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RCFP WHITE PAPER

Homefront Confidential

*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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Homefront Confidential:
How the War on Terrorism Affects Access to Information
and the Public's Right to Know

A project of The Reporters Committee for Freedom of the Press
March 2002

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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.
- A proposal for secret prosecutions of non-American citizens by military tribunals.
- 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. While some information logically should be withheld because it could pose a direct threat to American ground forces or tip off a terrorist that he is under surveillance, 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. More information is becoming available from government agencies. It appears that any military tribunals, for example, will be conducted publicly. Recent military offensives have included open coverage from the media.

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.

This Reporters Committee "White Paper" will hopefully be the first of a series of reports outlining threats to media coverage of important news stories. The report begins with a chronology of events related to government secrecy since President George W. Bush took office. Major secrecy initiatives are discussed in depth later in the report, which concludes with a summary of parallel secrecy actions taken by state governments since September 11.

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– 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.

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.

20 - Bush signs an executive order empowering the Secretary of Health and Human Services to classify information as "secret."

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.

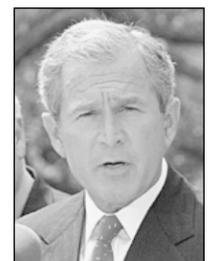
6 - The House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations holds a hearing concerning Executive Order 13233 and the Presidential Records Act.

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 secret military tribunals.

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.

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, 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.

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.

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 federal 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 U.S. 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.

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 - 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 of Energy, to release records from Cheney's Energy Task Force.

Covering the war

War in Afghanistan coverage blankets the nation's airwaves and newspapers every day, giving the considerable impression that Americans know or can know almost all there is to understand about the United States' involvement in the conflict.

But how much information do they really have?

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.

Defense officials describe the war on Afghanistan as a different kind of war, one the Pentagon often describes 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 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 Defense Secretary Donald 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.

Five months later, 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.

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

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 has never been at the front lines with American troops.

On the occasion 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.

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 American troops killed or injured by a stray bomb north of Kandahar. The Pentagon later apologized but the dam-

age 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 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, Press 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-Qaeda and Taliban fighters that had regrouped near the town of Gardez.

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

By then, the war was 149 days old.

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

The truth is, the American media's vantage point for the war has never 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.

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 rampant, 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 issue if the judiciary 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 opera-

tions.”

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.

“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.

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. After all, the First Amendment spares the press from prior restraint; it does not guarantee they 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 case 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. The Pentagon, as a result, 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

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.

Press advocates could argue that the Pentagon violates its own regulations in keeping reporters from conflicts.

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 some 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 might be 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, mostly from foreign ones. 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 just 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.” Conflict after conflict they willingly risk their lives to tell the world the truth about events, as the unfortunate 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.

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.

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

Military tribunals

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 for a variety of reasons 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.

To date, the government has not issued specific regulations for the proposed military tribunals. Meanwhile, the Senate is considering a bill that would authorize the tribunals, as long as the military provided certain protections.

Because of the uncertainties of the exact form a tribunal may take, it is difficult to evaluate the potential First Amendment restrictions on the press.

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 to try foreign nationals who were accused of committing war crimes a few times. The Supreme Court has addressed the issue of tribunals several times and has permitted such proceedings 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 military, 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 a few years

later 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 this 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 discussion 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.

Because of the uncertainties of the exact form a tribunal may take, it is difficult to evaluate the potential First Amendment restrictions on the press.

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.

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.

Stone, in writing the opinion, 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. Kabanamoku*, 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 Gen. Douglas MacArthur of the U.S. military, 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 dependents 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.

As noted above, 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.

Tribunals and the law

Under modern law, military courts are usually 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 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 what 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 that 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

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

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

‘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.

Also, there is, 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 Veigh 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 safeguards and substantive evaluations of the facts as would be expected in civilian court.

Recommendations

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

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, 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 immigration & terrorism proceedings

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.

Background

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.

In theory, court closures should be determined on a case-by-case basis. 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.

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 ACLU 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*’s suit asks for access to all future proceedings and for copies of transcripts of all past proceedings.

The ACLU’s suit focuses on Creppy’s order to close all immigration proceedings. The ACLU has 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 both lawsuits are Attorney General John Ashcroft, Creppy and Hacker.

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, arguing that it is unconstitutional.

