon can spend on either the missile defense program *or* to fight terrorism. Under Bush, the defense budget is expected to substantially increase by billions more through 2007.

With the establishment of the Missile Defense Agency in January 2002 — technically, the former Ballistic Missile Defense Organization was given agency status — Bush gave missile defense unprecedented priority.

The former director of BMDO, Air Force Lt. Gen. Ronald T. Kadish, was given the new title of director of the Missile Defense Agency. His overarching duty is to establish one program that will develop an integrated missile defense system. And another prime task seems to be assisting in the effort to keep secret most information about the successes and failures of the system.

In a June 2002 news briefing, Kadish said that "no responsible individual would make that type of information available to our adversaries so they can defeat our system."

He conceded that Congress, charged with

making decisions about expenditures for the program, would be let in on "what the system can actually do" but even that would "be done in a different way."

And the public? "What will be important for people to know is that the decisions to move forward on specific elements will be based on factual information . . . . And people should have confidence in that," he said.

Pete Aldridge, the Undersecretary of Defense for Acquisition, Technology and Logistics, scoffed at any suggestions of congressional oversight evasion and disregard for planning and reporting requirements. Those requirements, he said in a June 2002 *USA Today* op-ed article, merely "have been modified to accommodate the peculiarities of a development program without precedent."

Meanwhile, Defense Secretary Donald Rumsfeld, also citing national security and the need for flexibility, has proposed exempting missile defense spending from the Pentagon's auditing and accounting rules.

Critics have said such secrecy proposals are designed to deflect scrutiny of mission failures, such as the $10 million prototype booster rocket for the missile defense system that veered off course in December 2001 and crashed into the ocean near Vandenberg Air Force Base in California.

The previous year, a $100 million experiment failed when a U.S. missile warhead did not hit a dummy warhead in a test at the same air force base.

In February through May 2002, the Pentagon's new PAC-3 missile defense weapon failed numerous tests when interceptors failed to fire out of launchers. Even when they did fire, they missed about half the time.

Journalism and public interest groups continue to press for details — and to show that they understand the line between fair public disclosure of funding and effectiveness of missile defense systems and an unsafe release of the intricate details of military operational strategy.

A Bad Omen: The Presidential Records Act

The administration of President George W. Bush has taken steps to ensure that years from now Americans might learn very little about the events surrounding September 11. Consider the administration's attitude toward the release of former President Ronald Reagan's papers.

Bush issued an executive order on Nov. 1 changing the way presidential papers would be released. Rebutting the instant criticism that followed, White House counsel Alberto Gonzales wrote in the editorial pages of The Washington Post:

"The order, they said, was an affront to open government and would put procedural roadblocks in the way of disclosure of important historical information. The critics were wrong."

Gonzales dismissed claims from historians and journalists that the White House stifled the release of some 68,000 pages of Ronald Reagan's White House files due for release on Jan. 20, 2001, exactly 12 years after he left office. The order, Gonzales said, merely perfected the mechanism for release of the records. The release of Reagan papers would be forthcoming, he said.

"We are confident that, over time, the vast majority of presidential records — including many otherwise privileged records — will be made available to the public," Gonzales wrote.

Historians and journalists waited three more months for the release of the bulk of the records.

Ironically, if Bush had left the matter alone, the records would have been released more than 19 months ago.

Instead, the order effectively impounds records ripe for release and locks them up for an undetermined period of time. The order has also provoked speculation that Bush sought to prevent the release of records that could implicate or embarrass his own government appointees who served with Reagan or his father, then-Vice President George H.. W. Bush.

The Bush order could effectively seal records for an additional 12 or 20 or perhaps even another 100 years. Several provisions, particularly one allowing former presidents and their descendants the privilege of reviewing and resealing records, could effectively sock the records away for perpetuity, leaving the public and its future generations oblivious to what happened during a president's term in office.

But most of the papers seeped out . . . very slowly.

Despite Gonzales' assurances, the release came only after a coalition of historians and open government advocates, including the Reporters Committee for Freedom of the Press and Public Citizen, filed a lawsuit for the records, arguing that the president's order violates the Presidential Records Act. (American Historical Association v. National Archives)

The National Archives and Records Administration, charged under that law with monitoring the disclosure of such documents, released 67,500 pages last winter from the cache of Reagan files due for release and, earlier this summer, more than 23,000 additional pages of Reagan records. But 150 Reagan documents remain boxed.

The discovery phase of the case in mid-July revealed that the National Archives failed to issue its intent to open the vice presidential records of the elder Bush until April 2002, nearly 15 months after statutory restrictions on the records had expired. On June 17, the National Archives released 844 pages of those records but withheld

Top White House military officials have made it clear this year that the public won't have enough information to determine whether that money is well-spent.

40 pages for further review.

Traditionally, the ownership of presidential papers rests with the former president himself, although many have chosen to donate the materials to the United States. But when President Richard M. Nixon asserted proprietary claims over the records and tapes from his administration in the late 1970s, Congress responded.

The Presidential Records Act of 1978, signed into law by President Jimmy Carter, deemed presidential records public property and created a mechanism for the records to be released to the public over a specific period of time. The law was applicable to the president taking office on Jan. 20, 1981, and so Ronald Reagan became the first president subject to the provisions of the act.

After a president leaves office, the law places the records under the stewardship of the National Archives. And it provides that the records will not be subject to public access for the first five years after the archivist secures them.

