September 2005

RCFP WHITE PAPER

Homefront Confidential

SIXTH EDITION

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

Prepared by

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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

Sixth Edition
September 2005

A project of The Reporters Committee for Freedom of the Press

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Key

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

SEVERE
HIGH
ELEVATED
GUARDED
LOW

Threat Level *Section*

Foreword

In the days immediately following September 11, the U.S. government embarked on a disturbing path of secrecy. 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.

At first, we hoped that the move toward secrecy would be short lived. The actions would be viewed as temporary or "emergency" measures. Unfortunately, that has not been the case. Led by secrecy-loving officials in the executive branch, secrecy in the United States government is now the norm.

Over the past four years, the federal government has taken a variety of actions designed to restrict information from reaching the public, including:

• A directive to agency heads by former Attorney General John Ashcroft that changes the interpretation of the federal Freedom of Information Act to allow the agencies to deny access more often to public records if a claim of invasion of privacy or a claim of breach of national security can be alleged.

• Secret imprisonment of more than 1,100 non-American citizens on alleged claims of immigration violations or as material witnesses.

• Aggressive investigation of "leaks" of national security-related information that has resulted in subpoenas of reporters and citations of reporters for contempt of court in several federal courts throughout the country.

• Secret arrests and indictments of perhaps dozens of suspects in the War on Terror.

• New layers of security for government documents that make it virtually impossible to exercise oversight of government operations.

• New federal laws and regulations that override state open records laws.

In our first *Homefront Confidential* White Paper in March 2002, we argued that no one has demonstrated that an ignorant society is a safe society. Citizens are better able to protect themselves and take action when they know the dangers they face. That principle applies more than ever today. But in the four years since September 11, an astonishing amount of information has been taken away from the American people.

There has been modest progress in only one area. The Pentagon created an elaborate "embedding" system to place more than 700 journalists with U.S. military units during the invasion of Iraq in 2003.

Despite early optimism from legal experts, appellate courts have been very reluctant to weigh in on actions taken by federal agencies. So far, the executive branch has had free reign in determining how much citizens will know about the War on Terror.

American citizens and lawmakers must speak up, or their ideal of a free and open society will be a thing of the past. American citizens hopefully are less frightened than they were in September 2001, and some are more determined to maintain civil rights and liberties. Some citizens — but not enough — have started to object to the secret imprisonment of witnesses and immigrants. They want details about just how much the USA PATRIOT Act affects their civil liberties. Americans are questioning whether they were lied to when the Bush administration justified war with Iraq with claims about weapons of mass destruction. And Congress has introduced legislation that would create a federal "shield law" to allow reporters to protect the identities of confidential sources in most situations.

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

Homefront Confidential includes a threat assessment to the public's right to know based on the color-coded scheme used by the Department of Homeland Security. Just as the government assesses threats to the nation's security, this report assesses how government actions have affected the media's ability to provide information to the public.

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

For daily updates on threats to the public's right to know, log on to our weblog at www.rcfp.org/behindthehomefront, funded by the Robert R. McCormick Tribune Foundation.

The Reporters Committee owes special thanks to the John S. and James L. Knight Foundation for funding the first and third editions of this project. Thanks also to our staff members who have contributed to this report since its first edition in 2001: Gregg Leslie, Rebecca Daugherty, Kimberley Keyes, Kirsten B. Mitchell, Grant Penrod, Ryan Lozar, James McLaughlin, Jeff Lemberg, Kirsten Murphy, Jennifer LaFleur, Sara Thacker, Wendy Tannenbaum, Gil Shochat, Ashley Gauthier, Monica Dias, Mimi Moon, Phillip Taylor, Amanda Groover, Thomas Sullivan, Jennifer Myers, Tejal Shah, Alba Villa, Corinna Zarek, Kristin Gunderson, Kevin Capp, Jane Elizabeth, Jim Getz, Kate Dunphy, April Thorn, Paula Canning, Katrina Hull, Emily Harwood, Lolita Guevarra, Victor Gaberman, Maria Gowen and Lois Lloyd.

Lucy A. Dalglish
Executive Director
September 11, 2005

A chronology of events

SEPTEMBER 2001

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 news-gathering 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 from its enforcement files, including information on its Web site about security violations.

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

Bush

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 buys 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 again become available to the public.

Also, by this date, the Bureau of Transportation Statistics has taken down from its Web site the 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 sites.

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

bin Laden

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 in Afghanistan.

18 - Federal Freedom of Information 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.

Also, 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.

26 - The USA PATRIOT Act is enacted, thereby expanding the FBI's ability to obtain records through secret court orders and giving government investigators greater authority to track e-mail and telephone communications and to eavesdrop on those conversations.

29 - A coalition of civil rights groups, including the Reporters Committee, files a formal FOI Act request to obtain information about more than 1,000 noncitizen "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

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

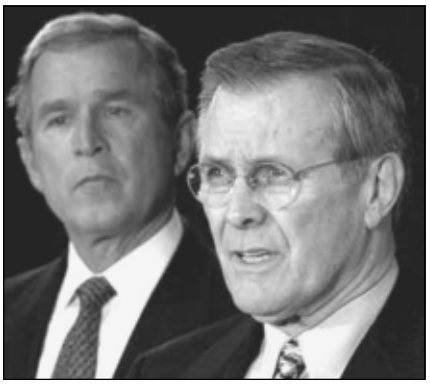
13 - Bush issues a Military Order, stating that suspected terrorists could be tried by military tribunals. No provision is made in the order for public access to the proceedings.

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

26 - 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.

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.



Bush & Rumsfeld

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

DECEMBER

5 - The Reporters Committee and 15 other groups file a lawsuit against the Department of Justice, alleging that it 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. For the rest of 548 detainees still in custody, it gives only 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."

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

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

13 - News organizations air videotape of Osama bin Laden boasting about terrorist attacks.

14 - Representatives of the Global Relief Foundation, an Islamic charity suspected of funding terrorism, are tipped off to an FBI raid when *New York Times* reporters call for comment, according to statements made later by the charity.

16 - Knight Ridder news service 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 - The Pentagon disbands pool coverage and allows open coverage in Afghanistan.

Also, the Bush administration announces that captured Taliban and al-Qaida 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 2002

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

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

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

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

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

18 - In Alexandria, Va., U.S. District Judge Leonie Brinkema denies Court TV and C-SPAN's motion to broadcast or record the trial of Zacarias Moussaoui.

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

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

FEBRUARY

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

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

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

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 in Washington, D.C., orders the Department of Energy to release records from Vice President Dick Cheney's energy task force.

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.

Cheney

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

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

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

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

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

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

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

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

APRIL

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

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

18 - The Sixth Circuit lifts the stay on Edmonds' order, finding that there is little chance that releasing the Haddad transcripts will harm national security.

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

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

26 - In Alexandria, Va., Judge Brinkema rules that pleadings in the Moussaoui terrorism case will not be available on the court Web site unless Moussaoui consents to the posting.

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

MAY

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

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

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

Moussaoui

21 - An INS rule that authorizes INS judges to issue protective orders and accept documents under seal takes effect.

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

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

Also, Judge Brinkema rules that forensic psychological evaluation of Moussaoui will be kept under seal.

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

JUNE

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

11 - Judge Brinkema grants a motion for an order declaring that sensitive aviation security information will not be disclosed during the Moussaoui terrorism criminal proceedings.

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

13 - The INS publishes a proposed rule to require registration and fingerprinting of visitors to the U.S. if they are from a nation that poses a "security risk."

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

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

24 - The federal judge in the Moussaoui case grants a motion to withhold addresses of prospective witnesses.

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

JULY

10 - Federal prosecutors say they have ordered the Justice Department's inspector general to investigate whether government officials leaked to *Newsweek* e-mails concerning the case against John Walker Lindh.

11 - U.S. District Judge Michael Mukasey in New York rules that the government may

detain material witnesses during investigations, contradicting Judge Scheindlin's April 30 order.

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


Ashcroft

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

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

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

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

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

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

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

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

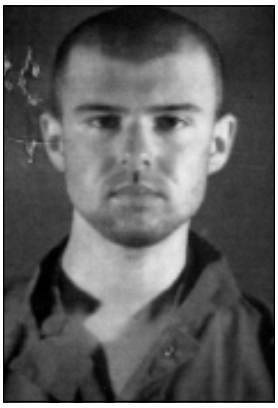
24 - A state court judge in New York grants the government's request to intervene in *Mariani v. United Airlines,* a wrongful death action.

James Ujaama, a Seattle resident and U.S. citizen, is arrested in Denver as a material witness to terrorist activity.

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

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

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


Lindh

AUGUST

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

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

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

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

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

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

12 - Reporters covering the Pentagon are meeting tighter requirements for unescorted access to the building. Only those reporters who work full-time within the Pentagon or who visit at least twice a week are allowed unescorted access to the Pentagon. Other reporters must have an escort.

The INS publishes a final rule to require registration and fingerprinting of visitors to the U.S. if they are from a nation that poses a "security risk."

15 - Judge Kessler in Washington, D.C., stays her order to the government to release names of detainees within 15 days so that it can appeal.

16 - U.S. District Judge Robert Doumar in Norfolk, Va., rules that the "Mobbs Declaration" (an affidavit by a government official) was an insufficient basis for detaining Yaser Hamdi as an "enemy combatant."

20 - The General Accounting Office issues a report on the Freedom of Information Act. The study found FOI requesters and agencies did not agree on the effects of September 11 on FOI processing. It found agencies had made some progress in FOI processing, but that backlogs continue to grow.

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

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

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

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

29 - Judge Brinkema issues a blanket order in the Moussaoui case placing "any future pleadings filed by the defendant, *pro se*, containing threats, racial slurs, calls to action, or other irrelevant and inappropriate language," under seal. The Reporters Committee joins several news organizations seeking access to those filings, objecting that a complete ban on access was not justified.

Hamdi

SEPTEMBER

9 - The Foreign Intelligence Surveillance Court of Review meets for the first time in its history to review in secret an appeal by the Justice Department regarding applications for secret search warrants used to gather foreign intelligence information under the USA PATRIOT Act.

11 - The INS rule requiring registration and fingerprinting of some visitors to the United States becomes effective.

24 - *The New York Times* files a motion to intervene in the Moussaoui criminal case for purposes of access to records. The *Times* had filed a FOIA request with the New York Port Authority, but the Port Authority refused to turn over the records, claiming that they were subject to a protective order that had been issued in the Moussaoui case. The court never rules on the motion; all parties enter into a stipulation, which the court endorsed.

26 - Moussaoui files a motion asking the court to issue a gag order on the prosecutor. The motion was denied, but Judge Brinkema had previously given attorneys specific orders not to discuss certain aspects of the case.

27 - Brinkema concludes that Moussaoui has "toned down his inappropriate rhetoric" in motions he was filing, and therefore "the administrative burden on the United States of identifying and redacting problematic language from the defendant's *pro se* filings no longer justifies a total sealing of all the defendant's pleadings." Under Brinkema's order, all of Moussaoui's pleadings will be initially filed under seal. Within ten days after Moussaoui files his documents, the United States must "advise the Court in writing whether the pleading should remain under seal or be unsealed with or without redactions."

OCTOBER

8 - The U.S. Court of Appeals in Philadelphia (3rd Cir.) issues its ruling in *North Jersey Media Group v. Ashcroft*, finding that blanket closure of immigration courts is justified by the potential threat to national security.

30 - Attorney General Ashcroft reports to Congress that anti-leaks legislation (a so-called "Official Secrets Act") is not necessary.

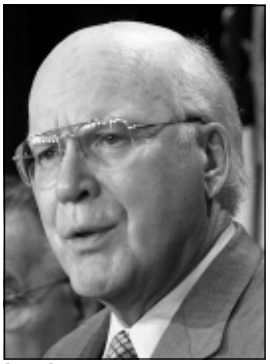
NOVEMBER

16 - The first in a series of Defense Department-sponsored reporters boot camps takes place in Quantico, Va. The week-long program puts 58 journalists through basic first aid and wartime safety training.

18 - The Foreign Intelligence Surveillance Court of Review rules that under the USA PATRIOT Act, the government may obtain search warrants from the secret FISA Court where the primary purpose of an investigation is criminal activity, not foreign intelligence.

Also, the U.S. Court of Appeals (D.C. Cir.) hears arguments in *Center for National Security Studies v. Ashcroft*. The plaintiffs, including the Reporters Committee, argue that the federal Freedom of Information Act requires the Justice Department to disclose the identities of hundreds of foreign nationals secretly detained after September 11.

25 - President Bush signs the Homeland Security Act into law.



Leahy

DECEMBER

4 - U.S. District Judge Michael Mukasey in New York rules that the president has authority as commander-in-chief to detain "unlawful combatants," but military detainee Jose Padilla has the right to challenge his detention and to consult a lawyer.

11 - The United Nations International Criminal Tribunal for the former Yugoslavia adopts a qualified reporter's privilege to prevent war correspondents from being forced to provide evidence in the court's prosecutions of war criminals. The decision provides considerable protection for journalists who cover conflict zones and who are subpoenaed to testify before the tribunal.

12 - The Reporters Committee and other press advocacy groups send a second letter to the Bush administration urging it to abide by wartime coverage guidelines established in 1992 by the Pentagon and media groups. The letter also asks the White House to ensure access to action not only in the Middle East, but stateside as well.

JANUARY 2003

8 - The U.S. Court of Appeals in Richmond (4th Cir.) overturns Judge Doumar's ruling, finding that Hamdi's detention as an enemy combatant is legitimate and he may be held without access to a lawyer.

10 - *The Washington Post* reports that an INS registration requirement has resulted in the detention of more than 500 men.

17 - Sen. Carl Levin (D-Mich.) questions Homeland Security Secretary nominee Tom Ridge about FOI provisions in the Homeland Security Act and is assured that Ridge will help "to clarify the language."

24 - The Department of Homeland Security officially starts operating as a cabinet-level agency.

27 - The Department of Homeland Security issues interim regulations to implement the Freedom of Information Act.

Also, the Department of Justice's Office of Information and Privacy posts its interpretation of the requirements of the Homeland Security Act for confidential treatment of critical infrastructure information.

28 - In his state of the union address, President George W. Bush told the nation, "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." Controversy over the veracity of this statement would lead to the subpoena of numerous journalists and the jailing of *New York Times* reporter Judith Miller on July 6, 2004, for refusing to divulge her confidential sources.

Bush also announces the creation of a Terrorist Threat Integration Center "to merge and analyze all threat information in a single location." Civil libertarians worry about the TTIC's potential to invade individuals' private lives.

29 - The American Library Association passes a formal resolution objecting to certain provisions of the USA PATRIOT Act and warns that "the activities of library users, including their use of computers to browse the Web or access e-mail, may be under government surveillance without their knowledge or consent."

Also, the INS issues final rules requiring state and local jails holding federal detainees under contracts with the federal government to keep information about them secret.

FEBRUARY

7 - The Center for Public Integrity reveals a secret draft of "PATRIOT Act II," which expands government surveillance powers and increases secrecy surrounding detainees suspected of terrorism.

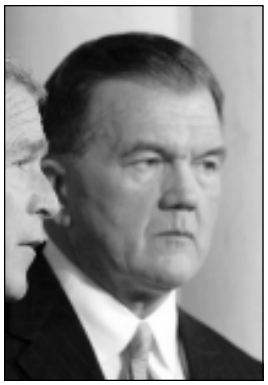
10 - The American Bar Association adopts a formal resolution that calls for congressional oversight of FISA investigations to ensure that the government is complying with the Constitution and limiting improper government intrusion.

12 - The Pentagon begins making embed assignments for what eventually will become the largest ever wartime mobilization of journalists. The Pentagon continues sponsoring combat training programs at domestic military bases to train 238 journalists in time for a possible invasion of Iraq.

Congressional leaders agree to block funding for the Pentagon's Total Information Awareness project, pending review of the data mining program's effect on civil liberties.

14 - U.S. District Judge Paul Friedman in Washington, D.C., dismisses *Hustler* publisher Larry Flynt's lawsuit against the Pentagon concerning battlefield access. Friedman said he could no longer consider the lawsuit because the Pentagon included a *Hustler* reporter among those to be embedded in future Middle East combat missions.

18 - The ACLU and other advocacy groups petition the U.S. Supreme Court to review the government's authority to conduct surveillance under FISA, as amended by the USA PATRIOT Act, where the government's primary purpose is a criminal investigation rather than foreign intelligence. The group also asks the justices to review how the law contravenes the First and Fourth Amendments.



Ridge

20 - President Bush signs the 2003 Consolidated Appropriations Resolution, including a short provision written by Rep. George Nethercutt (R-Wash.) to make government data on gun sales secret to protect "homeland security," among other reasons.

25 - Senators Leahy, Grassley and Arlen Spector (R-Pa.) introduce Senate Bill 436, requiring that FISA applications and opinions containing significant legal interpretations be publicly available in an annual report submitted by the attorney general and that FISA rules and procedures be shared with congressional committees. The bill also requires that the aggregate number of FISA wiretaps and surveillance orders against Americans and requests for information from libraries be disclosed to congressional committees.

Also, the Reporters Committee comments on FOI regulations, asking the Department of Homeland Security to incorporate broader expedited review provisions that are found in regulations used by the Justice Department.

26 - The U.S. Supreme Court cancels its review of the government's challenge to court-ordered release of gun sale data in *City of Chicago v. Dept. of the Treasury* and asks the lower court to see what effect the Nethercutt appropriations amendment has on release of the data under the federal Freedom of Information Act.

27 - In a contentious exchange over the costs of war with Iraq, the Pentagon's second-ranking official disparages a top Army general's assessment of the number of troops needed to secure postwar Iraq. House Democrats then accuse the Pentagon official, Paul D. Wolfowitz, of concealing internal administration estimates on the cost of fighting and rebuilding the country.

A coalition of newspapers files a complaint demanding that transcripts of Mohammed El-Atriss' unprecedented ex parte, in camera bail hearings in Passaic County, N.J., be released to the public.

Also, The American Society of Newspaper Editors releases an evaluation of the effect of "PATRIOT Act II" on newspapers. It concludes that the act's impact on the First Amendment can be divided into three general categories: (1) Increased surveillance authority that might chill speech, especially political dissent; (2) Increased restrictions on access to government information, either generally or through the Freedom of Information Act; and (3) Increased criminal provisions that might affect the First Amendment protections of the right to free association.

28 - The Pentagon releases ground rules for embedding reporters among U.S. troops in future Middle East combat missions, particularly if the United States launches attacks on Iraq.

Also, the Pentagon releases a draft list of crimes, including hijacking, poisoning and rape, that terror suspects prosecuted by U.S. military tribunals could be charged with.

The media parties in *North Jersey Media Group v. Ashcroft* petition the U.S. Supreme Court to review the Third Circuit's decision to close deportation hearings.

MARCH

2 - *The Philadelphia Inquirer* reports that many terrorism prosecutions may not be what they seem: Of 62 indictments by the U.S. Attorney's Office in New Jersey in "terrorism cases" — the most of any office in the country — 60 of those cases were against "Middle Eastern students charged with paying others to take their English proficiency tests."

Flynt

4 - Attorney General Ashcroft tells the Senate Judiciary Committee he has authorized more than 170 emergency searches since the September 11 attacks — more than triple the 47 emergency searches authorized by other attorneys general in the last 20 years. Ashcroft says he also would continue efforts to remove "excessive restraints imposed in the late '70s" on police and surveillance powers, according to a *Newsday* report. Ashcroft also asserted that courts had upheld all of his policies challenged by lawsuits, although Sen. Russell Feingold (D-Wis.) pointed out that one appellate court ruled against his policy on blanket closing of special interest immigration hearings, and a federal court in Washington, D.C., ordered the department to release the names of detainees picked up in the anti-terror sweep following the attacks.

The *Akron Beacon Journal* reports that the Ohio Department of Health's choice of keeping secret the location of smallpox-vaccinated healthcare workers was intended to keep the information from terrorists so that they could not target hospitals. But healthcare workers complain that it means patients, including those with seriously affected immune systems, also do not know where they can receive treatment from healthcare workers who have been vaccinated.

6 - Rep. Bernard Sanders (I-Vt.) introduces the "Freedom to Read Protection Act," which "amend[s] the Foreign Intelligence Surveillance Act to exempt bookstores and libraries from orders requiring the production of any tangible things for certain foreign intelligence investigations, and for other purposes."

7 - The first wave of embedded journalists — 662 of them — ships out to Iraq. By the time President Bush announces the end of major combat on May 1, more than 700 journalists will have been embedded with U.S. troops.

8 - A contract for Iraqi post-war construction is secretly awarded to Halliburton, the company formerly headed by Vice President Dick Cheney. Throughout early March no-bid and limited-bid contracts are awarded to selected companies, including prominent Bush campaign contributors. Requests for the contracts were sent by the Pentagon as early as November 2002.

11 - Chief U.S. District Judge Michael Mukasey in New York issues a sharp opinion that not only reaffirms his original ruling that detained U.S. citizen Jose Padilla is entitled to a lawyer, but adds a rebuke to the government: "Lest any confusion remain, this is not a suggestion or a request that Padilla be permitted to consult with counsel, and it is certainly not an invitation to conduct a further 'dialogue' about whether he will be permitted to do so. It is a ruling — a determination — that he will be permitted to do so."

13 - Sen. Patrick Leahy (D-Vt.) introduces the "Restoration of the FOI Act."

17 - U.S. District Court in Los Angeles rules in *Coastal Delivery Corp v. U.S. Customs Service* that the agency can withhold information on seaport inspections because terrorists might find it useful.