Individual detainees may be challenging the blanket closure order, as well. The *New Jersey Law Journal* reported that a Newark lawyer, Bennet Zurofsky, who is representing a detainee, has challenged the rule during his client’s proceedings, arguing that the closure order violates his client’s Fifth Amendment due process rights and also violates the Justice Department’s own regulations.

Zurofsky claims that the order violates due process rights because it prevents detainees from defending themselves. The Creppy order bars everyone except the judge and the lawyers from the proceedings. The *New Jersey Law Journal* reported that Zurofsky’s client wants his cousin to attend the proceedings as a witness, but the secrecy order has prevented it.

The Justice Department has defended the

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.

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

Sorting it out

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, each case should 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 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.

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 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. Court TV 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, 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* 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."

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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 with 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-NY) 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 Improvement 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, Bush was 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, that 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 bomb-

States have gradually permitted cameras inside courtrooms. Currently, all 50 states permit audio and visual coverage in some circumstances.

*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.*

er 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 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 had argued that the ban on cameras is unconstitutional because it discriminates between print and broadcast 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 a 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 broadcast-

ing photographic images of the physical layout of the court and of court personnel.

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

Brinkema's ruling is 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 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.

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

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 hasn't always been for the Bush administration's or the government's lack of trying. As reporters battle restrictions in covering a war raging in Afghanistan, they've faced several obstacles, albeit sporadic, in covering news events stateside after the terrorist 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. So far, Ferry has not been successful in securing 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.

If a theme developed with stateside bans, it had to do with restricted 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. 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 couldn't 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 news-gathering 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 didn't 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.

Six months after September 11, broadcasters still haven't gotten an explanation why news helicopters were among the last aircraft to return to the sky.

*"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."
— George Bush*

The USA PATRIOT Act

Government agents gained broad new powers to investigate terrorism through wiretaps and other electronic surveillance when President Bush signed the USA PATRIOT Act into law on Oct. 26, 2001.

Just six weeks after the terrorist attacks on the World Trade Center and the Pentagon, Congress rushed to enact the sweeping new enforcement powers with little debate. The awkwardly named law — the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 — gives government investigators greater authority to track e-mail and telephone communications and to eavesdrop on those conversations.

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

The law 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."

While the direct ramifications of the new law on journalists are still largely unknown, 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 idea did not become law.

Journalists should become familiar with the electronic surveillance features of the new law because those provisions are the most likely to pose a problem for 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). (50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862)

Unlike wiretapping conducted under domestic law enforcement procedures, FISA allows

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

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, U.S. corporation or something similar — 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 or assumed a false identity on behalf of a foreign power while already in this country. (50 U.S.C. § 1801 (b)(2))

Unlike ordinary wiretaps, a secret court grants FISA wiretaps. (50 U.S.C. § 1803)The FISA court — a group of seven judges from different federal circuits that meets twice a month in Washington, with two judges always available in Washington — reviews applications for wiretaps. Its proceedings are confidential.

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.

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

What is a roving wiretap?

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, 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 this means 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, al-

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.

though 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. 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 is not reluctant to ignore those guidelines if it believes the reporter might have information that could help a criminal investigation.

Last summer, the Justice Department violat-

ed the guidelines 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

One of the major problems confronting the news media since September 11 is the regression of federal and state governments in the area of release of information. The rollbacks to access cover a diverse collection of data, from names of terrorism-suspect detainees to library information on bodies of water. And not surprisingly, the new attitude can be traced straight back to the top, as seen in the policy statement released by the Attorney General in October.

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

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The House committee with FOI oversight on March 7 edited its guidebook for FOI users to specifically reject the Ashcroft memorandum.

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. It stated in the guide “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*)

Access to the Detainees

After more than 1,100 non-U.S. citizens were detained in connection with September 11, Attorney General John Ashcroft swore 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 Freedom of Information 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.

These 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 in late October filed an FOI request with the Justice Department and some of its components, including the Immigration and Naturalization Service. 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 federal district court in Washington, D.C. 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 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.

The case is still before the court.

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 inmates serving time because the state's Freedom of Information 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. (*Brady-Lunny v. Massey*)

In New Jersey, a superior court judge in February permitted the federal government to participate in a case brought by the American Civil Liberties Union for the names of detainees held in state facilities in Hudson, Passaic and Middlesex Counties.

Lawyers for the counties argued that their contracts with the federal government prohibited the release of names. The attorney for the federal government argued at a hearing in Jersey City that the federal government has a strong interest in secrecy.