After the five-year period, the former president could continue to assert privilege to certain records, provided that they contain information regarding national security, federal appointments, trade secrets, confidential communications with advisors or personal privacy. The records could be sealed if the information was specifically exempt from disclosure by federal statute.

After 12 years, the restricted materials become available to the public, subject to the same federal Freedom of Information Act exemptions as other records, except for one that allows "deliberative process," "executive" or other traditional privileges to come into play.

The provisions of the law apply to vice-presidential records as well.

But in the waning days of his administration, Reagan altered the provisions of the act with Executive Order 12,667. That order required the archivist to notify the sitting president about pending disclosure of records.

Just as the 12-year term was running out, the current Bush administration made a series of requests beginning in March 2001 asking the National Archives to delay the release of the records until June 21. In a letter, the White House claimed it sought the extension "to review the many constitutional and legal questions raised by the potential release of sensitive and confidential presidential records and to decide the proper legal framework and process to employ in reviewing such records."

The White House followed with two more extension requests — one in June asking for an Aug. 31 deadline; another on Aug. 31 seeking an indefinite extension.

On Nov. 1, Bush issued Executive Order 13,233, an edict that allows both a former president and incumbent president to halt the release of presidential records even after 12 years. The administration denied that the order was designed to prevent embarrassing records from seeing light, claiming instead that it would improve the release process.

Journalists, historians and members of Congress were not convinced.

Congressmen and witnesses appearing before the House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations on Nov. 6 decried the executive order, saying Bush designed it to stifle the release of documents.

Rep. Stephen Horn (R-Calif.), who chaired the hearing, eventually offered the Presidential Records Act Amendments to require incumbent and former presidents to make specific claims of executive privilege before halting release of White House papers.

If a former president makes the claim, the National Archives would hold the records for 20 working days to allow him to seek judicial recourse. The Archives would release the records after 20 days unless a court directed the records to be withheld. If an incumbent president makes such a claim, the Archives would hold the records until the president or a court allows them to be disclosed.

Meanwhile, the coalition of historians and journalists on Nov. 28 filed its lawsuit in federal district court in Washington, D.C. Despite past and pending records releases, the coalition contends the Bush order illegally limits access to records by circumventing the Presidential Records Act. The lawsuit asks the court to impose a permanent injunction ordering the National Archives to ignore the Bush Order now and forever.

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Legal precedents

Founding fathers Thomas Jefferson and James Madison could hardly foresee public records debacles such as this one over ownership of presidential records, but some of their writings are poignant in these circumstances.

In writing the Declaration of Independence, Jefferson listed the lack of public ownership of government records among the failings of the reign of King George. And Madison, in an 1822 letter to W.T. Barry, succinctly explained the basic tenet of open government:

"A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."

That said, traditions of ownership of presidential records before the Presidential Records Act of 1978 was sketchy, although most ex-presidents eventually donated many of their materi-

als to the National Archives for public use.

The matter came to a head in the 1970s when President Nixon, after his resignation, claimed that his presidential papers and tape recordings were his personal property. Through an agreement with the Administrator of General Services, Nixon retained "all legal and equitable title to the Materials including all literary property rights" although he planned to "donate" all material by Sept. 1, 1979, under certain other restrictions.

Congress passed the Presidential Recordings and Materials Preservation Act in 1974 to ensure government control over the more than 42 million papers and 880 tape recordings. Nixon challenged the law, saying in part that he enjoyed executive privilege over the records and that the law singled him out for punitive reasons.

But the U.S. Supreme Court, in several Nixon lawsuits concerning the records and tape recordings, opted to avoid the ownership issue, instead leaving that matter for Congress.

"Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial interests by entrusting the materials to expert handling by trusted and disinterested professionals," the Court wrote in its 1977 decision in Nixon v. Administrator of General Services.

That gave Congress the cue to craft and pass the Presidential Records Act of 1978.

As the first president subject to the act, Ronald Reagan stored more than 44 million pages of documents, electronic records and photographs at his presidential library in Simi Valley, Calif., under the care of the National Archives. Over the last 12 years, the Reagan Presidential Library released more than 4.5 million documents in response to FOI Act requests.

As the 12-year deadline approached, the National Archives identified 68,000 pages of documents withheld from FOI Act requests solely on Reagan's assertion that they contained "confidential communications." Upon further review, both national archivists and Reagan's advisers determined that other FOI Act exemptions could not be invoked to keep the records sealed.

Although the records were ready for release, the White House extension requests and subsequent order halted disclosure. The Bush administration said at one point the order merely crafted procedures designed to insure national security.

But the Presidential Records Act, in evoking the FOI Act, already addresses matters of national security. Although the presidential materials would be available to the public, some documents could be withheld from view if they fall within a statutory restriction category or are subject to a valid, constitutionally based claim of executive privilege.

The act specifically prohibits withholding of presidential records solely because they contain confidential discussions with advisers.

The Bush Order turns the Presidential Records Act on its ear, allowing both a sitting president and an incumbent president to stifle the release of presidential documents, simply by asserting an executive privilege claim, valid or otherwise.

The order requires the National Archives to channel all requests for presidential records to both the sitting and former president and gives them unlimited time to review them. The order also places the burden of justifying the privilege on the parties seeking records, effectively requiring court action for records releases.

The Bush Order cites the Nixon v. Administrator of General Services case as the impetus for executive privilege.