22 - The first journalist is killed in Iraq. Terry Lloyd, of ITN television in the U.K., was killed when a group of journalists got caught in crossfire in southern Iraq.

24 - The U.S. Supreme Court refuses to allow the ACLU to challenge the Justice Department's use of secret FISA warrants under the USA PATRIOT Act in cases where the primary purpose is a criminal investigation but gathering foreign intelligence information is also a "significant purpose."

The existence of Halliburton's Iraq post-war reconstruction contract is revealed.

25 - President Bush amends the Clinton Executive Order on Classification, broadening the classification system.

Also, a U.S. District Court in Salt Lake City issues a ruling in *Living Rivers v. U.S. Bureau of Reclamation,* to deny maps on potential flood areas because terrorists might use that information.

26 - The New York Stock Exchange revokes press credentials issued to Al-Jazeera reporters.

Also, the U.S. begins its first prosecution of members of an alleged terror cell in the U.S. since the 2001 attacks. The Associated Press reports that jury selection took place in the Detroit trial of four men accused of conspiracy to support terrorism, but the proceedings were closed.

Kelly

APRIL

1 - In an 18-page letter to Attorney General Ashcroft, the House Judiciary Committee requests information regarding the implementation of the USA PATRIOT Act.

4 - The first U.S. journalist is killed in Iraq. Michael Kelly of the *Atlantic Monthly* and *Washington Post* was killed along with a U.S. soldier when the Humvee they were riding in ran off the road and into a canal.

8 - Al-Jazeera offices in Baghdad are struck by U.S. bombing mission.

Also, U.S. tanks fire rounds into the Palestine Hotel in Baghdad, killing two journalists.

15 - Department of Homeland Security issues regulations on protecting critical infrastructure information.

25 - President Bush authorizes a new national policy that establishes guidance and implementation actions for commercial remote sensing space capabilities. The directive moves more government satellite imaging to commercial companies. The policy also allows the government to limit distribution or collection of photos in cases of national security.

MAY

1 - Attorney General Ashcroft discloses that the government obtained a record 1,228 warrants under the Foreign Intelligence Surveillance Act (FISA) last year for secret wiretaps and searches of suspected terrorists.

Also, the Senate Intelligence Committee rejects White House proposal that would allow the CIA and the Pentagon to issue "national security letters" requiring institutions to provide personal and financial information about their customers.

2 - The General Counsel of the Department of Defense issues formal instructions that will govern military tribunal proceedings.

8 - Senate passes a FISA amendment by a vote of 90-4, which expands the government's authority to conduct searches and surveillance of suspected terrorists even if they do not have ties to a foreign government or terrorist organization. The amendment targets "lone-wolf" foreign terrorists and does not apply to U.S. citizens.

10 - Six French journalists traveling to the United States to cover a video game show are denied entrance because they lacked press visas.

17 - *The New York Times* reports that U.S. officials admitted that there had been several secret arrests of suspected al-Qaida operatives. The alleged operatives were in the U.S. conducting "presurveillance activities." The exact number of men, their identities, where they were arrested, where they were held, and the charges against them have not been disclosed.

20 - House Judiciary Committee releases answers received from the Justice Department, responding to its inquiry regarding implementation of the USA PATRIOT Act.

Also, the Justice Department says that as of January 2003, the number of people detained as material witnesses in terrorism-related cases was fewer than 50, with 90 percent detained for 90 days or less. Half were held for 30 days or less. The details were provided in a report to the House Judiciary Committee, in response to its request for information about the War on Terror.

24 - The FBI apologizes to eight Egyptian men who lived in Evansville, Ill., and who had been detained after September 11 as material witnesses. They were held without being charged with a crime and were unable to communicate with their families.

27 - U.S. Supreme Court declines to review *North Jersey Media Group v. Ashcroft*, meaning that the split in the circuits over closed deportation hearings will remain.

JUNE

2 - The Justice Department's Inspector General's report on the treatment of aliens detained after September 11 reports that the Bureau of Prisons did not provide adequate information about the location of the detainees to their attorneys or families, and these polices hindered the detainees' ability to obtain and consult with legal counsel.

12 - Rep. Joseph M. Hoeffel (D-Pa.) introduces the Surveillance Oversight and Disclosure Act (SODA), which requires the Justice Department to submit an annual report showing the number of search warrants issued under FISA, whether the targets were citizens or non-citizens, and the type of search conducted. In addition, the bill requires the Justice Department to provide a semi-annual report to intelligence committees regarding government requests for records from schools and public libraries.

16 - The Reporters Committee comments on critical infrastructure information rules, urging Department of Homeland Security to stay within the law and protect the information only when it is submitted by outside businesses to DHS itself.

Also, Victoria Clarke, Assistant Secretary of Defense for Public Affairs, announces her resignation. Clarke is credited by many with convincing Defense Secretary Rumsfeld to offer better media access to the battlefield through the embed process.

17 - The U.S. Court of Appeals in Washington, D.C., denies access to detainee names in a decision clouded by national security concerns in *Center for National Security Studies v. Department of Justice*.

Also, the Office of the Inspector General issues a formal report to Congress regarding the implementation of the USA PATRIOT Act, noting that it found 34 credible complaints of civil rights or civil liberties violations related to the Act in the past six months.

19 - Rep. Barney Frank (D-Mass.) introduces the "Restoration of the FOI Act" in the House, a companion to the Leahy bill in the Senate.

Clarke

Also, the Justice Department announces that an Ohio truck driver pleaded guilty to conspiring with terrorists. Iyman Faris pleaded guilty to the charges against him on May 1 in federal court in Alexandria, Va. His arrest, charge and plea had occurred entirely in secret.

23 - A Qatari man, Ali Saleh Kahlah al-Marri, is designated an enemy combatant. He had been detained as a material witness in late-2001. He was then charged in federal court for credit card fraud and for allegedly lying to the FBI. After his designation as an enemy combatant, he was transferred to military custody.

25 - Federal agency FOI officers convene for training, coordinated by the Department of Justice's Office of Information and Privacy, in how to withhold Homeland Security information.

Also, the Pentagon's Southern Command announces that it is prepared to try terror suspects at Guantanamo Bay.

26 - The *Arizona Daily Star* reports that Muhammad Al-Qudhai'een, a University of

Arizona student from Saudi Arabia, was arrested on June 13 and is being held in secret in a Virginia jail. He was apparently held as a material witness, although his hearing was not public.

JULY

3 - The Office of Information and Privacy issues a summary of training on new Homeland Security training topics for FOI officers.

4- President Bush designates six suspected terrorists to be tried by the military, but the government refuses to identify the men, say when the trials would take place, or identify the location of the trials. *The Washington Post* reports that two Britons, Moazzam Begg and Feroz Abbasi, are among the six men. The Australian government also announces that an Australian, David Hicks, is on the list.

6 - *The New York Times* publishes a column by former Ambassador Joseph Wilson questioning Bush's Jan. 28, 2003, assertion that Iraq tried to buy uranium from Africa. Wilson wrote that the CIA sent him to Africa in 2002 to investigate questions from Vice President Dick Cheney's office about whether Niger had agreed to sell a lightly processed uranium called yellowcake to Iraq. Wilson reported that such a transaction was "highly doubtful," and that he was confident that his report "was circulated to appropriate administration officials."

14 - *Editor and Publisher* magazine reports in its tally of embedded journalists that only 23 journalists remain attached to a military outfit. Most journalists had struck out on their own by that time, willing to brave the hostilities of a post-war Iraq without military support.

Rabih Haddad, head of a Michigan-based Islamic charity, is deported to Lebanon.

Novak

Syndicated columnist Robert Novak publishes a column that identifies Valerie Plame as a CIA operative. Novak says Plame was identified by unidentified senior administration officials. Willful disclosure by federal employees of such information is a felony. Plame is married to former ambassador Joseph C. Wilson IV, a prominent critic of the Bush administration's Iraq policies who concluded during a 2002 mission to Africa that there was little evidence that Saddam Hussein had sought uranium there. Wilson has said he believes his wife's identity was disclosed in retaliation for his public discussions of those findings.

16 - The *Anchorage Daily News* reports that more than 150 state and local governments nationwide have adopted resolutions criticizing the USA PATRIOT Act for violating citizens' constitutional rights.

17 - Time.com publishes a story by Matthew Cooper titled "A War on Wilson?" Cooper reported that "some government officials have noted to TIME in interviews, (as well as to syndicated columnist Robert Novak) that Wilson's wife, Valerie Plame, is a CIA official" and that the officials "suggested that she was involved in her husband's being dispatched to Niger."

22 - The U.S. House votes 308-118 to adopt an amendment to the USA PATRIOT Act prohibiting funds from being used to carry out the provision that allows the government to conduct "sneak and peek" searches with no notice to the target of the investigation.

29 - *The Denver Post* reports that, in order to avoid having to tell the FBI what patrons are reading under the USA PATRIOT Act, a Boulder, Colo., library "has decided to almost completely stop recording what books patrons have checked out."

30 - The ACLU files a complaint in U.S. District Court in Detroit alleging that portions of the USA PATRIOT Act that authorize the government to conduct secret searches and seizures are unconstitutional. Under the Act, librarians may be required to disclose the types of books people read and could not inform patrons if the government had requested such records.

Plame

AUGUST

6 - *The Washington Post* reports that another Pakistani man who allegedly had ties to Iyman Faris, Uzair Paracha, was arrested on March 31, 2003, and held as a material witness.The newspaper says Paracha would be charged soon. The case against him is under seal.

Mike Hawash, an Intel software engineer near Portland, Ore., who was detained as a material witness in February 2003, pleads guilty to giving material support to the Taliban and agrees to testify against his co-conspirators in exchange for a minimized sentence.

9 - Two Pakistani men were arrested at the Seattle-Tacoma International Airport after their names were flagged on an anti-terrorist "no-fly" list. *The Washington Post* reports that they are being held on immigration charges, as federal authorities try to determine what they were doing in the United States. Federal officials refused to identify the two men by name.

12 - Hemant Lakhani, a British citizen, was arrested in New Jersey. He allegedly is an arms dealer who tried to sell a shoulder-fired surface-to-air missile to an undercover FBI agent posing as a Muslim terrorist. Although the criminal complaint was filed under seal, reports say that he was charged with providing material support to terror groups.

22- News media groups ask Department of Homeland Security to make public comments it received on its proposed critical infrastructure information policies.

26 - In a sharply worded letter to President Bush, Democratic Sens. Hillary Rodham Clinton (N.Y.) and Joseph I. Lieberman (Conn.) demand to know why New Yorkers were given incomplete information about the potential dangers from the polluted air caused by the Sept. 11, 2001, attacks on the World Trade Center. The senators' letter was in response to a report released a week earlier by the inspector general of the Environmental Protection Agency.

27 - Signatories from 75 public interest groups ask Department of Homeland Security to publish rules on "safeguarding and sharing" information for public comment before making them effective.

28 - The New York/New Jersey Port Authority releases transcripts of emergency calls from those trapped inside the burning World Trade Center on September 11, 2001. The transcripts were released after a New Jersey judge granted *The New York Times'* request for the transcripts under the state's open records law.

29 - In a sealed opinion, U.S. District Judge Leonie Brinkema rules that accused Sept. 11 conspirator Zacarias Moussaoui must have access to the testimony of three captured al-Qaida operatives. The ruling is a setback to the government, which had argued that allowing access to the witnesses could compromise national security.

SEPTEMBER

3 - The General Accounting Office releases a study showing that one-third of federal FOI officers said that they were less likely to make discretionary disclosures of information and, of those, 75 percent cited the Ashcroft memorandum as persuasive in influencing the change.

4 - A redacted version of Judge Brinkema's order granting Moussaoui access to witnesses is released.

10 - Judge Brinkema rejects a proposed compromise in which the government would provide written summaries of the alleged testimony, setting the stage for a showdown in the U.S. Court of Appeals in Richmond (4th Cir.).

15 - The military holds a secret Article 32 hearing (similar to a probable cause hearing) for Ahmad I. al-Halabi, an Air Force translator at Guantanamo accused of spying. Though al-Halabi was arrested July 23, the news media doesn't learn of the case until Sept. 24.

16 - The Air Force Court of Criminal Appeals quashes the blanket secrecy order in the al-Halabi spying case.

22 - The Defense Dept. confirms that James Yee, a Muslim army chaplain who worked at the Guantanamo base, is being held in secret detention at a naval brig in South Carolina, for undisclosed reasons.

24 - The al-Halabi spying case is reported in the national news media. The Pentagon acknowledges that al-Halabi has been charged with some 30 espionage-related counts.

25 - The *Miami Daily Business Review* reports that a heavily redacted petition for review has been filed in the Supreme Court by Mohamed Kamel Bellahouel, an Algerian-born resident of Florida who was detained in the aftermath of Sept. 11. Bellahouel, identified only as "M.K.B." in the petition, is challenging the extraordinary secrecy with which lower courts have handled his case. In the courts below, 63 of the 65 docket entries are labeled "SEALED."


Fitzgerald

29 - The Justice Department informs the White House that it has opened an investigation into the leak of CIA operative Valerie Plame's identity.

30 - The military arrests a second Guantanamo translator, Ahmed Mehalba, and charges him with making false statements. Mehalba reportedly was found with classified documents at Logan Airport in Boston.

OCTOBER

1 - Sens. Leahy (D-Vt.), Craig (R-Idaho), Durbin (D-Ill.), Sununu (R-N.H.) and Reed (D-R.I.) introduce Senate Bill 1695, which expands the PATRIOT Act sunset provision.

2 - Sen. Craig (R-Id) and others introduced a bipartisan bill (S. 1709), the Safety and Freedom Assured (SAFE) Act, which would limit roving wiretaps under the PATRIOT Act, curtail delayed notification of searches, and increases privacy protections for library users and others.

Also, with prosecutors having defied her order to give Moussaoui access to the captured al Qaida witnesses, Judge Brinkema imposes sanctions. She eliminates the death penalty and bars prosecutors from introducing evidence related to the Sept. 11 attacks.

9 - The Pentagon announces that it will no longer require journalists who visit Guantanamo to sign an agreement not to ask questions about the recent espionage arrests.

29 - Iyman Faris, the Ohio man accused of plotting to blow up the Brooklyn Bridge, is sentenced to 20 years in prison by Judge Brinkema. The judge rejects Faris' last-minute attempt to withdraw his guilty plea, citing statements Faris made in a secret hearing.

NOVEMBER

5 - The Reporters Committee files a friend-of-the-court brief urging the U.S. Supreme Court to decide whether the secret docketing of the "M.K.B." case violated the public's First Amendment right of access to judicial proceedings.

6 - *The Washington Post* reports that a Canadian citizen, Maher Arar, was detained and sent to Syria by U.S. officials, where he was tortured for 10 months before being released. The case sheds public light on a shadowy CIA practice known as "rendition," in which terror suspects are turned over to regimes that are known to engage in torture for interrogation purposes. Arar is never charged with a crime by any government.

Also, in a move that will later make it impossible for the German courts to convict two accused Sept. 11 plotters, the Justice Department, without explanation, refuses to let Germany question detained al-Qaida operative Khalid Sheikh Mohammed.

10 - The Pentagon announces that a new Program Management Office has been created to oversee Iraqi reconstruction contracts.

The Supreme Court grants review in *Rasul v. Bush*, the first major challenge to the Bush administration's conduct of the war on terrorism. The justices will consider whether U.S. courts may hear challenges to the legality of the detention of foreign nationals detained secretly in Guantanamo Bay, Cuba.

17 - A federal appeals court in New York (2nd Cir.) hears oral argument in the case of Jose Padilla, one of at least three U.S. citizens held indefinitely in secret detention, without charges, as an alleged "enemy combatant." Attorneys for the Bush administration argue that the President has authority to detain anyone, even an American citizen, on the basis of an unreviewable finding that the person is an enemy combatant.

26 - The U.S. and Australia announce that they have reached an "understanding" allowing the U.S. to conduct military tribunals for two Australian citizens, David Hicks and Mamdouh Habib. The two are being held at Guantanamo Bay, Cuba.

DECEMBER

3 - The U.S. Court of Appeals in Richmond (4th Cir.) hears oral argument on whether Zacarias Moussaoui must be given access to the direct testimony of the captured al Qaida witnesses. The argument is conducted in a "bifurcated" format, with a morning session open to the public and a closed session in the afternoon.

Also, on the same day that the government must file a Supreme Court brief in the case of Yaser Esam Hamdi, a U.S. citizen being held as an enemy combatant, the Pentagon announces that Hamdi will be given a lawyer. The announcement is conveniently timed to allow the Justice Dept. to use that fact in its brief. Hamdi had been held for more than two years without access to counsel.

5 - The National Park Service puts U.S. Park Police Chief Teresa Chambers on administrative leave because she talked to *Washington Post* staff writer David Fahrenthold about shortfalls in budgeting and staffing caused by the need to beef up security at national "icons" such as the Washington monument following the terrorist attacks. It would later call her remarks "lobbying" on budget matters.

13 - President Bush signs into law broad new law enforcement powers as a part of the second installment of the PATRIOT Act. The newly signed law redefines "financial institution" to include stockbrokers, casinos, airlines and other institutions.

17 - President Bush issues a directive to *all* federal agencies directing them to protect voluntarily submitted critical infrastructure information in line with the Homeland Security Act. The language of the Act, however, only protects CII submitted to the Department of Homeland Security.

19 - In a prelude to the Supreme Court's decision in *Rasul*, the U.S. Court of Appeals in San Francisco (9th Cir.) rules that the Guantanamo Bay detainees have a right of access to American courts.

Also, the Bush administration suffers another legal setback, as the U.S. Court of Appeals in New York (2nd Cir.) determines that U.S. citizen Jose Padilla cannot be held indefinitely based on the President's assertion that he is an enemy combatant. Padilla's release is stayed pending the Supreme Court's resolution of the issue.

30 - Attorney General John Ashcroft recuses himself from the Justice Department's investigation into the leak of undercover CIA officer Valerie Plame's identity and Special Prosecutor Patrick J. Fitzgerald, the U.S. Attorney in Chicago, is appointed to lead the investigation.

Also, retired Army major general John D. Altenburg Jr. is named Appointing Authority, or general supervisor, of the military tribunals for Guantanamo detainees.

JANUARY 2004

2 - A coalition of 23 media and public interest organizations, including the Reporters Committee, moves to intervene in the sealed Supreme Court case of *M.K.B. v. Warden*.

Also, in an effort to release reporters from confidentiality agreements with possible White House sources, FBI investigators ask administration officials to sign waivers of their rights to have private conversations with reporters concerning the Valerie Plame investigation, *Time* magazine reports.

5 - In a highly unusual move, the Justice Department files a completely sealed response to the petition for review in *M.K.B. v. Warden*, without even a redacted version for public access. It appears to mark the first time the U.S. government's legal position in a Supreme Court case is entirely secret.

8 - A New York appeals court makes public its ruling that the New York City Fire Department may not redact statements about emergency workers' personal feelings from audiotapes of responses to the 2001 terrorist attacks. However, the court held that opinions and recommendations could be redacted under an exemption to the state Freedom of Information Law.

9 - The Supreme Court grants review in the Hamdi case.

20 - Arar, the Canadian citizen whom the U.S. sent to Syria, files a civil rights lawsuit against Attorney General John Ashcroft and other U.S. officials.

21 - The press learns that a Minneapolis man, Mohammed A. Warsame, has been charged with providing material support to al-Qaida. Warsame had been imprisoned for more than a month before charges were filed. The case proceeds in unusual secrecy, as his attorney, public defender Daniel Scott, is initially barred even from meeting with his client.

22 - The federal grand jury investigating the Valerie Plame leak issues three subpoenas to the White House, asking the Executive Office of President Bush to produce records of Air Force One telephone calls in the week before Plame's identity was revealed in Robert Novak's column. One subpoena seeks records of White House contacts with over two dozen journalists and news organizations, including Novak, Chris Matthews, Andrea Mitchell and reporters for *Newsday*, *The Washington Post*, and *The New York Times*.

30 - A University of Texas student is questioned by FBI and Secret Service agents after making an open records request for information about utility tunnels under the university.

FEBRUARY

5 - Although more than two years have passed since President Bush authorized military tribunals for the Guantanamo detainees, none have been held. But the military issues new rules for the tribunals, including a requirement that defense attorneys be informed when the government is monitoring their conversations with clients.

Also, citing U.S. refusal to allow access to captured al Qaida witnesses, a German court acquits Abdelghani Mzoudi of 3,066 counts of accessory to murder for allegedly helping to plan the Sept. 11 attacks.

11 - Once again timing an announcement to bolster a brief, the Pentagon announces that alleged enemy combatant Jose Padilla will be given a lawyer. The move comes one hour before the Justice Department files a brief in the case.

13 - Veteran Justice Department prosecutor Richard Convertino sued Attorney Gen. John Ashcroft, claiming the Justice Department had retaliated against him for speaking out on lack of resources to carry out terrorism prosecutions and for testifying before the Senate Finance Committee at the request of Sen. Charles Grassley (R-Iowa).

20 - The Department of Homeland Security publishes interim regulations governing the confidential exchanges of Critical Infrastructure Information between the Department of Homeland Security and private entities. The department backs off its earlier proposal to make all federal agencies take steps to protect information voluntarily submitted by private entities, but speculates that it may expand the rules' coverage in the future.

Also, apparently seeing through the administration's tactics, the Supreme Court accepts review of Padilla's case. The hearing will be held the same day as that of alleged enemy combatant Hamdi.