"It's a worldwide investigation, and arguably, some of these individuals could have connections to terrorists," she said.

"It would be a violation of the privacy rights of individuals for me to create some kind of list."
— John Ashcroft

That case was still ongoing in early March. (*ACLU v. County of Hudson*)

Concealing the “Infrastructure”

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

However, congressional measures are on hold while senators look again at the problems.

The government 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.

September 11 fueled existing fears of an information meltdown.

Congress and the administration were taking a long look at what could happen to the 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 infrastructure became one of how to protect the infrastructure from terrorists, increasing its relevance to the moment.

The so-called Y2K bug, where scientists worried that computers might interpret the calendar change from 1999 to 2000 as reverting back to 1900, sparked concerns about what might happen in an actual breakdown of what has become known as the “critical infrastructure.” Government officials and congressmen explored ways to weed out systemic vulnerabilities in telecommunications, energy, financial services, manufacturing, water, transportation, health care and emergency services.

For government to get a handle on a problem, it needs information from private industry to understand how vulnerable those systems might be.

But industry lobbyists balk at the notion of exchanging information with government. They claim that without absolute assurances that government will hold the information in confidence, industries simply 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.

They argue that if they provide information, they risk its disclosure under the federal Freedom of Information Act, even though an FOI Act exemption provides ample protection for trade secrets and commercial and financial information. Furthermore, agencies are constrained from disclosure by a Reagan-era executive order to first seek a submitting company’s views on re-

lease.

The Critical Infrastructure Information Security Act introduced in late September by Sen. Bob Bennett (R-Utah) would foster “secure disclosure and protected exchange” of information between the government and private industry. It contains elements of a House bill titled the Cyber Security Information Act, which was introduced by Rep. Tom Davis (R-Va.) and Rep. Jim Moran (D-Va.), congressmen who actively pushed a similar measure in the last Congress.

FOI advocates have criticized the confidentiality measure as unnecessary and so sweepingly inclusive that it would prevent government and citizen oversight of industry, even when companies perform illegal activities.

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 act, it would have serious aftereffects.

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 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.

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.

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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, the National Archives and Records Administration, the NASA Glenn Research Center, the International Nuclear Safety Center, the Los Alamos National Laboratory, the Bureau of Transportation Statistics’ Geographic Information Service, 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.

A Bad Omen: The Presidential Records Act

Years from now, what will we know about what discussions the administration of President George W. Bush held about the events surrounding September 11? Perhaps very little, if the administration’s attitude toward the release of former President Ronald Reagan’s papers is any indication.

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 the claims from historians and journalists that the White House had just 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.

“We are confident that, over time, the vast majority of presidential records—including many otherwise privileged records—will be made available to the public,” he wrote.

Historians and journalists are still waiting.

Ironically, if Bush had left the matter alone, the records would already have been released.

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 Herbert Walker Bush.

Gonzales’s phrase “over time” causes historians and journalists considerable consternation.

The Bush order could effectively seal the 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 re-sealing 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.

Some of the papers have seeped out . . . very slowly and gradually.

The National Archives and Records Administration, charged under the Presidential Records Act of 1978 with monitoring the disclosure of such documents, released 67,000 pages from the cache of Reagan files due for release last year. But more than 1,000 more Reagan documents—and an undetermined thousands more from the elder George Bush’s eight years as vice president—remain boxed.

A coalition of historians and open government advocates, including the Reporters Committee for Freedom of the Press, have filed a lawsuit for the records, arguing that the president’s order violates the Presidential Records Act. (*American Historical Association v. National Archives*)

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

Ironically, if Bush had left the Presidential Records Act alone, the Reagan papers would already have been released.

The lawsuit asks the court to impose a permanent injunction ordering the National Archives to ignore the Bush Order and to make the Reagan and Bush papers immediately available.

applicable to the president taking office on Jan. 20, 1981, and so Ronald Reagan became the first president subject to the provisions of this 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 and 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 extensions — 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.

On Nov. 28, the coalition filed its lawsuit in

federal district court in Washington, D.C. . The coalition contends the 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 and to make the Reagan and Bush papers immediately available.

Meanwhile, the National Archives on Jan. 3 secured permission to release 8,000 pages of the Reagan documents. At present, it has yet to release more.

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 much of their materials 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 forbids withholding presidential records for the sole reason that 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.