That case, and Nixon v. United States before it, both recognize a continuing privilege for former presidents, but the Court did not say they enjoyed the same degree of privilege or that such a privilege lasts indefinitely.

The Court determined that the privilege in presidential records succumbs to "erosion over time." As for the confidential talks with advisers, the Court wrote that while such confidences are necessary while a president is in office, "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding."

The Presidential Records Act does not strip privilege from a former president after 12 years. It merely restricts the exemptions he can claim. But the Bush order is problematic because it grants a former president the same threshold of privilege as a sitting president. In fact, the former president could halt release of his records even if the incumbent wished to place them before the public. Likewise, a sitting president could stop release of a former president's records.

The Bush order effectively extends the exemption to descendants of former presidents, allowing them to claim control over the records should a former president become incapacitated or die. This measure could allow records to be sealed indefinitely, even though release might be mandatory under the Presidential Records Act.

Another unique aspect of the order is that it provides executive privilege for former vice presidents, even though such a privilege has never been recognized by the courts or Congress.

In defending the order, White House counsel Gonzales further said the order creates proper procedures. Despite the claims in the White House letters to the National Archives, a framework from the Presidential Records Act was clearly in place, complete with timetable and records schedule.

Instead of improving implementation of the act, the Bush Order confuses it. A deliberate, well-laid out schedule becomes a muddled mess, void of time frames and guidelines.

The Court determined that the privilege in presidential records succumbs to "erosion over time."

Where to from here

National Archivist John Carlin, in testimony, interviews and court documents, has made it clear: Archivists will abide by the Bush Order and will continue to withhold presidential and vice presidential records until further review is complete.

At present, that means that a few hundred pages of Reagan documents and Bush vice-presidential records remain sealed. In the future, that could mean records of other presidential administrations could be tied up in review indefinitely.

Proposed legislation would not really cure the problem.. Horn's bill, the Presidential Records Act Amendments, addresses only part of the ills of the Bush order. It wrests too strong executive privilege powers from former presidents. But even if passed, the bill would effectively leave control of old White House records in the hands of an incumbent president, forcing a requestor to solicit court action as the only resort to pry such records free.

The best remedy may come as a result of the pending lawsuit.

But the Bush administration seeks dismissal of claims raised in *American Historical Association v. National Archives*, arguing that the issues aren't ripe for review. The mere release of the Reagan and Bush documents, it says, makes the case moot.

The case for the Reagan papers may end. But the order stands for future administrations, leaving open the possibility that an embargo on records could create unnecessary gaps in presidential history.

The rollback in state openness

ELEVATED
ELEVATED RISK TO A FREE PRESS

A number of states jumped into the legislative fray soon after September 11, but many of the more severe proposals died before a vote or were modified to accommodate access concerns.

Nearly a year after the events of September 11, many state legislatures were still scurrying to pass anti-terrorism legislation before the sessions adjourned.

By the time the attacks occurred, most state legislatures had either adjourned or neared the end of the 2001 session, so their first opportunities to address September 11 came in 2002.

Initially, states considered creating their own versions of an Office of Homeland Security to coordinate efforts with the federal government to prevent another terrorist attack and attempted to draft roving wiretap provisions using the actions of the federal government as a model. As the sessions progressed, legislatures focused on bioterrorism and what to do in a public health emergency, especially if and when people were sick or dying from anthrax mailings.

Anti-terrorism legislation that had the most impact on journalists came in the form of exemptions from the states' open records and open meetings laws in the name of state security, under the dubious assumption that states could guard themselves against terrorism by wearing a cloak of secrecy.

Throughout the session, legislators continued to introduce bills narrowing open records and meetings laws in the hopes that secrecy would lead to security, even though no one had shown that open government in any way exacerbated the events of September 11.

Many states enacted measures that would make secret any discussions of evacuation plans, emergency response plans, security measures or emergency health procedures in case of a terrorist attack, as well as the security plans and manuals themselves. Another common bill would exempt architectural drawings of city buildings and infrastructure, including utility plants, bridges, water lines, sewer lines and transportation lines.

Some of the measures have fizzled out in proposal stages or before reaching a final vote. These include drastic measures that infringe on civil liberties, such as quarantining people as a result of a biological attack and the roving wiretap provisions. However, some legislation had enough momentum to find its way into law.

Some states focused on only enacting laws that would establish a state version of the Office of Homeland Security and increase the penalties for terrorism crimes. Some states were unsuccessful in passing any new anti-terrorism laws, many of which failed in committee hearings shortly after being introduced. A handful of states did not bother to introduce any laws at all, either because they met biennially in an odd year or because they concentrated instead on the sagging economy.

However, the states that successfully passed anti-terrorism legislation, such as Florida, did so aggressively and created sweeping laws that would preclude people from gaining access to what used to be open records.

Florida was the frontrunner in the anti-terrorism legislation race, introducing many shell bills to be filled in and passed in the very last moments of the legislative path to becoming law. Efforts ranged from trying to license all students who receive flight training in Florida, authorizing state health officers to declare a public health emergency and ordering Florida citizens to be confined and tested when a health disaster strikes. The legislature also tried to establish rules regarding cropduster-style planes used in aerial application of pesticides and fertilizer and establish rules regarding the storage of materials used

in these types of aerial applications, after it was learned that some of the September 11 terrorists showed interest in these types of planes. Other bills attempted to exempt information from public records laws, deal with bioterrorism threats, and amend the constitution to allow government to continue during emergency circumstances. Although many of these efforts failed, Florida did manage to pass many anti-terrorism laws.