Edmonds

23 - The U.S. Supreme Court denies the petition for review in *M.K.B. v. Warden*, denies the media's motion to intervene, and grants the Justice Dept.'s motion to file a completely sealed brief. The result allows the extreme secrecy in the case to persist.

24 - Charges are finally announced for the first two Guantanamo detainees to face military tribunals. The two men, Ali Hamza Ahmed Sulayman al Bahlul of Yemen and Ibrahim Ahmed Mahmoud al Qosi of Sudan, are accused of conspiracy to commit war crimes.

MARCH

3 - The Pentagon releases a proposal for annual administrative reviews of the Guantanamo detainees by three-officer panels. The process will be separate from the military tribunals.

25 - A federally sponsored Rand Corp. study of publicly available federal geospatial information concludes the information on all but four government Web sites would be of little use to terrorists. Posted information shows the location and key features of particular places but attackers are likely to need more detailed and current information — better acquired from direct observation or other sources.

28 - The American armed forces shut down the Baghdad newspaper *al Hawza*, sparking protests that eventually lead to violent uprisings in Fallujah and elsewhere. *al Hawza* had been critical of the U.S. occupation.

APRIL

2 - The Pentagon announces that it is freeing 15 Guantanamo detainees. Their names, and the original reasons for their detention and release, are withheld.

6 - The American Civil Liberties Union files a lawsuit challenging the USA PATRIOT Act powers in U.S. District Court in New York. The lawsuit challenges the FBI's use of national security letters to obtain business records from Internet service providers.

7 - A German appeals court releases Mounir el-Motassadeq, the only man convicted in any jurisdiction of having played a role in the Sept. 11 attacks. The court says acquittal was mandated by the U.S. refusal to provide access to detained al-Qaida operative Ramzi bin al-Shibh.

20 - The Supreme Court hears oral argument in *Rasul v. Bush*, the dispute over whether U.S. courts have access to hear cases by detainees at Guantanamo Bay.

22 - The U.S. Court of Appeals in Richmond (4th Cir.) rules that Zacarias Moussaoui may be prosecuted without live access to the al-Qaida witnesses, if detailed written summaries of their testimony are made available to the defense. The court reinstates the death penalty and allows prosecutors to introduce evidence relating to the Sept. 11 attacks.

26 - The Oklahoma Homeland Security Act is amended to strip the state Homeland Security Department of its open meeting and open records exemptions.

28 - The Supreme Court hears oral argument in the cases of Hamdi and Padilla, the U.S. citizens designated as enemy combatants.

MAY

3 - On the heels of the Abu Ghraib prison abuse scandal in Iraq, two former Sept. 11 detainees allege in a lawsuit that they were abused while in secret custody without charges at the Metropolitan Detention Center in Brooklyn. The men, Javaid Iqbal and Ehab Elmaghraby, say they were beaten, strip-searched, and sexually abused.

6 - The FBI detains Brandon Mayfield, a Portland, Ore., lawyer, on the basis of fingerprint evidence supposedly linking him to the March 11 train bombings in Madrid, Spain. Mayfield is not charged, and is held in secret custody.

11 - The Department of Homeland Security issues an internal directive to safeguard sensitive but unclassified information. The Federation of American Scientists' *Secrecy News* posts a copy of the directive, which describes how to identify and protect information for privacy and commercial reasons as well as for security reasons. The directive stops short of saying that sensitive information would necessarily be exempt under the Freedom of Information Act.

14 - Special prosecutor Patrick Fitzgerald seeks to question several reporters at *The Washington Post* and *Newsday* regarding sto-

ries they wrote about the leak of Valerie Plame's name to columnist Robert Novak.

18 - September 11 Commission hearings reveal that tapes of 911 calls withheld from the public by New York City show that some callers were given advice by dispatchers that proved fatal.

Also, the Pentagon announces rules for the annual administrative reviews of Guantanamo detainees. Among other flaws, the hearings will be closed to the public and press, the detainees will not be represented by lawyers, the rules of evidence do not apply, and there is no appeal to an outside court.

19 - The FBI reclassifies information provided by fired contract translator Sibel Edmonds in her whistleblower lawsuit and other actions to inform the public about failures in the translator program. The result is that she cannot testify in any actions brought against the government by families of the victims of September 11.

Russert

24 - NBC's Tim Russert, host of "Meet the Press," and *Time* magazine reporter Matthew Cooper are subpoenaed to appear before the federal grand jury investigating the Plame leak.

Also, a federal judge dismisses material witness proceedings involving Brandon Mayfield, the Portland, Ore. lawyer mistakenly linked to the Madrid bombings through a botched fingerprint analysis. U.S. District Judge Robert Jones also rescinds the gag order in the case and unseals the case file.

25 - Newsday.com reports that four reporters from *The New York Times*, Reuters and *Newsday* have been subpoenaed to testify in the terrorism-related trial of New York criminal defense attorney Lynne Stewart.

27 - The U.S. Court of Appeals in Boston (1st Cir.) refuses to overturn Special Administrative Measures (SAMs) governing the confinement of the so-called "shoe bomber," Richard Reid. Among other things, the SAMs prevent Reid from speaking to reporters or reading certain news publications.

30 - *Time* magazine reports that a March 5, 2003, Pentagon email says that a contract awarded to Halliburton was "coordinated" with Vice President Cheney's office. Both the Pentagon and Cheney's office deny that the email means that Cheney was involved with the award of the contract.

JUNE

1 - After insisting for two years that all details of the case against alleged enemy combatant Jose Padilla must be kept secret, even from the federal courts, the Pentagon abruptly releases detailed information about the case — apparently in an effort to allay critics and influence the Supreme Court.

3 - The American Civil Liberties Union sues the Department of Defense under the FOI Act for records on the treatment of detainees held by the American military.

7 - The city of Parma, Ohio, implements and immediately scraps a policy of recording names and descriptions of open records requesters in order to help police identify people who might use public records to commit crimes.

8 - Several news organizations report that a series of government memos, many authored by former Justice Dept. lawyer John C. Yoo, provided the Bush administration with legal arguments to support the use of torture during prisoner interrogations.

9 - The Congressional Research Service publishes a report providing options to the controversial regulations of sensitive security information by the Transportation Security Administration, which appear to give the agency full authority to prohibit disclosure of SSI to the public.

10 - The Pentagon announces charges against David Hicks of Australia, who becomes the third Guantanamo detainee to be charged. Hicks is charged with conspiracy to commit war crimes, attempted murder by an unprivileged belligerent, and aiding the enemy.

15 - Judge Charles Breyer of U.S. District Court in San Francisco rules in a case brought by two women contesting their placement on federal "no fly" lists that the Transportation Security Administration had improperly categorized "innocuous" information as "sensitive security information."

22 - President Bush releases a stack of selected memoranda addressing administration policy on the treatment of prisoners, and White House counsel spend time with reporters going over the newly released documents.

Washington Post reporter Glenn Kessler is interviewed by prosecutors investigating the Plame leak after sources release him from a promise of confidentiality.

Also, the trial of defense attorney Lynne Stewart begins in federal court in Manhattan. Stewart is accused of providing material support to terrorists by helping her client, Sheikh Omar Abdel-Rahman, communicate with members of a reputed terrorist organization, including through her contacts with journalists.

23 - The Pentagon announces that Navy Secretary Gordon Englund will oversee the annual administrative review process for Guantanamo detainees, which still has not begun.

28 - The Supreme Court rules in three major terrorism cases, which collectively present a strong rebuke to the Bush administration's conduct of the war on terrorism:

• In *Rasul v. Bush*, the court rules that U.S. courts have jurisdiction to hear challenges to the confinement of the Guantanamo detainees, opening the door for a flood of *habeas corpus* petitions by detainees.

• In *Hamdi v. Rumsfeld*, the court rules that Hamdi, a U.S. citizen detained as an enemy combatant, must be given an opportunity to contest that determination before a neutral fact-finder. All but one justice, Clarence Thomas, agrees that the administration's position that enemy combatants may be indefinitely detained on the President's word is unlawful.

• In *Rumsfeld v. Padilla*, the court dismisses a *habeas corpus* lawsuit by alleged "dirty bomber" Jose Padilla on procedural grounds, but the case is soon re-filed in a different court.

JULY

6 - Judge Reggie Walton of U.S. District Court in Washington, D.C., accepts the arguments by the Department of Justice that information Sibel Edmonds might give the court about what the FBI knew about the events of September 11 before they happened must be held in confidence as "state secret" information.

7 - The Pentagon announces the formation of a Combatant Status Review Tribunal, composed of military officers, to evaluate whether each of the nearly 600 Guantanamo detainees is properly categorized as an enemy combatant. The rules explicitly lack most due process protections found in American courts, such as access to a lawyer or the presumption of innocence.

9 - U.S. Park Police Chief Teresa Chambers is fired after seven months of forced administrative leave for discussing budget difficulties in the face of beefed up national security demands with a *Washington Post* reporter. The firing follows her petition to the Merit Systems Protection Board to reinstate her.

Also, an effort to curb government powers granted under the USA PATRIOT Act is narrowly defeated by one vote on in the U.S. House of Representatives. The measure would have prevented the government from accessing library and bookseller records — including library patron reading lists and book customer lists.

13 - The Justice Department releases a 29-page report to Congress detailing the department's use of the USA PATRIOT Act, asserting that it has helped thwart al Qaeda plots and led to scores of criminal convictions since the Sept. 11, 2001, attacks.

15 - Sen. Ron Wyden (D-Ore.) introduces the Independent National Security Classification

Board Act to establish a board to review and recommend standards for classification of records. *(S. 2672)*

18 - Iraq's interim prime minister Iyad Allawi issues an order allowing the *Al Hawza* to resume operations. The newspaper had been closed by American forces in March.

19 - Rep. Robert Cramer (D-Ala.) introduces a companion bill to Sen. Wyden's bill to establish an Independent National Security Classification Board. *(H.R. 4855)*

20 - Chief Judge Thomas F. Hogan of the U.S. District Court in Washington D.C., orders NBC's Tim Russert and *Time's* Matthew Cooper to testify before the Plame grand jury.

22 - The final report of the Sept. 11 Commission (The National Commission on Terrorist attacks Upon the United States) is released. The report cites a need to address problems of overclassification.

29 - The Justice Department agrees to let alleged enemy combatant Ali Seleh al-Marri meet with his attorneys. Like Hamdi and Padilla, al-Marri is held in secret detention at a military brig in South Carolina.

30 - The Combatant Status Review Tribunal conducts its first hearings. The names and nationalities of the detainees are withheld.

Also, the inspector general for the Coalition Provisional Authority releases an audit finding fraud, mismanagement and manipulation in the Iraqi reconstruction contracting process.

AUGUST

4 - A Pentagon audit finds that Halliburton failed to account for more than $1.8 billion of $4.2 billion it received to provide logistical support to coalition troops in Iraq. The audit is not made public, but is leaked to *The New York Times*.

Cooper

Also, three agencies announce more takedowns of Web information. The Nuclear Regulatory Commission removes certain security information from its Web site dedicated to the Reactor Oversight Process. The National Aeronautics and Space Administration promises to remove certain space surveillance data as of October 1 and, at the request of the Department of Homeland Security, the Federal Communications Commission agrees to restrict access to information about telecommunications disruptions, which DHS said would provide a "roadmap for terrorists."

6 - *Time* reporter Matthew Cooper is held in contempt of court after he refuses to comply with a July 20 order requiring him to testify before the grand jury investigating the Plame leak. Chief Judge Hogan of the U.S. District Court in Washington, D.C. orders Cooper to jail after he refuses to testify and fines the magazine $1,000 per day until Cooper complies with the order. The sanctions are stayed pending appeal to the federal court of appeals in Washington.

Also, *Washington Post* reporter Walter Pincus is subpoenaed to testify before the grand jury investigating the Plame leak. Meanwhile, Russert is questioned under oath by prosecutors investigating the Plame leak after a source (Vice President Cheney's chief of staff, Lewis "Scooter" Libby) releases him from a promise of confidentiality.

5 - In response to a request by news organizations, a federal judge in Seattle unseals documents from a lawsuit by Salim Ahmed Hamdan, one of the Guantanamo detainees who has been designated to face military tribunals. The documents contain allegations of physical and psychological abuse.

11 - Finally relenting to German pressure, the U.S. provides a German court with summaries of its interrogations of two al-Qaida operatives so that Sept. 11 suspect Mounir el-Motassadeq can be retried.

Also, *New York Times* reporter Judith Miller is subpoenaed to testify before the grand jury investigating the Plame leak.

12 - A U.S. District Judge in Manhattan orders the Department of Defense to respond to the American Civil Liberties Union and other groups' FOI requests for records on the abuse of prisoners detained at Guantanamo Bay by either providing records or citing exemptions for their withholding by August 23.

13 - The International Committee for the Red Cross reports evidence that the U.S. is holding suspected terrorists in secret detention centers across the globe. Terror suspects who have been reported as "captured" by the FBI routinely do not show up on prisoner lists, the Red Cross says. The government refuses to provide a comprehensive list of terror detainees.

Also, in its first rulings, the Combatant Status Review Tribunal upholds the enemy combatant designation of four Guantanamo detainees whose identities are not released.

16 - Citing national security, the Justice Dept. asks U.S. District Judge Colleen Kollar-Kotelly to allow it to monitor meetings between 12 Kuwaiti detainees at Guantanamo and their lawyers, in connection with habeas petitions involving the detainees. Kollar-Kotelly does not immediately rule on the request.

18 - Federal District Judge Alvin Hellerstein in Manhattan orders the Department of Defense and other federal agencies to release records on detainee abuse at Guantanamo and other foreign jurisdictions where the United States is detaining persons in its War on Terror.

19 - A Reuters reporter loses his motion to quash a prosecutor's subpoena in the Lynne Stewart trial, which is already underway.

23 - People for the American Way files suit in U.S. District Court in Washington, D.C., for information from the Justice Department showing how many times it has asked courts to seal records of court challenges brought by detainees.

Time's Matthew Cooper is interviewed under oath by the special prosecutor investigating the Plame leak after Lewis Libby releases him from a promise of confidentiality.

24 - Preliminary hearings begin in the first American military tribunals since shortly after World War II. The news media is permitted to attend, but only after signing "ground rules" that impose major restrictions on coverage. Representatives from human rights organizations are also permitted to observe the tribunals themselves, though they are barred from the tour of the prison given to members of the press.

Just three weeks into its operations, the Combatant Status Review Tribunal has already conducted hearings for 31 Guantanamo detainees. It has upheld the "enemy combatant" designation in all 14 cases in which decisions have been reached.

Also, the U.S. House Committee on Government Reform's subcommittee on national security heard the Director of the Information Security Oversight Office, the Deputy Under Secretary of Defense and others testify concerning the increasing overclassification of records.

26 - The Congressional Research Service issues "Secrecy Versus Openness," a short report on proposed legislation to restructure the classification process.

SEPTEMBER

12 - Mazen al-Tumeizi, a journalist for al-Arabiya, an Arab satellite channel, is shot dead as he made a live broadcast from Baghdad when U.S. helicopters fired on a crown gathered around the burning wreckage of a U.S. armored vehicle.

13 - Matthew Cooper and *Time* magazine are subpoenaed again to testify in the Valerie Plame investigation.

Reuters reporter Esmat Salaheddin testifies in the Lynne Stewart trial about the accuracy of a published story.

14 - Rep. Henry Waxman (D-Calif.) issues a lengthy white paper detailing new government secrecy and claiming that this administration has narrowed the scope of every open government law passed by Congress.

15 - U.S. District Judge Alvin Hellerstein in Manhattan, noting the "glacial pace" of the government's response to an FOI request by the ACLU on treatment of detainees, called for identification of records and a status conference in one month.

16 - *Washington Post* reporter Walter Pincus gives a deposition in the Valerie Plame investigation with an unnamed source's permission, but refuses to name the source who had already identified him or herself.

28 - *The New York Times* files a lawsuit in federal court in New York to block the disclosure of reporters Judith Miller's and Phillip Shenon's telephone records to prosecutor Patrick Fitzgerald. Fitzgerald, the U.S. Attorney in Chicago, is investigating the leak of a planned FBI raid on an Islamic charity in Chicago suspected of funding terrorism.

In a lawsuit filed by the ACLU, U.S. District Judge Victor Marrero rules that the FBI's use of national security letters under the USA PATRIOT Act is unconstitutional because of a lack of judicial supervision and because non-disclosure provisions violate the First Amendment.

OCTOBER

6 - The Department of Energy classifies its current intelligence budget and retroactively classifies previous ones.

7 - Judith Miller is held in contempt for refusing to testify in the Valerie Plame investigation and ordered jailed and fined $1,000 per day until she testifies. The sentence is stayed pending appeal.

8 - The Merit Systems Review Board upheld the National Parks Service's firing of police chief Teresa Chambers for telling a *Washington Post* reporter of inadequate funding for new terrorism protections.

12 - Sen. Mark Dayton (D-Minn.) closed his Capitol Hill Office in response to an intelligence report on terrorist threats that could not be shared with the public.

13 - Matthew Cooper and *Time* magazine are held in contempt for refusing to testify in the Valerie Plame investigation and ordered jailed and fined $1,000 per day until they testify. The sentence is stayed pending appeal.

20 - U.S. District Judge Colleen Kollar-Kotelly in Washington, D.C., refuses to allow the government to record meetings between three Kuwaiti detainees and their lawyers or to review any notes taken during the meetings because it would violate attorney-client privilege, but orders defense lawyers to keep secret any information they learn from their clients.

NOVEMBER

8 - U.S. District Judge James Robertson in Washington, D.C., halts the military tribunals at Guantanamo as unlawful and rules that detainee Salim Ahmed Hamdan may not be tried unless he is found not to be a prisoner of war under the 1949 Geneva Convention.

19 - Sen. Christopher Dodd (D-Conn.) introduces a reporter's shield bill in the Senate, but the session expires soon afterwards, before the bill can be acted on.

30 - *The Washington Post* reports that journalists who are not embedded with a military unit are barred from traveling through towns south of Baghdad.

DECEMBER

Throughout the month, the ACLU releases e-mails obtained under the FOI Act showing the FBI accused military interrogators of posing as FBI agents and humiliating and abusing detainees by techniques including inserting lit cigarettes in prisoners' ears and shackling them into a fetal positions for up to 24 hours, forcing them to soil themselves.

JANUARY 2005

14 - The Justice Department released an unclassified version of Inspector General findings that fired translator Sibel Edmonds' actions did not merit her retaliatory dismissal and that the FBI failed to follow up her claims that materials on terrorists were shoddily translated.

18 - The Associated Press reports that bounties of as much as $10,000 are reportedly being offered for murdering a journalists or an Iraqi translator in an area dubbed the "triangle of death" south of Baghdad.

19 - U.S. District Judge Richard Leon in Washington, D.C., rules in *Khalid v. Bush* that the president has the power to detain seven foreign-born terror suspects captured outside the U.S. and that the detainees have no "cognizable" constitutional rights.

20 - A freelance photographer covering a 2005 presidential inaugural protest for alternative media network Indymedia is hit with pepper spray and has his cameras confiscated before District of Columbia police arrest him as he films a group of protestors. Earlier on Inauguration Day, as many as 15 percent of the 1,000 television reporters and cameramen who applied for special credentials to be allowed into a high security zone for the ceremony do not get them, The Associated Press reported.

31 - U.S. District Judge Joyce Hens Green in Washington, D.C., rules in *In re Guantanamo Detainee Cases* that detainees have valid claims under the Fifth Amendment to the U.S. Constitution and that combatant status review tribunals at the prison in Cuba violate the detainees' rights of due process. (The U.S. Court of Appeals in Washington, D.C., was scheduled to hear oral arguments in the case, which has been combined with *Khalid v. Bush*, on Sept. 8, 2005, under the caption *Boumediene v. Bush*.)

Miller

FEBRUARY

2 - Reps. Mike Pence (R-Ind.) and Rick Boucher (D-Va.) introduce a reporter's shield bill in the U.S. House of Representatives.

U.S. District Judge Hellerstein in Manhattan tells the CIA it must comply with his Sept. 15 order to identify records on detainee treatment sought by the ACLU.

The Department of Justice told People for the American Way it must pay $400,000 to have its FOI request for secret legal proceedings against detainees processed.

9 - Sen. Richard Lugar (R-Ind.) introduces a reporter's shield bill in the Senate. Lugar's bill is identical to the one introduced in the House seven days earlier.

10 - Lynne Stewart is convicted in U.S. District Court in New York with only one of the subpoenaed journalists being called to the stand. Prosecutors dropped the subpoena of *Newsday* reporter Patricia Hurtado and two subpoenaed *New York Times* reporters were never called to testify.

14 - Sen. Dodd reintroduces his reporter's shield bill in the Senate.

15 - The U.S. Court of Appeals in Washington, D.C. upholds the subpoenas of Judith Miller, Matthew Cooper and *Time* magazine

16 - Sen. John Cornyn (R-Texas) and Sen. Patrick Leahy (D-Vt.) Introduce legislation to revamp the Freedom of Information Act. Among other reforms, the bill would make government-owned information held by contractors subject to the FOI Act and require data and effectiveness reports on secret exchanges of critical infrastructure information.

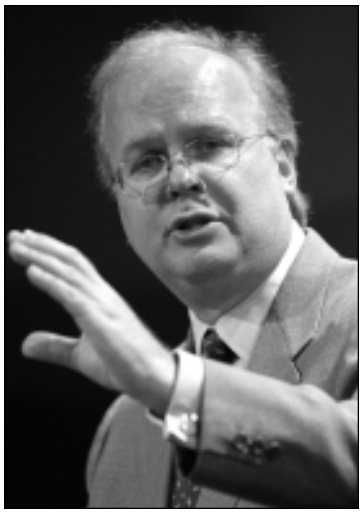
18 - U.S. District Judge Hellerstein in Manhattan tells the CIA he will not stay his decision while it appeals his order to identify records on detainee treatment sought by the ACLU.