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 an undetermined thousands of pages of Bush vice-presidential records remain sealed.

The Bush administration seeks dismissal of claims raised in *American Historical Association v. National Archives*, arguing that the issues aren’t ripe. The mere release of the Reagan and Bush documents, it says, would make the case moot.

The case for the Reagan papers, true, 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 Court determined that the privilege in presidential records succumbs to “erosion over time.”

The rollback in state openness

The states' most dramatic responses to terrorism have been through legislative attacks on open records and meetings laws in the hopes that secrecy would lead to security.

States have been eager to follow in the footsteps of the federal government in the war on terrorism through legislation.

Many states created their own versions of an Office of Homeland Security and attempted to draft roving wiretap provisions using the actions of the federal government as a model.

However, the states' most dramatic responses to terrorism have been through legislative attacks on open records and meetings laws in the hopes that secrecy would lead to security, even though no one has shown that open government in any way exacerbated the events of September 11. Out of the overwhelming number of antiterrorism bills proposed, most of them dealt with secrecy in one form or another.

Most of the state legislatures had either adjourned or neared the end of a 2001 session by the time the attacks occurred. Their first opportunities to address September 11 came in 2002. Proposed measures to exempt information are a hot topic in state legislatures this year.

Most states are considering proposals that would keep 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. Many states have also proposed exemptions for architectural drawings of city buildings and infrastructure, including utility plants, bridges, water lines, sewer lines and transportation lines.

Many 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 having the power to quarantine people as a result of a biological attack and roving wiretap provisions. However, some legislation had enough momentum to find its way into law.

In Florida, for example, the gravity of September 11 helped antiterrorism measures glide through the Legislature. The "Sunshine State" once enjoyed a reputation as one of the most open and accessible governments, but legislation expanding freedom of information exemptions for security sullies its nickname.

In many states, legislators and First Amendment proponents have been successful in opposing antiterrorism legislation that violates open government laws, arguing that the legislation is an overreaction.

Terrorism and the aftermath of the attacks provided many public companies and hospitals with the opportunity to renew efforts to persuade state legislators to carve out exemptions for information about them. For example, utility companies and hospitals in Missouri had been trying to persuade the state's legislators for years to keep their records and building maps secret but had been unsuccessful until recently in convincing any legislators of the need to introduce bills protecting that information. Revised packages of their old proposals now appear as security measures.

State attempts to counter the threat of terrorism by increasing secrecy are not limited to legislation. In New York, James K. Kallstrom and James G. Natoli, the directors for the Office of Public Security and the Office of State Operations, sent a confidential memorandum to the heads of all state agencies directing them to reevaluate all "sensitive information" they possess. It directs agencies to remove all sensitive information from the Internet and to exempt it from FOI disclosures. The memorandum defines sensitive information as "information related to systems, structures, individuals and services essential to the security, government, or economy of the state."

In Oklahoma, Gov. Frank Keating created a security preparedness panel by executive order to discuss state security measures in secret, but his powers were limited by state statute and by the state's Open Records Act. Attorney General Drew Edmondson later determined that the governor's panel would not be subject to the act because it had no budget, no state employees and no lawmaking powers.

And the list goes on. Here are some of the other proposals and bills appearing in state legislation around the nation.

California

- 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; 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. (AB 1763)

Connecticut

- 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. (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. (HB 5624)

- 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. (SB 486)

Florida

- A Senate bill proposes to expand an existing exemption to the state FOI law to include threat assessments, threat-response plans, emergency-evacuation plans and manuals for various security measures. It would also close any portions of meetings that would reveal security system plans. (SB 486, HB 735)

- A Senate bill proposes to create a new public records exemption for emergency response plans for public or private hospitals during acts of

terrorism. It would also close any portions of meetings that would reveal such plans. (SB 488)

- A Senate bill proposes to create 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 be included in the exemption. (SB 490)

- A Senate bill proposes to create a new public records exemption to ease transmission of public documents between law enforcement agencies. The public documents must relate to an active investigation to be included in the exemption. The law enforcement agency has the responsibility to tell the custodial agency that the investigation is no longer active. (SB 492)

- A Senate bill proposes to create a procedure to allow 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 is a viable threat of terrorist attack. The department must show evidence of the threat and that inspection or copying of the record would jeopardize the investigation. (SB 494)