Connecticut also considered a high number of anti-terrorism proposals. In addition to a spate of access bills, Connecticut also considered efforts to redefine the crime of terrorism, to supplement federal money to support the public safety department, and to temporarily suspend licensing of health care professionals in order to deal with public health emergencies.

Ohio may never reveal what its plans are to protect its citizens, because a law prevents officials from disclosing any information shared in a meeting dealing with security issues.

The list goes on. Here are some of the other proposals and bills appearing in state legislation around the nation.

Alabama

No bills were introduced, but there was a draft to create new exemptions to the state's FOI Act. The proposal, submitted by the state Department of Emergency Management, attempted to make secret state agency e-mail and meeting records if they would jeopardize agency safety. It also would have exempted from disclosure vulnerability assessments and infrastructure information for many public and government buildings.

Alaska

- A new law will exempt state infrastructure and security plans from disclosure. The bill was introduced into the legislature at the request of the governor in January and signed into law in June. (SB 238; 2002 Alaska Sess. Laws 36)

Arizona

None found

Arkansas

None found

California

- Assembly members proposed legislation limiting access to meetings where matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or public facilities are to be discussed. The bill would also permit these closed sessions to include a security consultant or security operations manager to discuss security issues involving the safety and delivery of essential public services, including drinking water, wastewater treatment and electric service. The bill was being reviewed on the Senate floor in mid-August. (AB 2645).
- Another bill would make it a crime for public officials to disclose information discussed in a closed meeting. The bill was amended in a Senate committee and was being reviewed in mid-August. (A.B. 1945)
- Bills would add to the offenses for which a court could order wiretapping relating to threats of bioterrorism or other terrorist acts and expanding the government's wiretapping powers. AB 74 was last amended in the Senate on Aug. 5. It originated as criminal procedure legislation, but made its comeback to address wiretapping laws. AB 2343 also addressed wiretapping powers of the state, but it failed to pass on April 23. (AB 74; AB 2343)
- A bill would authorize the state to develop a plan in case of a public health emergency, including powers to collect and record data, to make certain individuals' health information accessible, and to take and use property as needed for the safety, care and treatment of individuals. It has been in committee since May 22. (AB 1763)

Colorado

- A new law creates the Office of Preparedness, Security and Fire Safety. It allows a records custodian to deny the public access to any records that contain specialized details of security arrangements or investigations or any other records voluntarily given to the state by private agencies in the name of security, unless the records are already available to the public. The bill was signed by the governor June 3. (HB 02-1315; 2002 Colo. Sess. Laws 300)

Connecticut

- A new law provides that procedures for sabotage prevention and response will not be available under FOIA. It specifically addresses water supply infrastructure and applies to all large water suppliers. It outlines the need for a water source assessment plan and a determination on how susceptible that water is to contamination. It was signed into law June 3. (HB 5153; 2002 Conn. Acts 02-102 (Spec. Sess.)
- A House bill proposed to give power to the governor to declare a public health emergency and power to the Public Health Commissioner to implement any procedures necessary to deal with the emergency. Any emergency response plan would not be subject to FOIA. No action has been taken on this measure since May 4. (HB 5286)
- A House bill would create a biological agents registry, requiring all persons who possess biological agents to register with the state. It exempts the registration from public access. The bill has been tabled in the House Judiciary Com-

mittee since April 25. (HB 5288)

• Representatives also proposed legislation giving the head of any division of the state broad discretion to exempt from disclosure any records that he has "reasonable grounds to believe may result in a safety risk." They would include security plans and architectural drawings of the infrastructure, such as bridges, sewer lines and water lines. The bill died after a public hearing on March 6. (HB 5624)

• Another new law exempts certain security information and records from the state Freedom of Information Act. It prohibits disclosure of security manuals and drawings, engineering and architectural drawings of government buildings, and training manuals that include security procedures. It was signed into law on June 13. (HB 5627; 2002 Conn. Acts 02-133 (Spec. Sess.))

• A Senate bill would give the chair of the Public Utilities Control Authority discretion to exempt from disclosure any records that relate to the security and emergency plans of utility companies that he has "reasonable grounds to believe may result in a safety risk." These records also include architectural drawings of utility plants. The bill passed through the Senate and was introduced in the House, but was tabled, with no further action taken since April 18. (SB 486)

Delaware

• A law amends the Delaware Freedom of Information Act exempting information that could jeopardize the physical safety of Delawareans. Exempted records include emergency response procedures, vulnerability assessments, and building plans and blueprints. It was introduced on May 8 and signed into law by the governor on July 3. (SB 371; 73 Del. Laws 354 (2002))

District of Columbia

A bill known as the "Omnibus Anti-Terrorism Act of 2002," exempts from the city's Freedom of Information Act and any other publication requirement all response plans and any vulnerability assessments intended to prevent or mitigate a terrorist attack. The measure also defines the crime of terrorism and sets up a response plan to deal with threats of bioterrorism. The measure was passed in April. (B14-0373)

Florida

Because of the number of anti-terrorism bills passed in special sessions prior to the 2002 regular session, the list below is but a sampling of the most recent legislation in Florida.