Agents from the CIA and Energy and Defense Departments search library archives at the University of Washington and reclassify some donated by the late Sen. Henry "Scoop" Jackson.

23 - The U.S. Army Court of Criminal Appeals in Arlington, Va., rules in *Denver Post v. United States* that an investigating officer illegally closed a preliminary hearing to investigate murder charges against Army soldiers in connection with the death of an Iraqi general during interrogation. The closure order should have been "narrowly tailored" to protect classified information, the court held, and ordered that a redacted transcript of the hearing be released.

24 - U.S. District Judge Robert W. Sweet of New York rules that *The New York Times* has a right under the First Amendment and the common law to keep its reporters telephone records secret from Chicago prosecutors in the Global Relief Foundation leak investigation.

28 - U.S. District Judge Henry F. Floyd of Spartanburg, S.C., rules in *Padilla v. Hanft* that Bush administration has no power to hold terror suspect Jose Padilla, an American citizen, as an "enemy combatant" without charging him with a crime.



Rove

MARCH

2 - Rep. Christopher Shays (R-Conn.) chairman of the House Subcommittee on National Security, Emerging Threats and International Relations holds an oversight hearing about the proliferation of "pseudo-classification" categories of information that are not classified but are withheld from the public under other labels.

4 - Italian journalist Giuliana Sgrena is shot by U.S. troops as she is being whisked to freedom after one month in captivity in Iraq. Her driver, Italian military officer Nicola Calipari, is killed.

16 - Citing unnecessary protections for "big business polluters," Sen. Patrick Leahy introduces the Restore FOIA Act, an amendment to the Homeland Security Act that would revise protections for Critical Infrastructure Information provided by businesses.

25 - A Pentagon report clears the U.S. military of any wrongdoing in the shooting of Sgrena and Calipari. Italian officials blast the report and ask for further investigation.

APRIL

6 - The Inter-agency Security Oversight Office reported a record 15.5 information classification actions by the federal government in 2004.

MAY

2 - The Department of Defense released photos of American soldier's caskets flown into Dover, Del., but blacked out faces of soldiers carrying the caskets citing privacy and security concerns.

10 - The federal appeals court in Washington, D.C., affirmed the dismissal of whistleblower Sibel Edmonds' lawsuit because litigation might reveal "state secrets."

12 - Rep. Henry Waxman (D-Calif.) introduces the Restore Open Government Act to eliminate restrictions on FOI disclosures inherent in the "Ashcroft memo" and "Card memo," to eliminate pseudo-classification, cut over-classification and reduce protections for critical infrastructure information.

JUNE

1 - U.S. District Judge Hellerstein in Manhattan orders the Department of Defense to redact personally identifying features from the "Darby" photographs of detainees at Abu Ghraib and release the photographs to the ACLU under the FOI Act.

24 - A U.S. military sniper shoots and kills Yasser Salihee, an Iraqi reporter working for Knight Ridder in Baghdad.

27 - The U.S. Supreme Court declines to hear the appeal of Judith Miller, Matthew Cooper and *Time* magazine, who have been held in contempt of court for refusing to testify in the Valerie Plame investigation.

30 - *Time* magazine agrees to cooperate with prosecutors in the Valerie Plame investigation and turn Matthew Cooper's notes over to the grand jury.

JULY

6 - Matthew Cooper announces that his source has waived confidentiality and that he will testify in the Valerie Plame investigation. Judith Miller is jailed for refusing to testify. She will remain in prison until she agrees to cooperate or until the grand jury expires in 120 days.

15 - U.S. District Court of Appeals (D.C. Cir.) holds in *Hamdan v. Rumsfeld* that military tribunals planned for four detainees at Guantanamo Bay are legal.

17 - Matthew Cooper reveals in a *Time* magazine column that he has testified before the grand jury in the Valerie Plame investigation and that his source was presidential advisor Karl Rove.

18 - The reporter's shield bill is amended in the House and Senate to address Justice Department concerns that it would hamper terrorism investigations.

A federal district court judge in San Diego dismissed an "invasion of privacy" suit by the wife of a navy SEAL whose Internet posted photos of Navy SEALS posed sitting on hooded and handcuffed Iraqi prisoners were republished by The Associated Press.

19 - U.S. Court of Appeals in Richmond (4th Cir.) hears oral argument in *Padilla v. Hanft*. No decision had been issued by late August.

20 - The U.S. Senate holds a hearing on the reporter's shield bill.

22 - The federal government asks federal Judge Hellerstein in Manhattan to now consider withholding the "Darby" photographs for individual safety concerns. The judge had rejected government arguments that disclosure of the photos, with identities redacted, would intrude upon privacy.

AUGUST

1 - U.S. Court of Appeals in Richmond (4th Cir.) holds in *Media General Operations, Inc. v. Buchanan* that the government's interest in protecting an ongoing antiterrorism investigation of Islamic charities and businesses justified sealing a search-warrant affidavit containing "sensitive details" about the probe.

2 - Freelance reporter Steven C. Vincent becomes the first American journalist attacked and killed in the war in Iraq when he is kidnapped and shot by masked gunmen in the southern city of Basra.

4 - Arguing that the government cannot exempt pictures that show outrageous government behavior simply because they could trigger rioting and violence, 14 news groups filed an amicus brief in *ACLU v. DOD* protesting the use of the FOI Act's law enforcement exemption to hide pictures of prisoner abuse at Abu Ghraib.

8 - The ACLU asks the U.S. Supreme Court to review the dismissal of fired FBI translator Sibel Edmonds' court case for "state secrets" reasons.

The Defense Department struck a settlement agreement with a Delaware journalism professor to release photographs of the coffins returned to Dover, Del., as "expeditiously as possible." Many of the black marks obliterating faces of the honor guard were removed.

14 - The Reporters Committee and 13 other press groups ask the federal district court in Manhattan to reject new government arguments that depictions in detainee torture pictures are too incendiary to release.

16 - A federal judge in Manhattan orders the government to disclose part of its arguments against releasing detainee photos it says are too incendiary to release.

The Reporters Committee continues to track these events through a daily journal on its Web site. "Behind the Homefront" is a weblog of leads, tips and reporting done elsewhere. The project can be found online at www.rcfp.org/behindthehomefront.

Covering the war and its aftermath

HIGH
High Risk To a Free Press

Unprecedented access to the battlefield during the war in Iraq enabled journalists to offer a fairly comprehensive picture of combat. But as efforts turned to re-establishing order, government support for access became more haphazard and unpredictable, and efforts to shut down foreign press or restrict movements and reporting by journalists continue to raise concerns.

For much of the two-month military invasion in Iraq in 2003, more than 700 journalists bunked and marched with U.S. and British troops, sticking close to the soldiers whether they were preparing for battle or fighting on the front lines. The result: Riveting coverage of wartime that won high praise from the military itself.

"Battlefield reporting was more current and accurate than ever before and clearly helped the military's goal of rebutting Saddam Hussein's disinformation campaign," Ret. Brig. Gen. Jim Swanson of the U.S. Air Force wrote in a commentary for *USA Today*.

But as hundreds of journalists left the embedded ranks or returned home after the close of official combat, goodwill between journalists and the military appears to have faded. Two years after the start of war in Iraq, the strong government support of openness and free press activities in conflict overseas has been replaced with hesitation and haphazard, unpredictable practices, including:

• Abuse and sometimes detainment of journalists covering the aftermath of the war. Arab journalists, in particular, appear to have been the target of much harassment and sometimes imprisonment. But reporters from major broadcast networks and U.S. newspapers also reported soldiers stifling coverage and seizing notes and photo files;

• Efforts to control the distribution of news. After the initial invasion, the Pentagon considered several plans to bypass reporting of major news networks and newspapers, including one similar to its short-lived Office of Strategic Influence that was launched more than two years ago;

• Restriction of new media in Iraq. In March 2004, Iraqi administrator Paul Bremer ordered coalition troops to shutter *al-Hawza*, a newspaper that frequently criticized U.S. conduct in Iraq. In July, the Iraqi prime minister established a media committee to impose aggressive restrictions on burgeoning print and broadcast media in Iraq;

• Shutting out news media from Saddam Hussein's hearing. Much of the world's press was shut out of preliminary court hearings of the deposed Iraqi dictator, following a ruling by an Iraqi judge. Only a *New York Times* reporter and a CNN correspondent were permitted to attend;

• Hurdles continued for journalists trying to count the deaths of U.S. military personnel, enemy soldiers and Iraqi civilians, the latter two which the U.S. military does not officially count. The military also does not count soldiers killed in "friendly fire" incidents. The reticence to report deaths, *Slate* reported in November 2004, can be traced back to the Vietnam War and the significant problems that emerged during that conflict when Defense Secretary Robert McNamara overemphasized body counts as a measure of success.

Although government support has not reverted full circle from its wartime height, the significant retreat heightens concerns that journalists might not have the same unique access in covering the continuing war on terrorism as they had earlier.

Coverage success in war time

Within the first six months after the Pentagon began embedding journalists, the process of attaching journalists with U.S. troops in the battlefield appeared to work. The news media got a pass to the front lines; the U.S. military relished in thousands of reports showing the troops at their finest; the American public got a living-room view of war.

Despite the coverage, concerns surfaced that the American press failed to press enough, not only failing to question the need for the war but the actual successes of the war. Critics say the press routinely fell for the government line, noting early reporting of the Pvt. Jessica Lynch saga that played up the heroic aspects of her 2003 rescue. Others pointed to many broadcasts with screens displaying red, white and blue or correspondents using the word "we" when describing movements of American soldiers.

Despite worries that an embedded journalist equated to a compromised journalist, the process allowed the press its great-

est access to a battlefield in more than three decades.

And the embed process, for the most part, worked smoothly because the Defense Department opted to refrain from controlling the system too much, even when less flattering reports came to light. In fact, the Pentagon considered making the embed program permanent.

At the time, defense officials had yet to grapple with a rash of news reports it did not want the public to see. Because the United States had been such a dominating force in the war, there never was video showing a bloody defeat of an Army unit or a news account of a blatant violation of the Geneva Convention.

But the aftermath of the invasion of Iraq proved to be the most difficult part, as the United States embarked on reconstruction in an ancient land of 25 million people with deeply divergent ideologies.

Reporters began covering bloody ambushes and insurgent revolts, providing accounts of U.S. soldiers dying in combat almost weekly. Articles highlighted Iraqi casualties, particularly those of women and children, in the wake of bombing raids. Broadcast and print reports included many comments from those who opposed the war and Iraqi occupation by coalition forces.

Perhaps it was the news media's coverage in 2004 of the torture accounts at Abu Ghraib, a former Iraqi prison used by coalition forces to detain war prisoners and captured insurgents, that disturbed government officials most. News of the mistreatment, displayed through graphic photographs and video footage, promised to have long-lasting repercussions for U.S. foreign policy.

In testimony before the U.S. Senate Armed Services Committee on May 7, 2004, Defense Secretary Donald Rumsfeld said more photographs and videos of prisoner abuse in Iraq exist, but that they would not be released in the near future.

"If these are released to the public, obviously it's going to make matters worse. That's just a fact," Rumsfeld testified. "I mean I looked at them last night, and they're hard to believe . . . And if they're sent to some news organization and taken out of the criminal prosecution channels that they're in, that's where we'll be. And it's not a pretty picture."

Sea change in attitudes toward press

The military's appreciation for the news media was seldom as enthusiastic as it was in the months following the Pentagon's plan allowing reporters to accompany U.S. troops in combat, possibly the largest mobilization of journalists in military history.

From the start, defense officials considered the immersion of reporters historic, noting that even during the Normandy Invasion of World War II only a few dozen journalists stormed the beaches with the American forces. Even in the open coverage of Vietnam, reporters were seldom assigned to specific units.

The Pentagon itself handled much of the mind-boggling logistics involved in deploying the journalists, including offering combat training courses for those covering the war on terrorism.

Amid the swelling ranks of journalists stepping forth to be embedded in American military units came cries of press advocacy from unique sources: Pentagon officials and even from Rumsfeld himself.

"We are dealing with a person in the case of Saddam Hussein and his regime that are accomplished liars," Rumsfeld said. "They are consistently, day after day, saying things that aren't true. And it strikes me that having people who are willing to report the truth — the free press from around the world — is probably a good thing.

"They can see for themselves what's taking place and be able to, the Good Lord willing, report the truth."

Yet in 2001 and 2002, Rumsfeld and his staff regularly depicted the war on terrorism as something different, something so nebulous that to make military actions of this war transparent would be close to impossible.

What changed their minds the first time? The answer remains unclear.

The new ground rules governing the process of placing journalists — both American and foreign — among U.S. troops suggested a mix of good public relations to counter Iraqi claims of American atrocities and a desire to simply get out the truth about U.S. military endeavors.

"We need to tell the factual story — good or bad — before others seed the media with disinformation and distortions, as they most certainly will continue to do," read the official ground rules, released on Feb. 28, 2002. "Our people in the field need to tell our story — only commanders can ensure the media get to the story alongside the troops."

The comments show a marked difference from the Pentagon that refused to acknowledge at the outset of the war on terrorism its 1992 agreement with the news media to embed reporters among troops early in armed conflict, quickly convert to open coverage and to aid coverage in most ways possible. The Pentagon of the last 30 years has not exactly shown itself to be the most transparent government entity but instead one that, on the battlefield, has tried to control coverage.

And that is why there was early skepticism about the embedding plans.

The ground rules for embedding took a first step toward ensuring coverage of a war that cannot be covered through traditional means, but they fell short of advocating open coverage, the default plan from the 11-year-old agreement between the media and the military hammered out between the two sides after the first Gulf War.

A sense of vagueness permeated the rules, language that could offer anything from a slight to a likely possibility that curtains could fall down over the transparency.

For example, Rule 4.F.7. allowed the release of the date, time or location and results of completed conventional missions and actions but "only if described in general terms." And the rules warned that the release of information about details such as friendly force strength, friendly casualty figures and the origin of air operations should include only "approximate" numbers and descriptions. An origin of air operations might be described as simply "land-based."

The Pentagon, to its credit, refrained from taking too much advantage of vague language in the rules and allowed the news media to file thousands of reports with few restrictions during the war.

Some of the riveting stories told of the horrors and mistakes of war, such as a *New York Times* report from Dexter Filkins of a U.S. Army sergeant who accidentally killed an Iraqi woman standing too close to a target. But there were also stories of soldiers helping Iraqi children or feeding and comforting scared and starving families.

Ted Koppel, the veteran anchor of ABC's "Nightline," joined the embedded ranks himself and enjoyed unprecedented access to the quarters of a commanding general. Koppel also sat in on

some top-secret briefings, on condition that he would not disclose U.S. strategy or troop movements in advance.

Journalists enjoyed access from nearly every Army division, naval ship and command center, offering stories about almost every skirmish and advance during the two-month war. Many, like Koppel, had access to briefings before and after attacks on condition they not report information that could help Iraqi forces.

The American public, in turn, saw a much more complete picture of how its military fights a war — a sea change difference from what the Pentagon allowed only a year earlier in Afghanistan.

But after Iraq, attitudes changed about press access, and now it appears that the Pentagon may be inching back to its pre-war sensibilities. A military that once seemed to embrace a media presence now appears to be repulsed by it.

In October 2003, Agence France-Presse reported that one of its photographers and another from Reuters were detained for several hours by Iraqi police under orders from the U.S. military. The two were covering an attack on a U.S. convey near Fallujah when they were captured, held at a police station, transferred to a U.S. Army base and released five hours later.

At about the same time, The Associated Press reported that one of its photographers had been detained by U.S. soldiers, handcuffed and then held at gunpoint for more than three hours.

On Nov. 2, 2003, David Gilkey, a *Detroit Free Press* photographer, said U.S. soldiers erased his film disk while he was covering the crash of a CH-47 Chinook helicopter shot down near Fallujah and then forced him and other journalists to retreat to a site 20 miles away.

In November 2003, Sandy Johnson, Washington bureau chief for The Associated Press, wrote a letter to the Pentagon signed by 30 other news organizations to complain about those situations and a rash of other abuse and harassment. In the letter, the media groups said there were "numerous examples of U.S. troops physically harassing journalists and, in some cases, confiscating or ruining equipment, digital camera discs, and videotapes."

But the abuses continued.

Chip Somodevilla, a Knight Ridder photographer, told *Nation* magazine that he was with two Iraqi fisherman on a small boat on the Tigris River on Dec. 9, 2003, when shots exploded in the water near them. Somodevilla found that the shots came from an American military official who later attempted to destroy the photographer's press credentials.

On Jan. 5, 2004, U.S. troops detained four Iraqis working for Reuters and NBC, held them for three days, subjecting them to sleep deprivation and other uncomfortable treatment. The troops captured the men after they arrived at the scene of a downed American helicopter outside Fallujah. A brigadier general later told reporters that the crash had been caused by Iraqis posing as journalists.

A week later, Reuters filed a formal complaint citing the "wrongful arrest" and apparent "brutalisation" of its employees. Reuters wrote two more letters to the Pentagon calling its explanation for the detainment "woefully inadequate" and faulting defense officials for failing to provide better security for journalists.

Amid the complaints of harassment and abuse of journalists, the Bush administration appears to have tried a number of methods to take the news reporting aspect of the war into its own hands.

In October 2003, President Bush, Rumsfeld and Iraqi administrator Paul Bremer bypassed the national news media to tell the administration's story directly through exclusive interviews with five regional broadcasting companies. Bush had been quoted as saying that he wanted to "go over the heads of the filter and speak directly with the people" because there was a "sense that people in America aren't getting the truth."

Later, the Pentagon attempted to resurrect something akin to its hotly debated Office of Strategic Influence with a $300,000 grant to a private contractor to consider how to design an "effective strategic influence" campaign. Rumsfeld disbanded the previous office nearly two years ago after it became known that military officials were considering plans to provide false news items to foreign journalists in an attempt to influence opinion and policy abroad.

Bitter, high-level debates continue within the Pentagon over how far it can and should go in managing or manipulating information to influence opinion abroad, *The New York Times* reported in December 2004. The deceptive techniques risk blurring traditional lines between public affairs programs in Pentagon — whose charter calls for giving truthful information to media and public — and world of combat information campaigns or psychological operations.

In December 2003, the *New York Times* reported that the Pentagon also hoped to transmit its own news footage from Iraq directly to TV outlets in the United States. Dubbed by critics as "C-SPAN Baghdad," the $6.3 million project was designed to provide a more positive coverage of the war by circumventing the major networks and allowing regional and local media outlets access to footage gathered by the Pentagon.

The White House denied it was an effort to manage the news, although it came at a time when it had been especially critical of coverage focusing on deaths resulting form Iraqi conflict instead of on the rebuilding effort. The service began operating in March 2004.

In February 2004, the Pentagon also launched an Arabic-language satellite TV channel designed as an alternative to Middle Eastern broadcasts often critical of the United States. U.S. officials admitted that the network, which will cost $62 million to run in its first year from a studio in Springfield, Va., will compete with both al-Jazeera and al-Arabiya, two of the most popular TV channels in the region.

While it was preparing its own news distribution programs, the Pentagon did little to discourage Iraqi government efforts to stifle the development of independent news organizations. In September 2003, the Iraqi Governing Council banned al-Jazeera and al-Arabiya. In a reported vote in a private session, the council called for reporters from the two channels to be banned from Iraq until government officials could review their broadcasts.

In March 2004, Iraqi administrator Bremer ordered the closure of *al-Hawza*, an Iraqi weekly heavily critical of U.S. foreign policy. Officials closed the paper because it was deemed to have incited violence, a violation of one of Bremer's decrees.

Writing for *Newsday*, First Amendment attorney Floyd Abrams said, "Of all the messages the United States could send to the people of Iraq, the sorriest is this: If you say things we disapprove of, we'll shut you up."

The Washington Post two weeks later reported that the shutdown of the newspaper, run by Shiite Muslim cleric Moqtada Sadr, provoked a violent backlash in Fallujah that eventually erupted into major fight.

On July 28, 2004, Iraq's new prime minister Ayad Allawi

established a media committee to impose restrictions on news organizations, although such restrictions had yet to be finalized. But such restrictions would include a prohibition on unwarranted criticism of the prime minister. On Aug. 9, the prime minister closed al-Jazeera's Baghdad bureau for a month to examine claims that the network's extensive coverage of kidnappings encourages militants.

Stateside, the Pentagon extended a ban of media coverage and photography of the return of soldiers killed in action, prohibiting picture-taking of any flag-draped casket arriving at Dover Air Force Base in Delaware.

The issue came to a head on April 19 when *Newsday* published a photo taken by Tami Silicio, a Kuwait-based cargo worker employed by a military contractor, showing 20 such coffins. Silicio was fired three days later.

The Bush administration defended the ban, saying it protects the privacy of families. But legislation to alter the ban soon appeared in both the House and Senate. Sen. Frank Lautenberg (D-N.J.), in his proposal, claimed the ban "prevents the American people from seeing the truth about what's happening." The Senate on June 21 rejected Lautenberg's bill with a 54-39 vote, instead approving a measure from Sen. John Warner (R-Va.) to approve a coffin-photo policy based on privacy.

A different kind of war

Perhaps journalists should have expected such an about face from the Pentagon.