Idaho

- An Idaho House bill would exempt from disclosure records that provide detailed evacuation plans and emergency response plans, the release of which would "have a likelihood of threatening public safety." (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 constitute 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 the legislation passed the House, the Senate did not pass the bill. (HB 459A)

- State representatives also propose to exempt 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. (HB 560)

- A Senate bill revises wiretapping provisions to allow law enforcement agencies to intercept computer and cell phone communications under certain circumstances. (SB 1349)

Kentucky

- Senators proposed to amend the open meetings law allowing the closure of meetings at which secure records are discussed. The bill would exempt 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. (SB 136)

Maryland

- Two bills, one in each house, have been proposed to authorize a custodian to deny access to a public record if access would endanger the public. (SB 240; HB 297)

- A House bill proposes the creation of 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. (HB 361)

- Bills in each house have been 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 provides 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. (HB 916; SB 720)

Michigan

- Similar proposals in each house would add another exemption from disclosure for records and information related to security matters, including security plans, emergency response plans and other plans for responding to acts of terrorism and similar threats. (SB 933; HB 5349)

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. (HB 1445)

- A Senate proposal would expand 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. (SB 712)

Nebraska

- Called the Emergency Health Powers Act, legislation 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. (LB 1224)

Oklahoma

- A Senate bill was amended to keep confidential all records pertaining to “security mea-

asures,” including surveillance tapes, security plans and security surveys. It also allowed all public agencies to keep the information secret. (SB 1472)

- A sweeping House bill related to antiterrorism would permit the court to authorize government wiretapping; redefine terrorism and increase the punishment for crimes committed with terrorist intent; allow for closed executive sessions to discuss acts of terrorism and response plans; require citizenship to appear on driver’s licenses; establish an Oklahoma Office of Homeland Security and expand the state police powers in case of an emergency or terrorist attack. (HB 2764)

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. (S 2324)

South Carolina

- A House bill, called the “Omnibus Terrorism Protection and Homeland Defense Act of 2002,” would criminalize aid to a terrorist or terrorist organizations, increase penalties for various terrorist activity, including contamination of agricultural crops and livestock through biological or chemical agents and increase the government’s power to conduct roving wiretaps. (H 4416)

South Dakota

- A House bill proposes to clarify the crimes included in “terrorist acts” and increase the penalties for crimes that are committed with terrorist intent. The crimes that are included are already outlawed. (HB 1305)

Tennessee

- Two bills, one in each house, would criminalize any distribution or delivery of biological warfare agent, chemical warfare agent, nuclear or radiological agent as an act of terrorism or as a hoax. (SB 2492; HB 2585)

- Several antiterrorism bills, all named “Terrorism Prevention and Response Act of 2002,” propose 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. (SB 2574; HB 2545; HB 3232)

- 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. (SB 2811; HB 2661)

Washington

- 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.” (HB 2411)

- A House bill proposes to restrict access to site plans, information in emergency preparedness plans, and technical information. (HB 2646)

- A Senate bill proposes to restrict access to certain public information related to state facilities and communications networks. (SB 6439)

Wisconsin

- A Senate proposal would close access to

security plans for public utilities filed with the state Public Service Commission. The proposal would also prohibit municipalities from releasing the records as well. (SB 394)

Wyoming

- A Senate bill proposed 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. (SF 67)

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The original 1992 nine-point statement of principles signed by Pentagon officials and news media representatives can be found in Appendix IV of the Freedom Forum report *America's Team: Media and the Military*, located at:
<http://www.freedomforum.org/templates/document.asp?documentID=13999>

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The proposed Senate bills to authorize military tribunals — S 1941 and S 1937 — can be found by searching at <http://thomas.loc.gov>.

Access to immigration & terrorism proceedings, page 13

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Press Enterprise Co. v. Superior Court (Press Enterprise II), 478 U.S. 1 (1986)

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The ACLU's complaint in the Michigan case is online at <http://www.aclu.org/court/haddad.pdf>

The ACLU's complaint in the New Jersey case is online at <http://www.aclu.org/court/creppy.pdf>

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The USA PATRIOT Act, page 18:

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Also see 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), and 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) http://www.fpc.gov/CRS_REPS/tssa1210.pdf

Other useful Web sites for 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/1110101a.html>.

Freedom of Information, page 21

Ashcroft memorandum, page 21

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

Critical infrastructure, page 24

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, page 24

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 antiterrorism 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, page 25

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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>