• A Senate bill proposing to expand an existing exemption to the state FOI law to cover threat assessments, threat-response plans, emergency-evacuation plans and manuals for various security measures was withdrawn in January but its companion bill was signed into law on April 22. The Senate proposal would close any portions of meetings that would reveal security system plans. Another failed Senate bill would have exempted building security plans from disclosure. (S 486, S 982, H 735; 2002 Fla. Laws ch. 67).

• A House bill proposed to exempt any emergency management plans that detail the response of public and private hospitals to a terrorism threat. The exemption includes any security systems, vulnerability analyses, sheltering arrangements and drug caches. The measure died on March 22 in the House Committee on State Administration. (H 729)

• Because of the apparent interest of terrorists in bioterrorism and in aircraft used in the aerial application of pesticides and fertilizers, Senate and a House bills proposed to exempt all restricted-use pilot license numbers from the public records laws. The bills also would have exempted all flight plans until 24 hours after a flight is completed. The measures died on the Senate and House calendars on March 22. (H 731, S 970)

• A bill that originated in the House attempted to exempt information on the type, location or amount of pharmaceutical materials in a depository maintained by a state agency as a response to an act of terrorism. However, it would have required that the certification of the sufficiency of the amount or type of pharmaceutical material remain an open record. The bill died in the House Committee on State Administration on March 22. (H 733)

• Senate and House bills would have expanded wiretapping powers for crimes of terrorism. Although these bills died committees in March, a comparable bill, HB 1439, was passed on April 22. (S 446, H 725; S 1774, H 1439, 2002 Fla. Laws ch. 72)

• A Senate bill would have required law enforcement agencies to coordinate efforts to combat terrorism. It would have exempted information and records shared with another federal, state or local agency. The bill died in January. (S 450)

• A Senate bill proposed creation of a new public records exemption for emergency response plans for public or private hospitals during acts of terrorism. It would have also closed any portions of meetings that would reveal such plans. The bill died in the Committee on Criminal Justice in March. (S 488)

• A Senate bill proposed creation of a new public records exemption for pharmaceutical depositories maintained in response to terrorism. Any certification to the amount of the pharmaceutical or the security of the depository would not have been included in the exemption. This bill was withdrawn from consideration shortly after it was introduced in January. (S 490)

• A Senate bill proposed creation of a new

public records exemption to ease transmission of public documents between law enforcement agencies. Only public documents that related to an active investigation would be exempt. The law enforcement agency would have had the responsibility to tell the custodial agency that the investigation was no longer active. The bill was withdrawn shortly after it was introduced. (S 492)

• A Senate bill would have allowed the Florida Department of Law Enforcement to automatically delay access to public records normally open to inspection and copying for up to seven days when there was a viable threat of terrorist attack. The department would have been required to show evidence of the threat and that inspection or copying of the record would jeopardize the investigation. It was withdrawn shortly after it was introduced in January. (S 494)

Georgia

• A Senate bill would require most state agencies to prepare a safety plan to address the threat of terrorism and detail agency response to such a threat. The measure would exempt all information related to site surveys, or safety and vulnerability assessments of public buildings and facilities from disclosure. No action has been taken on the bill in the House since April. (SB 365)

• A law signed May 16 grants the governor and the state public health department power to declare a public health emergency in bioterrorism cases. It authorizes medical resources necessary to contain a situation. It authorizes the public health agency to require notification to the state health department of certain illnesses or an unusual prescription trends. All reports are required to be confidential and not released to the public except when the state health department chooses to release a statistical report. (SB 385; Session law number unavailable)

• A Senate bill failed that would have protected records about the security of government facilities during a terrorist attack. It would have exempted government records, including all documents, papers, letters, maps, books, tapes and photographs maintained by the Governor, the Lieutenant Governor, and each member of the General Assembly or any other person acting on their behalf. (SB 396)

• A new law known as "Georgia's Support of the War on Terrorism Act of 2002," expands police wiretapping powers and requires providers of electronic communications services to provide the contents of any wire or electronic communications that are in their possession or are reasonably accessible. It was signed May 16. (SB 459)

Hawaii

• A Senate bill relating to electronic surveillance would have established a surveillance review unit within the state Attorney General's office that would have the responsibility to review all requests for electronic surveillance. The measure did not pass in the House in March. (SB 2694)

Idaho

• An Idaho House bill would have exempted from disclosure records that provide detailed evacuation plans and emergency response plans, the release of which would "have a likelihood of threatening public safety." The bill did not make it through the House. (HB 457)

• Another House bill proposed to give the court discretion to exempt records from disclosure requirements if the custodian meets certain requirements, including clear and convincing evidence that the release of the document would have constituted a threat to the public safety or to the health or safety of an individual, and proof that interests favoring restriction of access clearly outweigh interest favoring access. Although this bill passed in the House, it never made it through Senate committees. (HB 459A)

• State representatives enacted an exemption from disclosure evacuation and emergency response plans of buildings, facilities, infrastructures and systems held by or in the custody of any public agency only when the disclosure of such information would jeopardize the safety of persons or the public safety. The bill was introduced in January and signed by the governor on March 4, 2002. (HB 560; 2002 Idaho Sess. Laws 62)

• Wiretapping provisions that would allow law enforcement agencies to intercept computer and cell phone communications under certain circumstances was signed into law on March 22. (SB 1349aa; 2002 Idaho Sess. Laws 223)

Illinois

• A House bill attempted to exempt from the state open meetings act all discussion of homeland security issues, including planning and procedures to respond to an act of terrorism. After a few amendments, the bill was tabled in July. (HB 4411)