In the days immediately following the Sept. 11 terrorist attacks, defense officials prepared Americans and the news media for an early display of secrecy in the all-encompassing American campaign against terror by characterizing the war on terrorism as something other than a typical global conflict.

While the past century saw one international alliance stifle Nazism during World War II and a later one liberate Kuwait more than 14 years ago in the Persian Gulf War, they warned journalists and Americans that the first war of the new century promised something different.

Even before the first deployment of American troops to the Middle East after September 11, Rumsfeld cautioned the press and the public that this war would be waged against an often unseen enemy.

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

After joint forces defeated the Taliban in Afghanistan, defense officials praised many aspects of that part of the war, claiming that the country no longer harbored nor trained terrorists, the Afghan people enjoyed renewed freedoms and that terrorists had been sent scurrying.

Amid both the presence and absence of conventional warfare, combat preceding the war in Iraq displayed a considerable lack of openness. For most of the first 18 months following the Sept. 11 attacks, U.S. officials kept journalists at bay, leaving questions about how much Americans really understood about their country's involvement in the war on terrorism.

Consider:

• The escalation of U.S. forces before the Oct. 7, 2001, 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, 2001, raid involving U.S. Army Rangers and other special forces near Kandahar, particularly an account from Seymour Hersh in a *New Yorker* article that detailed the mission as a glorified failure. Officials declined to offer specific information to rebut Hersh's claims.

• 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 refused to field difficult questions concerning the Jan. 24, 2002, 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 Afghan leader.

• Dozens of American soldiers lost their lives in Afghanistan and other Middle Eastern countries and, according to several reports, including a July 21, 2002, *New York Times* article, several hundred, perhaps thousands, of Afghan citizens have lost their lives, including several dozen at a wedding ceremony. But the U.S. military has refused to offer estimates of the death toll since the beginning of military actions.

From the start of fighting in Afghanistan until the escalation of war in Iraq, defense officials described the war on terrorism as a different kind of war, one they often described as a war with multiple battles along multiple fronts and possibly against multiple and sometimes unknown enemies.

For journalists, that became 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, 2001, 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 had heard this talk before, more than 13 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, the new war arenas — the deserts and mountains of Afghanistan and Iraq — offered little hope of easy access to those reporting about war to the world.

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

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

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

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

As fighting waned in Afghanistan and attention turned toward Iraq, press bureau chiefs met monthly with Clarke and

Pentagon staff to improve access and to consider a more elaborate plan of placing reporters among troops. The chiefs stressed that they did not wish for an invasion on Iraq to occur without their presence as happened with Afghanistan.

For the war in Iraq, the bureau chiefs seemed to have gotten their wish as the Pentagon's mobilization of national and international media stood as the first time since World War II that defense officials actually assigned journalists slots with combat and support units.

Training for combat coverage was extensive. The Pentagon itself trained 238 journalists in four separate week-long boot camps on military bases stateside. Other journalists enlisted in programs sponsored by Centurion Risk Assessment Services, which claims to have trained more than 10,000 reporters since 1995.

To handle the logistics of the largest-ever mobilization of journalists, the Pentagon crafted an extensive set of ground rules explaining how news organizations could place their reporters among troops. Some bureau chiefs examined an early version of the rules dated Feb. 3, 2003. On Feb. 12, the Pentagon began making embed assignments. The final version of the rules was released Feb. 28, a day after defense officials spelled out final plans of the embedding program to bureau chiefs.

The ground rules defined "media embed" as a "media representative remaining with a unit on an extended basis — perhaps a period of weeks or even months." The Pentagon agreed to provide billeting, rations and medical attention and some assistance with communications if necessary in an effort to allow journalists to "live, work and travel" with units in order "to facilitate maximum in-depth coverage of U.S. forces in combat and related operations."

The Pentagon said it would only allow journalists attached to news organizations. It would allow freelance reporters only if they were attached to a legitimate media group.

The rules, too, required unit commanders to ensure that embedded journalists observe actual combat operations at every opportunity. The rules specifically forbade the commanders from excluding them for safety reasons or for gender. But the rules did allow unit commanders to suggest that embedded journalists be replaced if they could not handle the rigorous conditions of the mission.

The rules forbade journalists to carry or use firearms or use their own vehicles. But the military units to which they were attached were required to provide transportation and protection whenever and wherever possible.

The rules did not specifically bar the use of any communications equipment, but they allowed unit commanders to impose temporary restrictions on electronic transmissions if security needs arose. The rules required journalists to seek approval for transmissions in hostile situations or in combat. With the rules, the Pentagon stated that media reports would not be subject to security reviews and that the standard for releasing information "should be to ask 'why not release' vice 'why release.' " Decisions, the rules stated, should be made in minutes, not in hours.

The rules allowed for the release of considerable details of operations, particularly after specific missions were complete. The military described 14 categories of "releasable" information that ranged from date, time and location of previous missions to general types of forces involved in combat to operation code names to names and hometowns of units and of individual service members with the individuals' consent. All interviews with officials, service members and unit commanders were considered to be "on the record."

But the rules encouraged "security at the source" and placed restrictions upon the release of 19 different categories of information. These included reports detailing the specific numbers of troops, ships and aircrafts, the rules of engagement, intelligence information, future operations, effectiveness of enemy defenses and troop movement.

The rules reminded embedded journalists of the sensitivity of using names of casualties and asked that the names of the dead not be released for at least 72 hours to allow defense officials time to notify next-of-kin.

The rules allowed unit commanders to place embargoes to protect operational security but "will only be used for operational security and will be lifted as soon as the operational security issue has passed."

The Pentagon further required every journalist and news organization participating in the embedded process to sign a "hold harmless" agreement, releasing the United States from any liability should the journalist become injured or killed during the military operations. The agreement also noted that the government could terminate the embedding process at any time and for any reason.

Noticeably missing from the rules were designations for open coverage — the default system of coverage agreed to more than a decade ago. The rules themselves never discussed an open coverage plan nor did they mention what might happen if journalists ventured off on their own.

But Pentagon staff bluntly discouraged open coverage during the Feb. 27, 2003, meeting with press bureau chiefs. One issue had to do with reporter safety.

"The battlefield's a dangerous place, and it's going to be a dangerous place even embedded with our forces," said Brian Whitman, a deputy Defense Department spokesman and a former special forces major in charge of the embedding process. "It will be even a more dangerous place, though, for reporters that are out there not in an embedded status, that are moving around the battlefield, as I call it, running to the sounds of the guns."

Should journalists wish to remove themselves from embedded status, unit commanders were instructed to drop them off at the first safe location or at a point where they could get commercial transportation to take them out of the conflict zone. They were not given specific instructions on accepting unembedded journalists out on the field, except perhaps to treat them as ordinary citizens.

"So if there is some thought process going on that, 'Well, I'll put my reporter out there, I'll just link them up with a unit as they come into Iraq and then embed that way,' I would tell you that is an unlikely scenario that will unfold," Whitman said.

In essence, the embedding process, not open coverage, had become the default system of coverage for future military conflicts.

But the change hardly occurred in a vacuum. Assistant Defense Secretary Clarke noted that she talked extensively with many of the bureau chiefs about how to help their reporters cover the war. The embedding plan came only with their input, she said.

During a Jan. 14, 2003, meeting of the bureau chiefs, she joked: "Of course, if anybody wants to put their hands up now and say 'No, we're not interested in embedding,' that would really help in the process."

No hands from the bureau chiefs. Only laughter.

The Pentagon began preparing the journalists for embedding soon after that meeting. On March 7, 2003, the first wave of the journalists to be embedded with U.S. troops shipped out. By the time the war started on March 19, more than 1,000 journalists were strewn across the war arena, 662 of them were attached directly to an Army, Navy, Air Force or Marine unit.

Over the next two months, the number of embedded journalists would climb past 700. But by the time President Bush declared an end to major combat in Iraq on May 1, 2003, the numbers had dwindled considerably.

On July 14, 2003, *Editor and Publisher* magazine, which had been maintaining a regular tally of embedded journalists, reported that only 23 journalists remained attached to a military outfit. Most journalists had struck out on their own by that time, willing to brave the hostilities of a post-war Iraq without military support.

Soon after her resignation in 2003, Clarke told *USA Today* that there was a connection between the dwindling embedded ranks and a spike in bad news coming out of Iraq that summer.

"We went from hundreds of journalists all over Iraq covering every aspect of the war," Clarke said. "I don't know what the number is now, but it's a fraction of that now and I think that is too bad. There are some really important things going on in that country. Many are good, some are bad, but if there were more coverage and more comprehensive coverage people would get a clearer picture."

Clarke said the Pentagon would be encouraging news organizations to send more journalists.

But such an "invitation" to rejoin U.S. troops and forgo open coverage never appeared.

However, on June 22, 2004, Deputy Defense Secretary Paul Wolfowitz testified before the House Armed Services Committee, blaming journalists for only offering Americans a partial picture of America's mission in Iraq. In his testimony, Wolfowitz said reporters were afraid to travel, content only to "sit in Baghdad." Wolfowitz apologized for his comments three days later, noting that "many journalists continue to go out each day — in the most dangerous circumstances — to bring us coverage of the war in Iraq and Afghanistan."

Wolfowitz's and Clarke's calls aside, most of the world's press were stymied in their efforts to cover the June 29 transfer of power from the coalition to the new Iraqi government as well as the first appearance of Saddam Hussein in an Iraqi court.

Coalition officials gave journalists scant notice of their plans to transfer power two days early. When the journalists arrived, they were ordered to surrender their cell phones, agree to using one pool camera and embargo the news for more than two hours.

As for Saddam's hearing, only two reporters — one for the *New York Times* and one from CNN — were allowed in the courtroom due to a ruling from an Iraqi judge.

The press, the military and the American public were all winners in the U.S. military's program embedding journalists in Iraq, according to a RAND Corp. study released in December 2004.

"Allowing journalists to move with combat units appears to be the best solution to date at balancing the needs of three core constituencies — the press, the military and the public," said Christopher Paul, a RAND social scientist and lead author of the report.

The number of embedded journalists topped 800 at the height of combat in 2003, but dwindled to double digits by 2004, *Editor & Publisher* reported. As the January 2005 Iraqi elections approached, however, there was a surge in news organizations seeking embedded slots with the Marine unit in Fallujah. *E&P* reported that all 70 embed slots with the First Marine Expeditionary Force were filled in January 2005, compared to 15 embeds one month earlier.

Obstacles to coverage

Perhaps surprisingly, American reporters have always been free to go into the battlefields in Afghanistan and Iraq, although at the risk of being captured or killed by the Taliban or Iraq's Republican guard or snipers.

But the Pentagon did not improve reporting conditions much during the opening months of the war in Afghanistan 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 Sept. 11 generally occurred without the media. When America unleashed its first wave of attacks on Oct. 7, 2001, only a handful of journalists enjoyed a vantage point within Afghanistan. Although 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 during the Afghanistan conflict 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 bureau chiefs persuaded military officials to boost briefings to as many as a dozen a week, their reporters 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 in Afghanistan rarely came from the front lines with American troops.

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

For example, *Washington Post* reporter Doug Struck claimed that an unidentified U.S. soldier threatened to shoot him if he went near the scene of a U.S. Hellfire missile strike in Afghanistan in mid-February 2002.

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 was not completely truthful about other incidents, either. For example, White House officials have since backed away from a story they spread on Sept. 11, 2001, about threats to Air Force One to justify President George W. Bush's delayed return to Washington, D.C., that day.

During the first six months of the war in Afghanistan, the Defense Department either continually avoided answering questions or offered misleading answers about completed missions, including an Oct. 19, 2001, Army Rangers raid on Kandahar or a Jan. 24, 2002, Special Forces raid at Oruzgan or an estimated death count of Afghan citizens.

After the start of bombing, the Pentagon limited access to

U.S. troops so much that journalists had to base reports on the fall of Mazar-e-Sharif and other Taliban strongholds on second-hand reports.

Perhaps the most outrageous slight to press access came on Dec. 6, 2001, when Marines locked reporters and photographers in a warehouse to prevent them from covering a story about American troops killed or injured by a stray bomb north of Kandahar. The Pentagon later apologized, but the damage had been done. The press had to resort to accounts filtered through military sources.

In other situations, the press accused U.S. military officials and soldiers of encouraging Afghan fighters to seize photos and digital images from photographers and occasionally deceiving the public about military operations. The press also criticized the Pentagon for crafting an exclusive deal with satellite companies, preventing news organizations from purchasing photos of Iraq and Pakistan for three months after Sept. 11.

Journalists faulted the Pentagon for ignoring the 1992 agreement. In an Oct. 17, 2001, 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, 2001, 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, 2001, Assistant Defense Secretary Clarke unveiled "The Way Ahead in Afghanistan," a memorandum that was the Pentagon's closest statement to acknowledging the 1992 agreement until the release of the embedding rules.

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 opened coverage in Afghanistan and declared the end of pool coverage on Dec. 27, 2001.

For early war coverage in Afghanistan, though, that was too little too late. Most reporters and troops had already left Mazar-e-Sharif and Bagram. Poor access to troops stationed in Uzbekistan and Pakistan remained for months afterward because the Pentagon cited "host country sensibilities."

At the end of February 2002, the Pentagon quietly began allowing a handful of American journalists to join U.S. ground troops in active combat. Reporters joined the troops in eastern Afghanistan so they could witness assaults on suspected al-Qaida and Taliban fighters who had regrouped near the town of Gardez.

The reporters joining the operation agreed to withhold filing their reports until U.S. military officials gave them permission, Rumsfeld announced on March 4, 2002.

By then, the war was 149 days old.

But even those efforts did not go without hitches.

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

American correspondents rarely traveled with American soldiers even after March 4, 2002, a marked difference from coverage in past wars. Without cooperation from the U.S. military, the reporters resorted to traveling on their own into exceptionally dangerous areas or securing passage with Afghan commanders.

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

American and foreign reporters continued to complain about heightened restrictions on coverage of about 500 detainees at the Guantanamo Bay Naval Base in Cuba. In April 2002, U.S. military officials transferred the captives to a new, permanent prison that is far from view of journalists on the base.

At Camp X-Ray, the original detainee prison camp, journalists could view the detainees in their chain-link cells and often write about their detention. But at the new Camp Delta, journalists had little contact or view of detainees.

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

Military officials denied such claims. But there has been little independent verification from outsiders about the living conditions of those detained and very little from journalists.

War correspondents became so frustrated with the obstacles to their coverage efforts that they formed Military Reporters and Editors, borrowing the Army acronym for Meals Ready to Eat. The group hoped to improve talks with Pentagon officials and, thus, access to the battlefield.

On Dec. 12, 2002, MRE joined the signatories of a second letter urging the Bush administration to abide by guidelines established by the Pentagon and media groups and to ensure access to action not only in the Middle East, but stateside as well.

Since then, the Pentagon has offered assurances of improved access, the most significant action, of course, being the embedding process. The first wave of embedded journalists shipped out on March 7, 2003.

The war on terrorism was now 517 days old.

Although the access improved considerably, the embed process had its own shortcomings.

The very nature of an embed — the permanent attachment of a reporter to a single fighting unit — created obstacles. The reporter only viewed what the fighting unit viewed. Had reporters whose troops did not see action decided to leave their units, they were not allowed to re-embed. Those that remained naturally developed a strong attachment to the soldiers with whom they shared bread and bunk.

"All of the embeds have a strong stake in the outcome of any hostile action they might encounter, hence their understandably enthusiastic embrace of the plural pronouns 'we,' 'our,' and 'us' to describe the progress of the units to which they're attached," wrote Jack Shafer in his media criticism column for Slate. "You'd probably use the same words if you were dune-buggying your way to Baghdad."

Such attachment also meant that reporters often developed a working relationship beyond the simple act of reporting news.

In some of the more personal accounts from an embedded reporter, Ron Martz of the *Atlanta Journal-Constitution* wrote about consoling a wounded soldier as a frantic medic attempted to bandage his wounds, about him and photographer Brant

Sanderlin holding intravenous bags for wounded civilians, and about two U.S. soldiers wounded by bullets that likely would have killed him.

"Had they not been there, I most likely would not be typing this now," Martz wrote.

Some reporters took a step further in aiding U.S. troops.

While traveling with the First Marine Division, *Boston Globe* reporter Scott Bernard Nelson was the only one in the unit who spied an Iraqi sniper and informed a Marine gunner. The marksman fired 100 rounds and killed the sniper. Jules Crittenden of the *Boston Herald* wrote about how he called out Iraqi positions to soldiers in his division.

"Some in our profession might think as a reporter and noncombatant, I was there only to observe," Crittenden wrote in an April 13, 2003, account. "Now that I have assisted in the deaths of three human beings in the war I was sent to cover, I'm sure there are some people who will question my ethics, my objectivity, etc. I'll keep the argument short. Screw them, they weren't there. But they are welcome to join me next time if they care to test their professionalism."

Despite the attachment to their units, reporters said they could step back and tell the important stories about the war.

"If I found a story they didn't want me to tell, I'd do it," said Rick Leventhal, an embedded correspondent for Fox News, during a forum hosted by *New York* magazine and *The Guardian*. "For example, when we ran low on food, and we were eating one to two meals a day instead of three, they didn't want me to report that, but I did."

Some embeds, however, found that their reporting was being stifled by the very commanders ordered to allow it. Reporters attached to the USS Abraham Lincoln learned that they had to agree to restrictive guidelines set by Rear Adm. John M. Kelly as they boarded the ship. Kelly banned reporters from the general mess deck and required them to have a naval officer accompany them for every interview.

The restrictions later vanished when reporters complained to defense officials in Bahrain.

Although embedded reporters faced a variety of obstacles in covering the war, they had an easier time of coverage than the unilaterals — the name given to independent reporters who opted against official attachment to a military division.

The unilaterals faced the hostile Iraqi battlefields — not only bullets but sandstorms and unbearable heat — on their own without the considerable resources of a U.S. military division. Unilaterals attempting to reach Baghdad by themselves often ran out of gas, food and other supplies, resorting at times to pleading to passing military divisions for assistance.

The Pentagon repeatedly discouraged reporters from going out on their own. Assistant Defense Secretary Clarke later reported that U.S. troops bailed out a *Newsweek* correspondent who got caught in a fire fight only hours after being warned by soldiers of the danger. Clarke said troops twice helped a CBS television crew — once because they ran out of gas and a second time after they ran out of water.

And there was the simple act of survival for the unilaterals. After all, they comprised most of the 27 journalists who lost their lives in Iraq from the start of war through summer 2004.

One of the most formidable challenges for nearly every journalist covering the war abroad and stateside has been covering the U.S. and British governments' efforts to demonstrate that the Saddam Hussein regime actually pursued weapons of mass destruction.

But the press accounts of the lack of success in uncovering such weapons have subjected reporters to scorn and charges of unpatriotic reporting. With the embed process, independent coverage and the immediacy of news reports, the chance for a clear picture of the war came into focus sooner rather than months or even years later.

Steven C. Vincent became the first American journalist attacked and killed in the war in Iraq in August 2005 when he was kidnapped and shot by masked gunmen in the southern city of Basra. Vincent, a freelancer whose work appeared in *The New York Times* and *The Wall Street Journal*, was investigating the burgeoning influence of extremists and alleged corruption in the Iraqi police force.

The March 2005 shooting of an Italian journalist by U.S. troops after as she was being driven to freedom after a month in captivity sparked controversy after her version of what happened and the U.S. military's version did not jibe. Italian military officer Nicola Calipari was killed and journalist Giuliana Sgrena was wounded in the encounter.

In a television interview, Sgrena described the shooting as a "rain of fire," a description the White House called "absurd." The White House nevertheless promised a full investigation and a subsequent Pentagon report cleared the U.S. military and said soldiers involved should not be charged with dereliction of duty. Italian officials blasted the report and called for a further investigation. An Italian report a few weeks later refuted the U.S.'s exoneration of its troops saying, among other things, that the car whisking Sgrena to freedom was moving at 30 mph — not 50 mph as the military claimed — near a U.S. checkpoint that was not clearly marked.

Sgrena was injured on "Death Street," a 10-mile, attack-prone route out of and into Baghdad International Airport. Censored information in a government report contradicts a report by a Western security company about the number of attacks on the road, *The New York Times* reported May 31, 2005.

Journalists in Iraq are kept on a short leash, holed up in their hotel rooms unable to do man-on-the-street interviews or leave the heavily fortified U.S.-government protected "Green Zone" without military escort. In November 2004, non-embedded reporters were barred from traveling through towns south of Baghdad.

Reuters' Iraq bureau chief, Andrew Marshall, who in July 2005 finished a two-year stint in Baghdad, wrote on the *CJR Daily* Web site that "mobility has shrunk to almost zero over the past two years. The risk of kidnaping is extremely high and it is no longer possible to travel freely around the city. Even going to a news conference in the Green Zone has become a major logistical operation involving armoured cars, two-way radios and heavy security precautions."

Newsweek correspondent Joe Cochrane, who returned to Iraq in July 2005 after 18 months away, said journalists aren't adequately covering the war, but it's not their fault. Journalists are kept on a short leash as security worsens, he reported.

"The security situation has deteriorated so badly that journalists rarely venture out unless they're embedded with U.S. soldiers. That wasn't the case early last year, when foreigners could walk the streets outside the Green Zone, shop in local markets, and, most important to journalists, talk to the Iraqi people. Those days are long gone. . . . I would love to write about new schools being built and local village leaders learning about democracy, but I can't go out to see such things. "

The obstacles to reporting led news organizations to weigh

the risks of Iraq coverage.

"The question for foreign news organizations in Iraq now is whether half a story is better than none. For the moment, most think it is," CBS News correspondent Tom Fenton wrote in January 2005.

Despite the increase in western journalists leading up to the January 2005 elections, major U.S. news organizations began facing resistance from journalists reluctant to cover Iraq, *The Washington Post* reported. "The people who have experience there are exhausted," Marjorie Miller, foreign editor of the *Los Angeles Times*, told *The Post*. "It's terribly dangerous in ways that other wars haven't been. You could always get killed by being in the wrong place at the wrong time. Here, just by being a westerner, you're perceived, or fear you're perceived, as a partisan. Reporters don't want to be seen as partisan at a cost of their lives." Tim McNulty, the *Chicago Tribune*'s assistant managing editor for foreign news, agreed. "The pool of people willing to go has steadily shrunk over the last two years," he said. "The number of people who have spent a good deal of time there have said they've done their time and are not eager to go back. . . . If they say no, I don't ask the reasons."

After returning from Iraq, Army 1st Lt. Paul saw a void in American news reports about the war and created "Operation Truth," a program to link rank-and-file military members with journalists, *Editor & Publisher* reported in April 2005. Even with reporters on the scene, the ongoing system of embedding reporters actually limits the stories they can tell. "You need access from the military for your story," Rieckhoff said. "At its very foundation, as long as the military is controlling access to your story, you've got to play ball. Not to say that they're totally in bed, but you have to play along. If you don't, next time they'll deny you access."

Satellites

An exclusive deal between satellite companies and the U.S. government precluded news organizations from purchasing photos from Iraq and Pakistan for three months after Sept. 11. Some media organizations called the tactic "checkbook shutter control" and worried the trend would continue.

But during the initial invasion of Iraq, no such exclusive contracts existed. High-resolution satellite imagery gave newspaper readers and television viewers a new perspective on this war. In some cases, satellite images provided perspective when no information was available on the ground.

The New York Times used satellite imagery from Spacing Imaging to show the house in Mosul, Iraq, where Saddam Hussein's sons Uday and Qusay were killed.

When no reporters were allowed on the U.S. Air Force base on Diego Garcia in the Indian Ocean, satellite imagery confirmed that the U.S. government was constructing two B-2 bomber hangers there.

Satellite imagery has captured activities in North Korea where no reporters have been able to report from the ground.

In recent years, more companies have entered the satellite imaging business. Israel, France, Japan and India have launched high-resolution satellites, creating a wider supply of images.

But administration policy still allows for controls over distribution and collection of satellite images. The Bush administration in late April 2004 announced a new policy that makes commercial space photography — instead of photos taken by government satellites — the primary source for government users.

The policy replaced the policy set by the Clinton administration, which limited the activities of the space companies. The new directive will require federal agencies to buy the photos from private companies. But shutter control provisions in the policy allow the government to halt the gathering or distribution of satellite imaging to "protect U.S. national security and foreign policy interests."

Other limits on release of satellite images are either part of contracts satellite companies have with the U.S. government, or internal policies of the companies. Two key players in this venture are Colorado-based Space Imaging and Digital Globe. In 1999, Space Imaging launched its IKONOS satellite, which collects one-meter resolution black-and-white images (meaning a 1-meter-by-1-meter object can be seen in the image) and 4-meter resolution color images.

Digital Globe limits access to photos that would reveal U.S. military troop positions. And, as part of its licensing agreement with the government, the company waits 24 hours before releasing anything of an 82-centimeter resolution or better. Space Imaging claims to have no such policy for delayed distribution.

The new Bush administration policy has been hailed by imagery firms, which likely will see increased business as government agencies make greater use of commercial satellite imagery.

But the move to increased use of commercial vendors also poses new concerns for government openness advocates because it moves more government functions to private companies and allows the federal government to control information relating to national security or foreign policy.

Even though official policy allows the government to shut off satellite imaging or distribution of imaging through shutter control, that policy has not been used.

But some users of satellite images still say the market is not really open.

In early 2005, the National Geospatial-Intelligence Agency announced plans to remove topographic maps from the public domain as of Oct. 1. Such information involves airport layouts, coasts and harbors worldwide, as well as flight information, gathered via satellite. By keeping the maps secret, the agency said among the things it hope to accomplish is preventing access to data by those intending harm to the United States.

Security concerns also prompted the doctoring and blurring of satellite images of the White House, the Capitol and U.S. Senate and House Office Buildings that are publicly available on Google maps.

It is difficult to say how exactly the administration's policy will affect organizations that use satellite images because the policy itself is classified, though excerpts and analyses of the policy have been released.

Development of war coverage in the 1990s

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

But it took months and sometimes years of persistent questioning and research by the press for Americans to learn that most U.S. casualties during the 1991 Gulf 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. 25, 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 more than 48 hours and did not ease all restrictions on reporters until Nov. 7, 1983.

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 war access

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

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

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

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

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

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

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

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

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

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

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

"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.

In the most recent battlefield access case, a U.S. District Court in Washington, D.C., decided on Jan. 8, 2002, 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.

In a final ruling on Feb. 14, 2003, U.S. District Judge Paul Friedman threw out Flynt's lawsuit against Rumsfeld, noting that the Pentagon had placed one of *Hustler*'s reporters on a list

of embedded journalists.

Friedman said that because the Defense Department did not formally deny access to the *Hustler* reporter, the judge could no longer address the issue of whether journalists have a constitutional right to join U.S. troops engaged in combat.

"The mere existence of a legal disagreement about the scope of the First Amendment does not make that disagreement fit for judicial review," Friedman wrote.

Again, the court said such an injunction might be justified in another case. The U.S. Court of Appeals for the District of Columbia affirmed Friedman's decision a year later.

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 or, in this new case, the embed program.

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

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

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

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

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

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

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

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

The courts might have to address the issue again if a news organization, veterans group or relative of a deceased soldier decides to challenge the most recent ban on photos of flag-draped coffins.

Pentagon reports and codes

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

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

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

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

With this in mind, press advocates could argue that the Pentagon violates its own regulations should defense officials attempt again to keep reporters from conflicts.

At first blush, the newest ground rules suggested that the Pentagon had opted for much more media access to the battlefield. One positive for war correspondents is that they are no longer relegated to a briefing room as they often were during the Persian Gulf War.

But the word "embed" implied "stuck."

Indeed, Pentagon officials strongly discouraged news organizations from allowing their reporters to roam the battlefields or potential theaters of conflict. And they noted that reporters once embedded probably would not be embedded again should they wander off.

The "hold harmless" agreement includes a clause that allows the Pentagon to withdraw the embeds at any time for any reason. Should coverage of the war not progress as U.S. military leaders see fit, the embedding process — and, thus, an important part of wartime access — could come to an end.

But the process has not come to an end. Rather, defense officials have roundly praised it. In fact, the Pentagon has started discussions about making the embedded program created for the war in Iraq a permanent one. Shortly after she announced her resignation on June 16, 2003, Assistant Defense Secretary Clarke said the Iraq war proved that the embed program worked in many ways, including providing the American public the information it needed about U.S. military affairs.

"Transparency works," Clarke said at a June 17, 2003, Brookings forum. "The good news gets out. The bad news gets dealt with quickly."

And the war on terrorism has proven a variety of other important points on the need for battlefield access to remain as open as possible:

• Security issues. Pentagon officials and Congress should note that journalists have a long history of keeping secrets. During World War II, dozens of journalists joined the Allied forces for the Normandy invasion, agreeing to conditions that they not file their reports until after Gen. Dwight Eisenhower declared the invasion a success. A *New York Times* reporter later

in the war rode with the bombing squadron on its way to Hiroshima and waited three days before offering his account of the mission.

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

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

During the war in Afghanistan, reporters, knowing an initial strike was evident in early October 2001, never leaked the news. And during the war in Iraq, reporters routinely observed military briefings on condition they not compromise operational security. They for the most part complied with the rules.

Defense officials, however, complained about three incidents involving reporters.

Geraldo Rivera of Fox News was told in late March 2003 that he could no longer accompany U.S. troops in Iraq after he allegedly revealed troop positions on the air by drawing schematics in the sand.

Military officials on March 26, 2003, kicked freelance journalist Philip Smucker out of Iraq saying he revealed too much military information during a live interview with CNN. Smucker had been working for the *Christian Science Monitor* and *The Daily Telegraph* of London.

Officials removed one embedded reporter — Brett Lieberman of the Harrisburg, Penn., *Patriot News* — in late April after a commanding officer thought one of his stories revealed too much military detail. *Patriot News* editor David Newhouse defended Leiberman's reporting in that April 29, 2003, article.

Five journalists were booted from embed slots in the late 2004 and early 2005 for reporting secure information, *Editor & Publisher* reported. "They were all for operational security reasons, (revealing) something that would have been of use to the enemy," Maj. Kris Meyle, who runs the embed program, told *E&P* from Baghdad. "Generally, it gets done very quickly. Usually it was something that was not done intentionally by the reporter." Meyle declined to disclose the identities of the "disembedded" or the news organizations for which they worked. But she did not recall any from newspapers. "I remember them being broadcast," she said.

But such incidents proved to be exceptions to the thousands of reports transmitted from the Iraqi desert.

Even in the aftermath of the invasion and amid numerous complaints about the content and quality of war reporting, there was not another contention raised that a reporter had transmitted or released vital U.S. military secrets.

• Reporter safety. The Pentagon repeatedly raises reporter safety as an issue whenever it declines to allow journalists access to the battlefield. For the war in Afghanistan in particular, military officials at first said the combat would be 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, 2002. "This is a notably different activity. It's terribly untidy."

But war correspondents understand "untidy." In conflict after conflict they willingly risk their lives to tell the world the truth about events, as the tragic deaths of *Wall Street Journal* reporter Daniel Pearl and other journalists during the war in Afghanistan shows. And in Iraq, it is important to note the enormous numbers of reporters who have signed up for combat training so that they could tolerate the trials of war themselves.

U.S. authorities in Iraq ranked 108th on a list of countries posing the biggest dangers to journalists worldwide, according to a global survey of press freedom released in October 2004 by Reporters Without Borders. The organization gave the U.S. its own separate ranking in Iraq because of the number of journalists reported killed by U.S. military gunfire.

Between March 2003, when the U.S. invaded Iraq, and May 2005, 45 journalists died while covering the war in Iraq, according to the Freedom Forum. By comparison, 69 journalists died in all of World War II and 63 died during 20 years of conflict in Vietnam and Cambodia. Given the shorter duration of the wars in Iraq, it might be the most dangerous conflict journalists have ever covered.

Bounties of as much as $10,000 were reportedly being offered for murdering a journalist or an Iraqi translator in an area dubbed the "triangle of death" south of Baghdad, The Associated Press reported in January 2005.

A TV journalist was shot dead in September 2004 as he made a live broadcast from Baghdad when U.S. helicopters fired on a crowd gathered around the burning wreckage of a US armoured vehicle. Mazen al-Tumeizi, working for al-Arabiya, an Arab satellite TV channel, was killed in the incident.

An Iraqi journalist working for a U.S.-funded television station and his son were killed by gunmen in the southern city of Basra in February 2005.

In June 2005, A U.S. military sniper apparently shot and killed an Iraqi special correspondent for Knight Ridder, Yasser Salihee. The shot apparently was fired by a U.S. military sniper, though there were Iraqi soldiers in the area who also may have been shooting at the time. Salihee, 30, had the day off and was driving alone near his home in the western Baghdad neighborhood of Amariyah when a single bullet pierced his windshield and then his skull.

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

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

For example, the Pentagon itself referred to published news reports as evidence that the U.S. military did not cover up evidence from a July 1, 2002, air strike in Afghanistan that locals say killed dozens of people celebrating a wedding in the province of Uruzban.

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

Capt. T. McCready, a press affairs officer for the Joint Chiefs of Staff, stressed to bureau chiefs recently that having independent press coverage enables the military to examine the battlefield in numerous ways.

"I've got to tell you from a pure military perspective, it's a great benefit for us to have cameras behind what could potentially be enemy lines and I'll just lay that to you flat out because we

can pick up stuff off of just your normal, everyday broadcasts," McCready said.

Some press critics, however, have faulted journalists for failing to question the military enough about its failure to find damning evidence proving Iraq developed or was in the process of developing weapons of mass destruction. The news media also came under fire for verifying and correcting details of the saga of Pvt. Jessica Lynch, the soldier whose dramatic rescue was widely publicized, although the details were overstated to the news media by military officials.

And a reporter's eye can offer a different explanation for events, such as when soldiers open-fired on a van packed with 15 Iraqi women and children sped toward a checkpoint near Najaf on March 31, 2003. Depending on the account, 25 mm cannon rounds from American Bradley tanks destroy the van, killing either seven or 10 of the passengers.

Hours later, officials at U.S. Central Command in Bahrain called the incident tragic and faulted the driver of the van for failing to heed warning shots. Defense officials report the death toll at seven. But a journalist at the scene — William Branigan of *The Washington Post* — wrote an April 1, 2003, account that 10 people died in the accident and quoted a U.S. captain yelling at a platoon leader for failing to fire warning shots fast enough.

Defense officials responded with plans of an investigation despite initial reports describing the incident as a suicide bombing. Such a reaction likely would not have happened had Branigan not been there as an embedded journalist among U.S. troops.

• Improved military-media relations. Over the years, journalists have harped on the argument that a well-covered war enables the military to better understand the role of the journalist. But it is actually the opposite take that makes the better argument: That access to the military makes for the better journalist.

Military experts and officials often complain about journalists hyping a minor shooting skirmish or improperly identifying military equipment. Col. David Hackworth, a decorated Korean and Vietnam veteran and longtime war correspondent for *Newsweek*, made much of this ignorance before any of the fighting in Afghanistan or Iraq.

"From my experience, and this is one of the shockers, is that, in the last couple of decades, most military reporters don't know a tank from a turd," Hackworth said. "So they don't know what is secure and what is not secure, what is important and what is not important."

But after covering the latest war from the front lines, the media has an enormous cache of reporters that hold a better understanding of military affairs and war. The military, on the other hand, has a new generation of soldiers and officers who appreciate the role of the press.

• Open coverage logistics. The war on terrorism brought new rules and concerns. The Pentagon claimed in the Persian Gulf War and the wars in Afghanistan and Iraq that the unique circumstances of modern warfare preclude open coverage in the early and sometimes latter 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.

While the 1992 agreement called for embedded reporters, it also recognized the need for reporters to be able to step aside from the military units and cover the war from a variety of vantage points. The new ground rules did not even acknowledge open coverage. In fact, Pentagon officials strongly discouraged open coverage and continue to do so long after the start of the war in Iraq.

Reporters still in Iraq are mainly free to pursue open coverage, and are largely responsible for their own security.

• 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 the wars in Afghanistan and Iraq entail and, if they wish, to change their minds about supporting it.

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

And the American people have a right to view the victories as well as the defeats.

"We made a huge mistake trying to restrict press coverage in the first Gulf War because of our Vietnam mentality," Gen. Wesley Clark, a former presidential candidate and CNN military analyst, told Walter Isaacson and Eason Jordan for an essay published in the *Wall Street Journal*. "We had a First Armored Division tank battle that was just incredible, perhaps the biggest armored battle ever, but not a single image was reported or documented for history by the press. I hope we don't make that mistake again."

The American people have a right to learn if evidence exists of an Iraqi scheme to develop weapons of mass destruction. They have a right to observe how the U.S. government develops a new government in Iraq designed to ensure the people there have a say in their own government.

The Pentagon's guidelines and practice of embedding reporters made a positive statement in ordering that the release of information be the default standard when reporters asked for battlefield details. But the rules also offer numerous opportunities for military officers to withhold the information and access should things get nasty.

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

Access to terrorism-related proceedings

HIGH
High Risk To A Free Press

Hearings involving immigrants and material witnesses traditionally were presumed open. But post-September 11, secrecy stands as the default status for access, making it difficult — if not impossible — for the American public and the press to learn about cases involving detainees, material witnesses and others involved in the war on terror.

Traditionally, judicial and immigration proceedings have operated under a presumption of openness. In the aftermath of the Sept. 11 attacks, however, secrecy has become the default status for most proceedings even remotely connected to the war on terrorism. The changed climate has made it difficult for the American public and the news media to monitor the fairness and effectiveness of the Bush administration's antiterrorism policies.

The centerpiece of the administration's strategy has been a policy of massive, indefinite detention of hundreds, if not thousands, of people. Most of these detainees have never been charged with a crime and have never been given access to a lawyer. More than 500 are being held at the American naval base in Guantanamo Bay, Cuba, but others are confined in prisons in the United States. A Red Cross report indicates that hundreds of people are held in secret U.S. custody in detention centers across the world, as well.

Those detained include citizens and non-citizens alike. Some have been classified as "enemy combatants" and essentially have been held incommunicado without any legal process. Others have been arrested as material witnesses, often for reasons that have little to do with the purposes of the material-witness statute. A relative few have been prosecuted in American civilian courts, such as convicted Sept. 11 conspirator Zacarias Moussaoui. Finally, an unknown number of individuals — mostly Arab or Muslim men — have been arrested and, in many cases, deported on immigration charges.

Disappointingly, the American justice and immigration systems have largely accommodated the government's efforts to restrict public access in the name of protecting security interests. The U.S. Court of Appeals in Richmond (4th Cir.) in summer 2005 upheld a trial judge's refusal to unseal a search-warrant affidavit in a 2002 antiterrorism investigation in Northern Virginia. In April 2005, the U.S. Court of Appeals in Washington, D.C., closed a courtroom to hear arguments in an appeal brought by FBI whistleblower Sibel Edmonds, whose lawsuit was dismissed after the government asserted the "state secrets" privilege. And the U.S. Court of Appeals in San Francisco (9th Cir.) is considering whether to allow the government to file its briefs under seal in a lawsuit brought by privacy advocate John Gilmore over the secret rule requiring airline passengers to show identification.

With some notable exceptions — including a military appeals court's ruling in February 2005 that so-called Article 32 hearings are presumed open — judges, prosecutors, and other government officials have effectively limited public scrutiny of terrorism-related proceedings and documents.

Enemy combatants

Important Supreme Court decisions issued in 2004 are having an impact on litigation now pending in federal courts — cases that may end up before the high court again in the coming year.

In three major cases decided on June 28, 2004, the U.S. Supreme Court invalidated much of the Bush administration's strategy for handling so-called "enemy combatants" who took up arms — unlawfully, the Bush administration says — against the United States. While the full impact of the court's decisions remains unclear, the rulings appear to ensure at least some degree of media scrutiny of what had previously been an entirely secret process. The press has been permitted to cover at least part of the administrative detainee proceedings conducted at Guantanamo in the wake of the Supreme Court rulings.

Two of the cases, *Hamdi v. Rumsfeld* and *Rumsfeld v. Padilla*, addressed the rights of U.S. citizens, while a third, *Rasul v. Bush*, concerned the nearly 600 foreign nationals detained at the American naval base in Guantanamo Bay, Cuba.

In *Hamdi v. Rumsfeld*, the justices examined the case of Yaser Esam Hamdi, an American citizen who was allegedly captured in late 2001 while fighting for the Taliban in Afghanistan. Hamdi, a Saudi national, was held for nearly three years in a military brig in Charleston, S.C., but never charged with a

crime.

By an 8-1 margin, the justices agreed that Hamdi must at least be given the opportunity to contest the government's factual claims before a "neutral decision-maker." But the court's multiple opinions left some doubt as to what might satisfy that standard. A plurality opinion authored by Justice O'Connor suggested that an "appropriately authorized and properly constituted military tribunal" might suffice.

Hamdi was released from custody and sent back home to Saudi Arabia in October 2004. Justice Department officials refused to discuss the case publicly except to say Hamdi no longer posed a threat, *The Washington Post* reported.

In *Rumsfeld v. Padilla*, the justices voted 5-4 to dismiss the case of Jose Padilla, another U.S. citizen whom President Bush has branded an enemy combatant, on procedural grounds. Padilla was arrested in May 2002 for allegedly plotting to detonate a so-called "dirty bomb" in the United States. He has not been charged with a crime, yet he remains confined in a South Carolina military brig.

The high court ruled that Padilla's habeas corpus case should have been filed in South Carolina rather than New York, a procedural defect that his attorneys vowed to cure immediately. In July 2004 they did so, re-filing the lawsuit in U.S. District Court in Charleston, S.C.

On Feb. 28, 2005, a federal judge in that state ruled that the president had no authority to hold Padilla as an enemy combatant and ordered the government either to charge Padilla with a crime or let him go. The government appealed the decision in *Padilla v. Hanft* to the U.S. Court of Appeals in Richmond, Va. (4th Cir.), which heard oral arguments on July 19. No opinion had been issued as of late August.

In *Rasul v. Bush*, the high court considered whether American courts can hear habeas corpus lawsuits filed on behalf of Shariq Rasul and 15 other terror suspects detained indefinitely in Guantanamo Bay, Cuba. The justices rejected the Bush administration's argument that federal courts lack jurisdiction because the detainees are not citizens and the military base in Cuba is outside the territorial sovereignty of the United States.

"Considering that the [habeas corpus] statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship," Justice John Paul Stevens wrote in the majority opinion. Justice Stevens added that the United States exercises "exclusive control and jurisdiction" over the naval base at Guantanamo, despite its location outside the United States.

More than a year after the decision in *Rasul v. Bush*, however, not a single prisoner has had a court hearing on whether he is being rightly detained. Instead, the military instituted two new processes — combatant status review tribunals and administrative review boards — at Guantanamo Bay following the Supreme Court decisions. Lawyers who represent detainees question the constitutionality of these administrative proceedings, which often rely on secret evidence to keep prisoners in custody. A federal appeals court in Washington, D.C., will consider the legality of the proceedings this fall in a case called *Boumediene v. Bush*.