• A House proposal would have amended the state's open meetings act to exempt any discussions of security procedures to respond to a threat to the public. The measure failed in the Senate in April. (HB 3682)

• A Senate bill exempting computer geographic system information from the state's freedom of information act became law on July 11. (SB 1706; P.A. 92-0645, eff. July 11, 2002)

Indiana

• The major issue regarding the state's access laws in the 2002 session concerned the veto of a bill that would have exempted the Legisla-

ture entirely from the public records act. Gov. Frank O'Bannon vetoed the bill, which had been passed by large majorities during the previous legislative session, and the Legislature threatened to override the veto. (H.B. 1038)

Iowa

- A new law allows state agencies to close meetings when discussing information contained in the records of public airports, municipal corporations, utilities and water districts that could potentially jeopardize the public health and safety of the citizens. These confidential records include vulnerability assessments, security response plans, and architectural drawings and diagrams. The records would also be exempt from any disclosure requirements under the public records laws of the state. The bill was signed into law on April 8 (SF 2277; 2002 Iowa Acts 1076)
- A new law requires information about school security procedures and emergency preparedness information to be kept confidential if disclosure would reasonably be expected to jeopardize student, staff or visitor safety. The bill was signed into law on April 1. (HF 2151; 2002 Iowa Acts 1038)

Kansas

- A law was passed that exempts from disclosure records that "pose a substantial likelihood of revealing security measures" that protect utility, sewer treatment, water, and communication systems from criminal terrorism. The law was signed on May 29. (S 112)

Kentucky

- Senators proposed to amend the open meetings law allowing the closure of meetings at which secure records are discussed. The bill would have exempted from the open records law security matters such as hospital emergency plans, public agency communications plans, airport security plans and security system plans for public agencies. Introduced in the Senate on January 25, the bill did not survive committee hearings. (SB 136)
- A House bill would have established the state's emergency disaster response program called the Division of Emergency Management to deal with issues relating to chemical and biological terrorism. The measure did not pass. (HB 199)

Louisiana

- A new law outlines the state's anti-terrorism measures. It exempts from disclosure any record or information pertaining to security procedures, vulnerability assessments or any criminal intelligence information pertaining to terrorist activity held by a state agency or water utility company. It was signed April 23. (HB 53; 2002 La. 128)

Maine

- A new law exempts information regarding security plans or procedures of agencies of state and local government from the definition of public records in the freedom of access laws. The measure was signed into law on April 11. (LD 2153; P.L. 675)

Maryland

- A new law authorizes a custodian to deny access to a public record if access would endanger the public. The Senate bill was signed into law on April 9. (SB 240; HB 297; 2002 Md. Laws 3)
- Another new law creates a Biological Agents Registry program, which would require any person who possesses a particular biological agent to report to a central state registry. It also exempts the registry information from the open records act. The law was signed May 6. (HB 361; 2002 Md. Laws 361)
- Bills in each house were proposed to deny the inspection of specific information in a public record that relates to specified water and wastewater system plans, emergency response plans, communication and security systems, essential personnel and building plans of specified public buildings. The proposed legislation provided for judicial review to a person who is denied inspection of a specified public record and also establishes a specified burden of proof in certain cases. The Senate version was withdrawn in March. The House version failed as well. (HB 916; SB 720)
- The Maryland Security Protection Act of 2002, which expands pen registers and other wiretapping provisions, was enacted April 25. It gives any nuclear power plant facility license holder the ability to authorize a security officer to stop any person whom they have reasonable grounds to suspect trespassed on the premises. (HB 1036; SB 639; 2002 Md. Laws 100)
- Anew law establishes the Maryland Security Council and requires state agencies to cooperate with the Council under certain circumstances. The Senate version was signed into law on April 9. (HB 305; SB 242; 2002 Md. Laws 4)

Massachusetts

- The governor has proposed a bill that would exempt from public disclosure laws records such as security plans and threat assessments.

Michigan

- A Senate bill would exempt from disclosure any information relating to the records or information of security measures, including emergency response plans, risk planning documents, threat assessments, domestic preparedness strat-

egies, and capabilities and plans for responding to acts of terrorism or similar threats. (SB 933)

• A new law exempts any information relating to the state's critical infrastructure, or anything that would have a debilitating impact on the security and welfare of the state. It was signed April 9. (HB 5349; 2002 Mich. 130)

Minnesota

• A House bill would have authorized the closure of meetings that discuss security issues. This would have allowed closure any time security briefings, emergency response preparedness meetings, and vulnerability assessments were held. Any discussions of financial decisions relating to security measures must be discussed at an open meeting. The measure died shortly after it was introduced. (HF 2849)

Mississippi

• Mississippi's legislature tried to pass an anti-terrorism bill that would have defined terrorism and set up a emergency response system to coordinate with the federal government. No provisions that would affect public records laws were included. It died in committee in February. (HB390)

Missouri

• A House proposal would exempt from disclosure existing or proposed security systems for any building or property owned or leased by the government. These records may include photographs, schematic diagrams or recommendations made to analyze or enhance security of the building or property. No action has been taken since April. (HB 1445)

• A law expands the emergency powers of the governor when there is a major natural or manmade disaster, an act of biological terrorism, or there exists an imminent threat of a disaster. It was signed July 1. (SB 712)

• A House bill authorizes the closure of meetings any time security measures and response plans to prevent terrorism or contamination of water supply systems are discussed. The measure was introduced in December and no action has been taken on it since February 20. (HB 1098)

• A Senate bill would have established the Joint Committee on Terrorism, Bioterrorism and Homeland Security. This act would also add an exemption to Sunshine Law, allowing closure of meetings and records regarding specific information on certain terrorism readiness issues. Discussions of financial decisions relating to security measures would not be considered closed. It died on the house calendar in May. (SB 1112)

Montana

None found.