Combatant status review tribunals

In the wake of the high court's ruling, the Bush administration scrambled to retain control of the detainees. In what appeared to be an effort to stem a potential flood of *habeas corpus* petitions, the Pentagon hastily announced the formation of "combatant status review tribunals" — panels composed of three military officers — to evaluate whether each of the then-approximately 585 detainees was properly classified as an enemy combatant. The review tribunals were announced on July 7, 2004, less than 10 days after the Supreme Court's decision in *Rasul*.

By the time they concluded, the tribunals determined that all except 33 of more than 560 Guantanamo detainees had been properly incarcerated, according to *The New York Times*.

Several Guantanamo prisoners challenged the constitutionality of the combatant status review tribunals in separate *habeas corpus* actions brought in federal district court in Washington, D.C. In January 2005, the lawsuits resulted in opposite rulings by two judges of that court, setting the stage for review by the U.S. Court of Appeals in Washington, D.C. this fall.

On Jan. 19, U.S. District Judge Richard Leon dismissed the *habeas* petitions of seven foreign Guantanamo detainees captured in Bosnia and Pakistan, ruling that the president has the power to detain them and the prisoners had no "cognizable" constitutional rights. Twelve days later, U.S. District Judge Joyce Hens Green ruled the opposite, concluding the detainees have valid constitutional claims and that the combatant status review tribunals violated their due process rights. Appeals in both cases were filed in March.

A three-judge panel of the U.S. Court of Appeals in Washington, D.C. was scheduled to hear oral argument in the combined cases, titled *Boumediene v. Bush*, on Sept. 8. Both sides were expected to address the impact of that court's July 15 decision in *Hamdan v. Rumsfeld*, in which the court held that the planned war-crimes trials, called military tribunals or commissions, at Guantanamo are legal. (*See below*)

Administrative review boards

In December 2004, the Pentagon unveiled a new process called "administrative review boards" to ascertain whether a detainee still poses a threat to the U.S. or still possesses valuable information. Like the combatant status review tribunals, each board is made up of three American military officers. Seventy enemy combatants had completed the annual process as of July 2005. Four of them were slated for release and 25 were to be transferred to the custody of their home country, according to the Pentagon; the remaining 41 will remain imprisoned. Administrative review board hearings had also been held for another 92 detainees, who were waiting for Deputy Defense Secretary Gordon England to approve the board's recommendations.

As with the combatant status review tribunals, detainees are not represented by lawyers at the administrative review boards. They are prohibited from seeing any classified evidence against them and they cannot call witnesses. About half the detainees who underwent reviews had refused to attend, "many because they consider them unjust," *Newsday* reported in June.

In March, shortly after journalists were first let in to the administrative review hearings, the military stopped providing details of the allegations against each prisoner, The Associated Press reported. Officials previously had released "fact summaries" of the accusations that noted whether a detainee was connected to the Taliban or Al Qaeda. The military gave no reason for the change.

Officials allowed a reporter from *Newsday* to cover the review process for an unnamed 29-year-old Saudi on the condition that the paper not identify the detainee or participating officers. *Newsday* reported that "it was impossible . . . to draw conclusions

about the threat potential" of the anonymous detainee based on the unclassified parts of the proceeding.

The Supreme Court's decision in *Rasul* had made clear, of course, that Guantanamo detainees had a right not to administrative proceedings, but to take their cases to federal court. Although the detainees were notified of this right shortly after the ruling, most were unrepresented by counsel and had no practical means of filing a *habeas corpus* petition.

Those detainees who were represented by lawyers — usually *pro bono* counsel retained by family or friends in the United States — often were not permitted to meet with their attorneys. Since then, the government has permitted lawyer-client meetings in certain cases. Nearly 200 Guantanamo detainees had lawsuits pending in federal court as of July 2005, according to *The New York Times*.

Military tribunals

Separate from the combatant status review tribunals and administrative review boards, which determine only whether there is a sufficient factual basis for a detainee's continued confinement, the Defense Department had planned to try a few of the Guantanamo detainees, who were actually charged with crimes, before military tribunals. Trial dates had not been set by late August 2005, however, as defense lawyers have asked the U.S. Supreme Court to review the July 15 decision in *Hamdan v. Rumsfeld.* In that case, a three-judge panel of the U.S. Court of Appeals in Washington, D.C., rejected a challenge to the legality of the military tribunals, overturning a lower court decision.

President Bush had signed a Military Order on Nov. 13, 2001 authorizing the first American military tribunals since the World War II era. The tribunals — or "commissions," as the military calls them — were to try foreign terror suspects who were believed to have committed or plotted attacks against the United States.

Almost immediately, the broad scope of the President's order drew harsh criticism from legal scholars, the news media, and the international community. For example, law professors Neal Katyal and Laurence Tribe wrote in *The Yale Law Journal* in April 2002 that the President's order suffered from "dramatic problems," including "its authorization for the tribunals to operate in secret, without any publicity to check their abuses and with no threshold requirement of a showing that such secrecy is needed."

The military regulations implementing President Bush's order did little to cure these defects. The Pentagon's Military Commission Order No. 1, issued on March 21, 2002, established a procedural framework for the tribunals. It provided that the tribunals are to consist of between three and seven members, that the accused shall have the right to counsel, that the prosecution must share exculpatory evidence with the defense, and that the accused is presumed innocent.

On the question of media access to the tribunals, however, Military Commission Order No.1 was not terribly reassuring. The order recited that proceedings are to be open "except where otherwise decided by the Appointing Authority [a position now filled by John Altenburg, Jr.] or the Presiding Officer." It then listed a number of potential grounds for closing proceedings, including to protect the physical safety of participants and to prevent disclosure of "information protected by law *or rule* from unauthorized disclosure" — a standard that seemed to encompass non-classified information.

Military Commission Order No. 1 also specified that the identified grounds for closing proceedings are not exhaustive. Rather, it provides that the presiding officer has discretion to close any proceeding or restrict the release of information when he sees fit.

For nearly two years after the issuance of Military Commission Order No. 1, there seemed to be little tangible progress toward actually convening the military commissions. During this time, the Defense Department designated several detainees as "eligible" for standing trial and appointed their defense lawyers, but it did not initiate proceedings. The most significant development was the May 2003 issuance of Military Commission Instructions No. 1-8, which added more details to the tribunal process and defined the substantive elements of certain crimes.

Finally, on Feb. 24, 2004 — well over two years after the first detainees arrived at Guantanamo — the military charged two of them with crimes. The men, Ali Hamza Ahmed Sulayman al-Bahlul of Yemen and Ibrahim Ahmed Mahmoud al-Qosi of Sudan, were charged with conspiracy to commit war crimes for the alleged roles as al Qaida associates. In the following weeks, the Pentagon designated an additional 13 men as subject to tribunals, but only four were approved for trial — Bahlul, Qosi, David Hicks of Australia, and Salim Ahmed Hamdan of Yemen, who served as a driver for Osama bin Laden.

Preliminary hearings in those four cases were held the week of Aug. 23, 2004. About 60 members of the news media arrived at Guantanamo to cover the hearings, but all were required to sign "ground rules" imposing significant restrictions on the scope of their coverage.

Among other things, the ground rules stated that journalists can be excluded from any hearing at any time without explanation, that any information deemed classified or otherwise "protected" will not be released, and that no audio or videotaping or photography is allowed. Additionally, the Pentagon required journalists to agree not to disclose the identities of prosecutors, defense counsel, witnesses, and commission personnel without prior approval.

The proceedings were halted abruptly in November 2004 when U.S. District Judge James Robertson, acting on a habeas petition filed by Hamdan seven months earlier, ruled that the tribunals were unlawful and that Hamdan could not be tried unless it was first determined that he was not a prisoner of war under the 1949 Geneva Convention.

In a 45-page opinion, Robertson found it "troubling" that unlike courts-martial, the accused can be excluded from military tribunals. Hamdan also will never learn of any classified evidence against him — even his lawyer is forbidden to disclose it.

"It is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause [of the Constitution] could not be countenanced in any American court," Robertson wrote.

The government asked for expedited review of the decision by the U.S. Court of Appeals in Washington, D.C., while lawyers for Hamdan, hoping to sidestep review by the intermediate appellate court, asked the Supreme Court to take the case. The high court declined without explanation to do so, enabling the government's appeal to proceed before the D.C. Circuit, which heard oral arguments in March.

A three-judge panel that included Supreme Court nominee John Roberts reversed Judge Robertson's ruling on July 15. After determining that Congress authorized the president to

establish the military tribunals, the appeals court held that Hamdan had no right to enforce the Geneva Convention in court — and that even if the treaty could be so enforced, "it does not apply to al Qaeda and its members," Judge A. Raymond Randolph wrote. Senior Judge Stephen Williams, the third member of the panel, disagreed with that conclusion, although he concurred in the judgment.

In August, Hamdan's lawyers filed a petition for certiorari with the U.S. Supreme Court. If the high court decides to hear the case this term, it will issue an opinion by the summer of 2006. In the meantime, the military tribunals for Hamdan, Hicks and two others remain on hold.

History of military tribunals

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

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

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

A different result occurred in *Ex Parte Milligan* in 1866. Milligan was a U.S. citizen living in Indiana. Gen. Alvin P. Hovey ordered that Milligan be arrested and tried for his membership in an organization known as the Sons of Liberty. Hovey believed that group members, 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 U.S. 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, U.S. "officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal."

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

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

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

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

Nevertheless, many experts argue that *Quirin* does not provide blanket authorization for the use of military tribunals. The Court entered a brief order upholding the tribunals shortly after the arguments, but did not issue a full opinion until many months later. Scholars say some justices, particularly Harlan Stone and William Douglas, later regretted the ruling.

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

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

The Court said: "We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here . . . were plainly within those boundaries."

The Court narrowed its decision to avoid any sweeping statement regarding military jurisdiction and provided little guidance for application to future cases.

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

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

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

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

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

In 1950, the Court's decision in *Johnson v. Eisentrager* again confirmed the use of military tribunals. In Johnson, a group of Germans who had been captured in China during World War II challenged their trial and conviction by military tribunal. The Court held that nonresident 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 World War II.

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.

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.

Material-witness detentions

Many of the people detained as part of terror investigations are never charged with a crime. Instead, the Bush administration appears to be using the federal material-witness statute as a kind of "preventive detention" for Arab or Muslim men whom authorities suspect of terrorist connections but lack evidence to charge. That approach is at odds with the purpose of the statute, which is to authorize the brief detention of witnesses to ensure that they appear to give testimony.

According to a June 27, 2005 *New York Times* story, Human Rights Watch and the American Civil Liberties Union have identified at least 70 cases in which people were detained as material witnesses in a terrorism investigation. Of those, all but one were Muslim men. The *Times* reported that 42 of the 70 men were released without charges being filed, 20 were charged with non-terrorism-related offenses, and four were convicted of supporting terrorism — including Zacarias Moussaoui, who pleaded guilty in April. Two men, Jose Padilla and Ali Saleh Kahlah al-Marri, were detained as material witnesses and were later designated unlawful enemy combatants.

Because individuals detained as material witnesses are not charged with a crime, at least initially, the news media faces an uphill battle in trying to learn of their stories. Their arrests generate little or no public record, even though they can result in imprisonment under harsh conditions for months. When such stories are reported, it is often because the material witness is eventually released and makes his account public.

One of the most notorious material-witness cases is that of Oregon lawyer Brandon Mayfield, a converted Muslim who was wrongly accused of involvement with the March 2004 train bombing in Madrid and jailed for two weeks on a material witness warrant. Attorney General Alberto Gonzales acknowledged in April 2005 that the FBI had used parts of the controversial PATRIOT Act to secretly investigate Mayfield, who was cleared of any wrongdoing.

In another instance, *The New York Times* reported on Aug. 19, 2004, that Abdullah al Kidd, a U.S. citizen, was arrested as a material witness at Dulles Airport while waiting to board a flight to Saudi Arabia to pursue graduate studies. Kidd was held in solitary confinement for two weeks. He was then released but ordered by a judge to remain within the four-state territory of Idaho, California, Nevada and Washington. As a result, Kidd lost his graduate scholarship and his marriage dissolved. He was never charged with a crime or asked to testify in any proceeding.

Other prominent material-witness cases to be made public include those of James Ujaama and Maher "Mike" Hawash. Ujaama, a Seattle computer technician, was detained on July 22, 2002, as a material witness. Ujaama was also the subject of a Virginia grand jury investigation into whether he provided material support, including computer equipment, to the Taliban. Citing grand jury secrecy, a U.S. magistrate in Denver, Craig Shaffer, denied a request by *The Denver Post* and the *Rocky Mountain News* for access to a July 26, 2002 material witness hearing in Ujaama's case.

On Aug. 23, 2002, a federal court in Virginia held another hearing on the validity of Ujaama's detention. The hearing was closed, but various news organizations again sought access — again, unsuccessfully. After a closed hearing, Ujaama was indicted on Aug. 29, 2002, for conspiracy to engage in terrorism-related activities. He pleaded guilty in April 2003, and was sentenced to two years in prison.

The case of Hawash, an Intel software engineer from Portland, Ore., was similarly secret. Hawash was detained as a material witness in February 2003, but the government did not acknowledge his confinement until April 2003, when he was charged with conspiring to aid al-Qaida and the Taliban. The government alleged that Hawash had attempted to enter Afghanistan to fight with the Taliban, and, after failing to enter the country, conspired to plot terrorist activity with others in the Portland area.

On August 6, 2003, Hawash pleaded guilty to providing material support to the Taliban, and agreed to testify against his co-conspirators in exchange for a reduced sentence. He was sentenced on Feb. 9, 2004, to seven years in prison.

Although Hawash was eventually charged with a crime, critics have condemned the use of the material witness statute as a form of preventive detention. David Fidanque, executive director of the ACLU in Oregon, told the *San Jose Mercury News* that the government "used it as a form of preventative detention while they were taking their sweet time getting their ducks in a row." Fidanque questioned the need for a secret detention, noting that "if they had probable cause to indict him, they should have indicted him at the time [he was detained as a material witness]."

Despite the efforts of the news media and human rights organizations to document abuse of the material-witness statute, it remains unknown just how widespread such examples are. The government's expansion of the statute's purpose and its steadfast refusal to provide information about who has been detained make it very difficult for the public or press to monitor the detention of material witnesses.

Media access to terror prosecutions

In the relatively few cases where the government has seen fit to file criminal charges, rather than operate through the material-witness or enemy-combatant designations, federal prosecutors have aggressively sought to restrict public access to the proceedings. Frequently, judges have acceded to such requests, deferring to the government's claims that the secrecy is justified by post-Sept. 11 concerns about national security. Even in cases where no arrests have been made, courts have refused to allow access to what are normally public documents.

In March 2002, federal agents applied for warrants to search Islamic businesses and charities in Northern Virginia as part of an ongoing antiterrorism investigation. In support of each application they submitted the same 100-page affidavit by a U.S. customs agent, describing the investigation. They asked Magistrate Judge Theresa Buchanan of the federal district court in Alexandria, Va. to seal the affidavit, saying disclosure could threaten the ongoing probe. Buchanan granted the government's request.

Reporters for *The New York Times* and the *Tampa Tribune*, who asked to see the affidavit after the searches were conducted, were denied access to the document — even though under the Federal Rules of Criminal Procedure, affidavits filed in support of an application for a search warrant usually become part of the public case file after the warrant is executed and returned.

The newspapers asked the judge to unseal the affidavit but she refused. The *Times* and Media General Operations, Inc., owner of the *Tampa Tribune*, then petitioned the district court to unseal the affidavits. They also asked the court to direct the clerk's office to keep a public docket of search-warrant proceedings, after media lawyers were shown a ledger book, kept behind the counter at the clerk's office, that contained serial numbers and the words "sealed case" but no information as to what was in the docket.

The district court dismissed the petition, prompting the *Times* and Media General to appeal to the U.S. Court of Appeals in Richmond, Va. (4th Cir.). Fourteen media outlets, including The Reporters Committee for Freedom of the Press, filed a friend-of-the-court brief in support of the appeal.

In October 2003, Dow Jones & Co., publisher of *The Wall Street Journal*, asked Buchanan to release the affidavits because the government had admitted that changed circumstances no longer required the documents to be sealed in their entirety. After a hearing on the motion, Buchanan allowed a redacted version to be disclosed to the public. The appeal by the *Times* and the *Tribune* remained before the Fourth Circuit, however.

A three-judge panel of that court ruled on Aug. 1, 2005 that the government's interest in protecting the ongoing investigation justified sealing the search-warrant affidavit, which contained "sensitive details." The court accepted Judge Buchanan's reason for sealing the affidavits even though she voiced the reason *after* she sealed them.

Rules requiring judges to base a decision to seal on specific factual findings and to state the reasons for rejecting alternative measures to sealing are "for the benefit of the court, not the public," and the reasons for sealing the affidavits in this case were "patently apparent" from the documents themselves, Judge H. Emory Widener Jr. wrote for the court.

In a concurring opinion, Judge M. Blane Michael noted that Buchanan erred in failing to justify her decision to seal the affidavits until after the media filed a motion to unseal them. The error was harmless, however, "because the judge subsequently explained that the sealing was justified for reasons that were apparent to her at the time the order to seal was entered," Michael wrote.

The panel also refused to order the federal court clerk's office in Alexandria to keep a public docket of search-warrant proceedings.

As of Aug. 25, the newspapers had not appealed the Fourth Circuit's decision.

On Jan. 12, 2004, federal prosecutors in Minneapolis charged Mohammed A. Warsame with providing material support to al Qaeda only after Warsame had already been detained for more than a month in secret custody. When the Minneapolis-based *Star-Tribune* reported Warsame's identity, U.S. Attorney Tom Heffelfinger vowed to prosecute the law enforcement officials who had leaked the information. The case, which is still pending, has largely been conducted behind closed doors.

In Albany, N.Y., federal prosecutors invoked the Classified Information Procedures Act (CIPA) to try to withhold evidence not only from the public, but also from the defendants — two Muslim men who had been charged with money laundering in support of terrorism. The unusual request came a day after the *Albany Times Union* ran a front-page story exposing translation errors in a document that prosecutors had cited as establishing a link between the men and terrorists in Iraq.

In perhaps the most prominent post-9/11 terror case, however, the federal judge presiding over the trial of convicted Sept. 11 conspirator Zacarias Moussaoui in Alexandria, Va. has been largely skeptical of the government's requests for secrecy. U.S. District Judge Leonie Brinkema ruled in October 2003 that prosecutors could not introduce evidence related to the Sept. 11 attacks or seek the death penalty if they refused to give Moussaoui access to potentially exculpatory witnesses held in U.S. custody. Most of Brinkema's order was later overturned by the U.S. Court of Appeals in Richmond, Va. (4th Cir.). In September 2004, the federal appeals court released a heavily redacted opinion that allowed Moussaoui to submit written questions to other detainees, *The Washington Post* reported.

The Moussaoui case has been a prominent testing ground for the question of media access to terrorism prosecutions. In January 2002, Court TV and C-SPAN petitioned Judge Brinkema to allow "gavel to gavel" television coverage of the trial, despite a federal rule barring television cameras from federal courtrooms. The companies, supported by other media entities including the Reporters Committee, argued that the rule unconstitutionally discriminated against the television media. Judge Brinkema denied the request.

Judge Brinkema has generally taken a measured approach to allowing public access to court filings in the case. In April 2003, she issued an order establishing guidelines on public access to case filings and requiring the government to justify secrecy concerns when it sought to seal documents. Most pleadings from both sides have been released on a redacted basis.

The U.S. Court of Appeals in Richmond, Va. (4th Cir.) has also made efforts to accommodate the public's right of access, holding bifurcated oral arguments in May 2003 and December 2003 to allow the press to monitor the portion of the hearing in which classified information was not discussed. The briefs filed with the court of appeals were released after redaction, and the court's opinion was public.

Moussaoui became the first person in the U.S. convicted in connection with the Sept. 11 attacks when he pleaded guilty in April 2005 to six terrorism-related conspiracy charges. Jury selection for the sentencing phase of the proceedings, which could result in the death penalty, is scheduled to begin in January 2006.

M.K.B. v. Warden

The government has also taken a secretive approach toward the hundreds of men of Arab descent who were arrested on minor immigration charges after Sept. 11. In perhaps the most dramatic such case, an Algerian-born Florida resident named Mohamed K. Bellahouel was secretly jailed by U.S. authorities for five months in late 2001 and early 2002, apparently because he had worked at a restaurant frequented by two of the Sept. 11 hijackers. When Bellahouel filed a *habeas corpus* petition challenging his captivity, the federal courts withheld the case from the public docket as though it didn't exist.

The existence of Bellahouel's lawsuit became known only after a clerk at the U.S. Court of Appeals in Miami inadvertently placed it on a public calendar, where reporter Dan Christensen of the *Daily Business Review* noticed it. Christensen wrote a series of articles in the spring of 2003 about the case. Then, in June 2003, Bellahouel's public defender filed a heavily redacted petition for review with the U.S. Supreme Court.

The petition argued that the lower courts had violated the First Amendment and common law by sealing all pleadings in Bellahouel's case without articulating any findings to support such secrecy. According to the petition, the case had originally been left off the public docket in its entirety, and it had later been added to the docket by order of the appeals court, but with 63 of the 65 entries denoted as "SEALED."