Nebraska

• The Emergency Health Powers Act would provide access to individual health information in cases of emergency. In some cases, it would also give the government the power to confine individuals who are infected with a contagious disease or reasonably believed to be infected. Further discussion over the bill was postponed indefinitely in April. (LB 1224)

Nevada

There was no 2002 regular session in Nevada.

New Hampshire

• A new law exempts matters pertaining to terrorism or to preparations for emergency functions from the state's law requiring that minutes of all nonpublic meetings be disclosed within 72 hours. The bill was signed by the governor. (HB1423; 2002 N.H. Sess. Laws. 222)

New Jersey

• Gov. James E. McGreevey signed an executive order July 9 that would allow government agencies to exempt from disclosure 483 categories of public records in order to protect the state from terrorists or to protect privacy. The order came a day after the state's revised Open Public Records Act went into effect. The Act had opened up records in what was considered one of the most difficult states to get access to government information. After protests from state openness advocates, the governor amended the order the next week to limit the closures to about 80 categories.

New Mexico

None found.

New York

• A Senate measure would have denied access to any materials obtained or compiled in terrorist activity investigations at the discretion of the office of public security. The measure failed to pass. (S 6906)

• Two bills in the House and Senate attempted to exempt from disclosure information relating to critical infrastructure, such as electric lines, natural gas, steam or telecommunications systems. The measure passed the Senate but died in a House committee. (A 9841; S 6077)

North Carolina

• A House bill would have established a procedure for the state to prepare for a public health or bioterrorism emergency. It requires confidentiality of all health records, but allows for release to other state agencies to prevent or control a public health threat or to help investigate an act of terrorism. The measure failed to pass in both houses. (H 1508; S 1166)

North Dakota

The legislature meets biennially and will convene in 2003.

Ohio

- A new state law allows agencies to hold executive sessions when dealing with emergency response procedures under certain situations. It exempts from the definition of a public record all records that relate to security or infrastructure. It was signed May 7. (SB 184)

Oklahoma

- The governor signed a Senate bill which keeps confidential all records pertaining to "security measures," including surveillance tapes, security plans and security surveys. It allows all public agencies to keep that information secret. It was approved May 9. (SB 1472; 2002 Okla. Sess. Laws 234)
- A sweeping House bill related to anti-terrorism would permit the court to authorize government wiretapping, redefine terrorism and increase the punishment for crimes committed with terrorist intent and allow for closed executive sessions to discuss acts of terrorism and response plans. The measure would also establish an Oklahoma Office of Homeland Security and expand the state police powers in case of an emergency or terrorist attack. There has been no action on the bill in the Senate since May. (HB 2764)

Oregon

The Oregon Legislature meets biennially and will convene in 2003.

Pennsylvania

- A House bill that would have established a state Office of Homeland Security would have given authority to the agency to develop criteria for certain records, maps or any other information the agency deems necessary to keep out of the public domain. The measure died in committee. (HB2483)

Rhode Island

- A Senate proposal would exempt any plans, assessments or security measures related to publicly owned or publicly operated biological, nuclear, incendiary, chemical or explosive facility. There has been no action on the bill since it was introduced. (S 2324)

South Carolina

- The "Omnibus Terrorism Protection and Homeland Defense Act of 2002," criminalizes aid to a terrorist or terrorist organizations, increases penalties for various terrorist activity, including contamination of agricultural crops and livestock through biological or chemical agents, and increases the government's power to conduct roving wiretaps. It was signed July 2. (H 4416; 2002 S.C. Acts 339)

South Dakota

- A new law clarifies the crimes included in "terrorist acts" and increase the penalties for crimes that are committed with terrorist intent.. This bill was signed February 25. (HB 1305; 2002 S.D. Laws 103)

Tennessee

- Two bills, one in each house, would have criminalized any distribution or delivery of biological warfare agents, chemical warfare agents, nuclear or radiological agents as an act of terrorism or as a hoax. The measure did not pass in either house. (SB 2492; HB 2585)
- The "Terrorism Prevention and Response Act of 2002" was enacted after several proposals were introduced to expand the crimes of terrorism to include possession or manufacture of a biological or chemical warfare agent and increase the penalties for the crime of terrorism. HB 3232 was signed July 9. (SB 2574, HB 2545; SB 3192, HB 3232, 2002 Tenn. Pub. Acts 849)
- Two bills, one in each house, propose to make confidential any plans made by law enforcement agencies in response to or in order to prevent any act of violence at a business or school. No action on these bills since early February. (SB 2811; HB 2661)

Texas

The state legislature meets biennially and will convene in 2003.

Utah

- A new law classifies records containing information about explosives. It was signed in March. (SB 61; 2002 Utah Sess. Laws 78)
- A new law was signed as a substitute after a House bill attempted to exempt records of a government agency regarding security measures, including security plans and procedures and building work designs. The bill also would have enacted new definitions and penalties for criminal offences, including prohibiting terrorism through weapons of max destruction and hoaxes threatening the use of those weapons. (HB 283; HB 283S; 2002 Utah Sess. Laws 166)

Vermont

None found

Virginia

- A new law exempts from disclosure plans to prevent or respond to terrorist activity, such as specific security or emergency procedures. It

also exempts any engineering and architectural drawings and training manuals if the disclosure would harm the security of government buildings or people. A provision also allows meetings to be closed when discussing actions taken in response to a threat to public safety and requires requestors to provide records custodians with their name and legal address. (HB 700; SB 134; 2002 ch. 715)

Washington

- A companion bill was enacted after the House proposed to restrict from public access "architectural or infrastructure designs; maps or other records that show the location or layout of facilities where computing telecommunications or network infrastructure are located or planned to be located." The Senate rejected that measure but approved another which was signed into law on April 3. (HB 2411; SB 6439; 2002 Wash. Laws 335)
- Two bills proposed to restrict access to site plans, information in emergency preparedness plans, and technical information. The bills were introduced, but no further action was taken. (HB 2646; SB 6676)

West Virginia

None found

Wisconsin

- A Senate proposal would close access to security plans for public utilities filed with the state Public Service Commission. The proposal also would have prohibited municipalities from releasing the records as well. The measure failed in the Assembly on March 26. (SB 394)

Wyoming

- A Senate bill addressed how the state would deal with a terrorist attack, providing for the quarantine and vaccination of its citizens and providing compensation for any personal property that must be taken or used. It also addressed attacks on crops and resources. The measure was introduced in the House on March 1 and no further action was taken. (SF 67)

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Some information on the USA PATRIOT Act came from:
Electronic Frontier Foundation, *Analysis of the Provisions of the USA PATRIOT Act That Relate to Online Activities*, (Oct. 31, 2001) at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.html

Electronic Frontier Foundation, *Foreign Intelligence Surveillance Act, Frequently Asked Questions (and Answers)*, Sept. 27, 2001) at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/fisa_faq.html

Congressional Research Service Report for Congress, *Terrorism: Section by Section Analysis of the USA PATRIOT Act*, (Dec. 10, 2001) at http://www.cdt.org/security/usapatriot/011210crs.pdf

Also see *The USA PATRIOT Act: A Legal Analysis*, CRS Report for Congress, (April 15, 2002) at http://www.fas.org/irp/crs/RL31377.pdf

Other useful Web sites: for the text of USA PATRIOT Act, *see* http://www.politechbot.com/docs/usa.act.final.102401.html *or* http://www.epic.org/privacy/terrorism/hr3162.html

For more information, see Electronic Frontier Foundation, http://www.eff.org; American Civil Liberties Union, http://www.aclu.org/congress/l110101a.html; and American Library Association, http://www.ala.org/washoff/patriot.html.

The letter from Rep. F. James Sensenbrenner and Rep. John Conyers Jr. to Attorney General John Ashcroft can be found at http://www.house.gov/judiciary/ashcroft061302.htm. The Justice Department's response can be found at http://www.fas.org/irp/news/2002/08/doj072602.pdf

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Ashcroft memorandum

The text of the Ashcroft Oct. 12 memorandum is available at http://www.usdoj.gov/oip/foiapost/200119.htm; The text of the Reno memorandum is available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV3/page2.htm

Access to the detainees' names

Center for National Security Studies v. Department of Justice, No. 01-2500 (D.D.C. Aug. 2, 2002)(order delayed, Aug. 15, 2002)

Access to information on the detainees

ACLU v. County of Hudson, 799 A.2d 629 (N.J. Super. A.D., June 12, 2002)
Brady-Lunny v. Massey, 185 F. Supp. 2d 928 (C.D. Ill., Feb. 8, 2002)

Critical infrastructure

The Critical Infrastructure Assurance Office offers details and updates about how the government and private industry assure the safety of bridges, roads, computer networks and other infrastructure at http://www.ciao.gov

The text of two leading bills cited in this section — S. 1456 and HR 2435 — can be found by searching at http://thomas.loc.gov

Web site takedown

Three civil libertarian groups — OMB Watch, the Electronic Frontier Foundation and the National Coalition Against Censorship — keep a running tally on government efforts to shut down Web sites and restrict expression after September 11.

OMB Watch's page monitoring government sites can be found at http://www.ombwatch.org/article/archive/104/

EFF's anti-terrorism page can be found at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/antiterrorism_chill.html

The National Coalition Against Censorship's site on free expression after September 11 can be found at: http://www.ncac.org/issues/freeex911.html

Presidential Records Act and Bush Executive Order 13,233

American Historical Association v. National Archives, Civ. No. 01-2447 (D.D.C. Nov. 28, 2001)
Nixon v. General Administrator, 433 U.S. 425 (1977)
Nixon v. United States, 418 U.S. 683 (1974)

The Presidential Records Act of 1978 (44 U.S.C. §§ 2201 *et seq*), Executive Order 12,667 (54 Fed. Reg. 3,403 (1989)), Executive Order 13233 (66 Fed. Reg. 56,025 (2001)) and a considerable amount of other materials, court filings and pleadings, can be found at Public Citizen's Web site at: http://www.citizen.org/litigation/briefs/FOIAGovtSec/PresRecords/index.cfm

The House Government Reform Committee is considering H.R. 4187 (107th Cong., 2nd Sess. 2002), also known as the Presidential Records Act Amendments.