On Nov. 5, 2003, the Reporters Committee filed a friend-of-the-court brief urging the Supreme Court to review the case in order to clarify that the public and press have a right of access to *habeas corpus* proceedings. Two months later, a coalition of 23 media and public interest organizations — including the Reporters Committee, *The New York Times*, *The Washington Post*, Gannett, Knight Ridder, Hearst, ABC News, and CNN — asked to be added as parties to the case.

The unusual request to intervene at the Supreme Court level, rather than at the trial court, was made necessary by the unique circumstances of the case, the media coalition argued: "Because of the exceptional secrecy surrounding this case, [the coalition members] were unaware of its very existence when it was being litigated in the district court, and were therefore unable to move to protect their interests by intervening there."

Making the case even more unusual, the Solicitor General's office filed a completely sealed response brief on January 5, 2004. Prominent First Amendment lawyer Floyd Abrams said in news accounts that he could not recall a single other case in which the U.S. government's position in a Supreme Court case was entirely secret.

On Feb. 23, however, the justices denied Bellahouel's petition for review, denied the news media's motion to intervene, and granted the government's motion to file a completely secret brief, all without comment. In short, the court allowed the extraordinary secrecy in the case to stand.

The Bellahouel case continues to have an impact, however. On Aug. 23, 2004, People for the American Way sued the Justice Dept. to obtain release of redacted records of secret court proceedings against Sept. 11 detainees. The lawsuit "was prompted by the case of Mohamed Kamel Bellahouel, one of hundreds of Middle Eastern men detained by DOJ after the 9-11 attacks," the organization said in a news release. That case is now pending in U.S. District Court in Washington, D.C.

Super-sealing cases in federal court is "not as rare as it seems on its face," a Justice Department lawyer said during a hearing in March, explaining the government's difficulty in complying with PFAW's Freedom of Information Act request.

Attorney Marcia Berman cited the "many material witnesses who were picked up and arrested" immediately after Sept. 11 as the reason for the number of cases sealed in their entirety, according to a transcript of the March 17 hearing. "But also in a lot of those cases, the government did ask for a proceeding or just an arrest warrant to be sealed," Berman added.

Media access to court-martial proceedings

This past year, the military has guarded secrecy in court proceedings against American servicemen accused of abusing prisoners. In October 2004, for example, the Navy refused to identify two SEAL members who were to face military trial, called court-martial, for allegedly assaulting a prisoner at Abu Ghraib who later died. One of the SEALs, Lt. Andrew Ledford, was identified just before his trial began in May in San Diego, Calif. An unnamed CIA official testified from behind a floor-to-ceiling curtain during the court-martial for Ledford, who was acquitted.

In another case, the press was denied access to a December

2004 preliminary hearing, called an "Article 32" hearing, at Ft. Carson, Colo., to determine whether three Army soldiers would stand trial for allegedly murdering an Iraqi general during interrogation. Maj. Gen. Abid Hamed Mowhoush suffocated inside a sleeping bag in November 2003 while in U.S. custody in Qaim, Iraq.

After convening in open session, Capt. Robert Ayers closed the Dec. 2 proceeding — held pursuant to Article 32 of the Uniform Code of Military Justice — to hear evidence from a security specialist, who advised Ayers that classified matters were linked to the investigation. Ayers shut out the public and press from the entire proceeding for the rest of the day while he heard testimony from several other witnesses.

The Denver Post challenged the closure to the U.S. Army Court of Criminal Appeals, which stayed the Article 32 hearing on Dec. 3 while the newspaper's appeal was pending. The *Post* later filed a brief arguing that the First Amendment provides a qualified right of public access to courts-martial. The Reporters Committee for Freedom of the Press submitted a friend-of-the-court brief supporting the newspaper's appeal.

The Arlington, Va.-based court agreed with the media, ruling on Feb. 23 that Ayers should have tailored the closure order narrowly to prevent disclosure of classified information. Closing the entire proceeding was "ill-considered, overbroad, and clearly erroneous," the court stated, since a review of the transcript revealed that in only "a few instances" was the testimony so intertwined with classified data that it justified closure.

The government, which submitted secret documents to support its position, had contended the law was unclear whether the same standards for closure of courts-martial governed the pretrial Article 32 proceedings. But the court held that — as with a trial — an officer conducting an investigatory hearing must consider the substance of the testimony witness by witness, and determine that all of a witness's testimony will disclose classified information before he can shut out the public and press. Otherwise, the witness must testify in open session as to non-classified information.

Although the court did not order Ayers to re-hear the testimony given behind closed doors, it directed him to release a transcript of the Dec. 2 proceeding to the public, with the portions containing classified information redacted. The Article 32 hearing resumed in March.

Describing interrogation methods at the Qaim facility where Mowhoush was held, a Utah National Guardsman testified in closed session that CIA interrogators beat Iraqi prisoners with a sledgehammer handle, according to a transcript obtained by the *Post* in July. Mowhoush was allegedly stuffed inside a sleeping bag and bound with electrical cord.

Court-martials for Chief Warrant Officer Jefferson L. Williams and Chief Warrant Officer Lewis E. Welshofer, both charged with murder, are set for this fall, *The Washington Post* reported.

On Dec. 3, 2004, President Bush issued an executive order amending the rule that governs closure of courts-martial, R.C.M. 806(b). The new rule, which took effect in January, provides that courts-martial be open to the public unless (1) there is a "substantial probability" that openness will threaten a more important interest, such as a defendant's right to a fair trial; (2) closure is "no broader than necessary" to protect that interest; (3) the military judge considered "reasonable alternatives" to closing the courtroom and found them insufficient; and (4) the judge makes "case-specific" findings on the record to support closure.

In addition, the new rule requires military judges to make findings on the record before excluding specific people from a courtroom. The findings have to show the reason for the exclusion and why the judge believes exclusion is necessary, and that the exclusion "is as narrowly tailored as possible."

Closure of immigration proceedings

Immigration and naturalization proceedings have been handled by INS administrative courts operated by the Justice Department rather than federal district courts. The administrative regulations provide that the proceedings "shall" be open to the public, but permit closure if necessary for national security or privacy reasons.

On Sept. 21, 2001, Chief Immigration Judge Michael Creppy issued a memorandum to all immigration judges and court administrators. The memorandum stated that "the Attorney General has implemented additional security procedures for certain cases in the Immigration Court." It directed judges to close immigration hearings 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 a particular case exists on the docket.

The Creppy memorandum appeared to mandate an across-the-board closure policy that departed drastically from the previous practice that each immigration case is evaluated on its own merit to determine whether closure is necessary. In response to lawsuits from media and public interest organizations, two federal courts of appeals reached conflicting decisions on whether the policy in the Creppy memorandum was constitutional. The U.S. Supreme Court declined to hear the case, meaning the circuit split remains.

Sixth Circuit: Across-the-board closure is unconstitutional

On Jan. 28, 2002, the *Detroit Free Press* and the *Ann Arbor News* filed a lawsuit in U.S. District Court in Michigan challenging the closure of immigration proceedings. The next day, the American Civil Liberties Union filed a similar lawsuit in Detroit. 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 alleged that the immigration proceedings relating to Rabih Haddad should be open to the public. The *Free Press's* suit asked for access to all future proceedings and for copies of transcripts of all past proceedings. On March 5, 2002, the two lawsuits were consolidated into *Detroit Free Press v. Ashcroft*.

A U.S. District Court judge in Detroit ruled April 3, 2002, that across-the-board closure was unconstitutional and Haddad's proceedings should be open. Judge Nancy G. Edmunds wrote in her opinion: "Openness is necessary for the public to maintain confidence in the value and soundness of the government's actions." Edmonds ordered the immigration court to release transcripts of the deportation proceedings against Haddad.

In August 2002, the U.S. Court of Appeals in Cincinnati (6th Cir.) issued an opinion strongly affirming the trial court ruling, finding that the across-the-board closure of immigration proceedings was unconstitutional. The court held that the First Amendment requires a presumption of openness that must be

applied to immigration proceedings.

The desire to protect national security may be a "compelling interest" but the immigration judge had failed to make particularized findings to justify closure, and the Creppy Memorandum also failed to specify particular facts requiring closure, the court concluded. Most importantly, the court found that the Creppy Memorandum was not "narrowly tailored."

"The Government offers no persuasive argument as to why the Government's concerns cannot be addressed on a case-by-case basis," Judge Damon Keith wrote.

Haddad's deportation case continued, and he was eventually deported to Lebanon on July 14, 2003.

Despite the resolution of the Haddad case, the government may still seek to close immigration hearings. In August 2003, the government requested a closed hearing in the case of Nabil al-Marabh, a Detroit man once suspected of having links to al-Qaida leader Osama bin Laden. al-Marabh, once No. 27 on the U.S. government's terror watch list, had been detained on Sept. 19, 2001, just eight days after the Sept. 11 attacks.

After news organizations in Michigan filed a legal challenge to the government's attempt to close the al-Marabh proceedings, the government dropped its request for secrecy. A public hearing was held before Immigration Judge Robert D. Newberry in September 2003. On Jan. 21, 2004, Newberry ordered al-Marabh deported to Syria. The publicly available opinion states that Marabh had been "credibly linked to elements of terrorism" and posed a danger to U.S. national security.

Third Circuit: Blanket closure is justified

A media coalition also battled the blanket closures on immigration hearings in New Jersey, but with less success.

On March 6, 2002, North Jersey Media Group Inc. and the *New Jersey Law Journal* filed a lawsuit in U.S. District Court in New Jersey. Like the ACLU lawsuit in Michigan, the New Jersey suit challenged the constitutionality of Creppy's order.

On May 29, 2002, U.S. District Judge John Bissell ruled that the across-the-board closure of immigration proceedings was unconstitutional. Bissell found that the First Amendment right of access was infringed by a blanket closure order and declared that proceedings should not be closed unless there is a showing of a particular need on a case-by-case basis.

Bissell's ruling was appealed to the U.S. Court of Appeals in Philadelphia (3rd Cir.), which heard arguments in September 2002. The following month a split panel of the Third Circuit court issued its ruling, finding that blanket closure of immigration courts was justified by the potential threat to national security.

The Third Circuit found that the First Amendment right of access can apply to administrative proceedings such as immigration hearings, but it must consider the "experience and logic" of allowing access to a particular type of proceeding before determining if the right actually applies. The court noted that "Congress has never explicitly guaranteed public access" to immigration proceedings.

Furthermore, because some cases have upheld closure of specific immigration proceedings, the court ruled that there was not an "unbroken, uncontradicted history" of openness that would require a presumptive right of access under *Richmond Newspapers*.

The court also found that the "logic" of allowing access, which the Supreme Court has said depends on "whether public access plays a significant positive role in the functioning of the particular process in question," does not mandate openness because of the negative effects access would have.

The court stated that the September 11 attacks changed our "national life," making national security a primary concern. Therefore, the court found, "to the extent open deportation hearings might impair national security, that security is implicated in the logic test." The court rejected the argument that openness should be favored as long as openness played a positive role in the proceeding, finding that a court must also evaluate whether "openness impairs the public good."

The court held that the government presented "substantial evidence that open deportation proceedings would threaten national security." It relied entirely on the affidavit of Dale Watson, an FBI counterterrorism and counterintelligence expert, who listed seven concerns with openness: (1) open proceedings would reveal sources and methods of investigation; (2) terrorists would be able to learn how others have entered the United States illegally; (3) terrorists could learn which members of cells had been detained; (4) it may motivate terrorists to accelerate the timing of attacks; (5) public hearings could permit terrorists to create false or misleading evidence, or destroy evidence, or tamper with witnesses; (6) detainees have a privacy interest in keeping secret their involvement in a government investigation; and (7) to prove the need for secrecy on a case-by-case basis would require the government to divulge sensitive information. Although the court agreed that some of those concerns were speculative, the court stated that it was "quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise."

In a dissent, Judge Anthony Scirica said that he found that "experience and logic" show a long history of access to immigration proceedings and an important public interest served by such access. In addition, the harms the government warns of can be addressed through a case-by-case determination of the need for sealing orders, and do not merit a blanket prohibition on access.

Showing just how divisive the case was in the Third Circuit, a petition for rehearing by the entire court was voted down in a 6-5 vote on Dec. 2, 2002 — with Scirica voting against rehearing.

On Feb. 28, 2003, the media parties petitioned the U.S. Supreme Court to review the Third Circuit's decision. However, on May 27, the Supreme Court decided not to review the case. The Court's failure to review the case means that the split in the Circuits will remain.

Although the Supreme Court did not disclose its reasoning in rejecting review, the Solicitor General had urged the Court not to take the case, arguing that there was no right to attend deportation hearings and the issue was moot, anyway, because most hearings had already taken place.

Other immigration proceedings

Individual detainees have challenged the Creppy memorandum as well, with mixed results. On Feb. 28, 2002, Malek Zeidan filed a complaint in U.S. District Court in New Jersey challenging the Creppy Memorandum as it applied to his removal proceedings.

Zeidan, a Syrian with an expired visa, had been living in New Jersey. He was arrested on Jan. 31, 2002, by INS agents. A closed hearing was held three weeks later. His lawyer, Bennet Zurofsky, challenged the closure rule during the hearing. When the immigration judge refused to open the case, Zeidan's suit was filed in U.S. District Court.

The complaint alleged that the closure of his case violated his due process rights and was contrary to protections in INS regulations and the Administrative Procedures Act. In March 2002, after the suit was filed, the government removed the "special interest" designation from his case. Because the issue was deemed to be moot, the Zeidan case was dismissed on April 16, 2002. Zeidan was released on bail.

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

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

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

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

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

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

For the hundreds of detainees who have been arraigned or deported, justification for their detention has mostly been kept secret. Because of the high level of secrecy involved, a coalition of groups filed a Freedom of Information request with the INS, asking for the names of the detainees. When the INS refused to release the information, the groups, including the Reporters Committee, filed a lawsuit in U.S. District Court in Washington, D.C., asking the court to rule that the names must be released. On Aug. 2, 2002, District Court Judge Gladys Kessler ordered the government to release the detainees' names. However, on June17, 2003, the federal Court of Appeals in Washington, D.C., ruled that the government did not have to release the names of the detainees.

In July 2003, the Office of the Inspector General for the United States Department of Justice issued a report that criticized government agencies for using "preventive detention," the practice of detaining immigrants even when there is no evidence of involvement with terrorist activities. The report said that immigrants were locked up for months merely because their visas had expired. "Detention without evidence is not the hallmark of a free society," the report stated.

Gag orders, other restraints on speech

Prosecutors, judges and prison officials have gone to unusual lengths to prevent suspected or convicted terrorists from communicating with the outside world once they have been detained. These measures have included the liberal use of gag orders, the imposition of "Special Administrative Measures" (SAMs) that bar prisoners from communicating with anyone but their lawyers, and efforts to monitor attorney-client communications in terror cases. The result has been to diminish the amount of information available to the public and news media in terrorism cases.

Gag orders

Judges have routinely imposed gag orders upon the attorneys in terrorism-related cases, despite the objections of some defense lawyers that the gag orders interfere with their ability to defend their clients.

In the case of Richard Reid, the so-called "shoe bomber" who was accused of trying to blow up an American Airlines flight from Paris to Miami, U.S. District Judge William Young of Boston, citing "national security concerns," issued an extremely broad gag order that forbade Reid's attorneys from repeating anything Reid said. Reid's public defender, Owen Walker, complained that the order hindered his ability to provide a defense, because Walker was unable to confer with other lawyers or investigate Reid's factual contentions. Reid eventually pleaded guilty and was sentenced to life in prison.

Gag orders were also imposed by Judge Leonie Brinkema in the Zacarias Moussaoui case, and by U.S. District Judge Robert Jones in the case of Portland, Ore., lawyer Brandon Mayfield, who was wrongly accused of having a role in the Madrid train bombing attacks of March 2004. Jones lifted the order after Mayfield was exonerated. A court issued a gag order in another material-witness proceeding involving Hussein al Attas, a former roommate of Moussaoui.

In one case, a judge's gag order snared an unusual victim: U.S. Attorney General John Aschroft. Ashcroft was publicly rebuked by U.S. District Judge Gerald Rosen for violating Rosen's gag order during the trial of four Detroit men accused of supporting Islamic terrorists. The attorney general apologized, and two of the men, Abdel-Ilah Elmardoudi and Karim Koubriti, were convicted in June 2003 of providing material support to terrorists. More recently, accused Lebanese terrorist Adham Hassoun asked a Miami federal judge in February 2005 to lift a gag order on him, claiming Ashcroft publicly discussed wiretap evidence against him last year.

Special Administrative Measures

According to the Justice Department, 26 inmates in the federal prison system were subject to special administrative measures (SAMs) at the end of last year that restrict their contact with other people. The measures typically include placing the inmate in special housing and limiting such privileges as correspondence, visiting, interviews with the news media and use of the telephone.

Federal regulations authorize the attorney general or the head of a law enforcement agency to order SAMs for a prisoner where "there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons." SAMs can also be imposed to prevent disclosure of classified information.

Three convicted terrorists at the so-called "Supermax" federal penitentiary in Florence, Colo., have filed lawsuits chal-

lenging the legality of SAMs that they say are overly punitive and restrictive. Richard Reid, Ramzi Yousef, and Wadih El Hage all complain that the measures go well beyond what is necessary for security purposes. Reid, for instance, said in a handwritten lawsuit that he is denied access to all religious materials, books, classes and correspondence courses, phone calls with family members, television news programs, and newspapers and magazines. Yousef and El Hage have made similar complaints. The lawsuits are pending in U.S. District Court in Denver.

The Bush administration has made a point of showing that it will enforce the most controversial measures aggressively. In a move that startled the legal community, the government indicted defense attorney Lynne Stewart in April 2003 for allegedly helping her client, Sheikh Omar Abdel-Rahman, communicate with members of a reputed terrorist organization, the Islamic Group, in violation of the SAMs governing Abdel-Rahman's confinement. Abdel-Rahman is serving a life sentence for conspiring to bomb the United Nations and other New York targets. Stewart, who was convicted by an anonymous jury in February 2005, is scheduled to be sentenced in September.

From the perspective of the news media, SAMs make it impossible to interview many of the key figures in the war on terror, even after they've been convicted and sentenced. The so-called "American Taliban" John Walker Lindh, for example, is barred by SAMs from talking to reporters, and likely will remain so until his sentence ends in the year 2019. Convicted Sept. 11 conspirator Zacarias Moussaoui has asked Judge Brinkema for permission to speak to reporters, but has been denied on the basis of his SAMs.

Monitoring attorney-client talks

Even in the traditionally sacrosanct area of attorney-client communications, the normal rules often do not apply in terrorism cases. Most notably, in the context of the enemy combatant cases, the government has sought to monitor meetings between terror suspects and their lawyers, and in some cases, to deny access to counsel altogether.

Yaser Hamdi and Jose Padilla, two of the U.S. citizens designated as enemy combatants, were denied access to counsel until shortly before the Supreme Court considered their cases. In what was widely seen as a cynical ploy to enhance the administration's chances of prevailing in the high court, both men were given limited access to a lawyer just hours before the government's briefs were due.

Attorneys representing the Guantanamo Bay detainees have had even more difficulty securing access to their clients. The lawyers who brought the *Rasul* case before the Supreme Court did so without ever having met their clients; they were retained by family members or friends of the detainees. After the Supreme Court ruled that the Guantanamo detainees must be permitted to bring legal challenges, the government appeared to drag its heels on providing the necessary security clearances or making arrangements for the meetings.

In October 2004, U.S. District Judge Colleen Kollar-Kotelly ruled that three Kuwaiti detainees who brought *habeas* petitions before the court had a right to counsel. She refused to allow the government to monitor meetings between the detainees and their lawyers or to review any notes taken during the meetings, ruling it would violate the attorney-client privilege. To protect national security, however, she ordered the defense lawyers to treat any information they learn from their clients as classified.

Conclusion

The battle over access to terrorism-related proceedings is being fought on several fronts — from civilian, military and immigration courts within the U.S. to administrative review boards and military tribunals at Guantanamo Bay. The degree of media oversight of these processes varies considerably. For the most part, however, the government has sought to shield proceedings and documents from the public view.

Accordingly, the news media must remain vigilant in seeking to force the issue of access whenever possible. In the absence of such pressure, judges are likely to defer to prosecutors' requests for secrecy, especially when national security is invoked.

Domestic coverage

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General Risk To A Free Press

After facing sporadic restrictions on newsgathering after Sept. 11, stateside reporters have worked mostly restraint-free, although security concerns have seeped into nonterrorism-related events.

While covering Russian President Vladimir Putin's 2001 visit to the United States, a Russian reporter wondered why President George W. Bush asked U.S. news outlets to refrain from broadcasting or printing statements from videotapes of Osama bin Laden.

Why, the reporter asked during a Nov. 13, 2001, news conference, didn't Bush simply order the press not to run the tapes?

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

But it has not always been due to a lack of trying. As reporters battle restrictions in covering a war on terrorism that started in Afghanistan and expanded during the U.S.-led war in Iraq, they have faced several obstacles, albeit sporadic, in covering news events stateside.

Twice, the government strongly discouraged the broadcast of war-related video: videotaped messages by bin Laden soon after the Sept. 11 attacks and, later, a graphic video displaying the murder and beheading of *Wall Street Journal* reporter Daniel Pearl. Government officials also tried restricting the use of satellite images and the gathering of video and photographs on government property and at the attack sites themselves.

In the immediate aftermath of Sept. 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, which Ferry said he picked up from an unattended fire truck to protect himself and his equipment. Two days later, Ferry was charged with criminal possession of a forged instrument. Ferry eventually pleaded guilty to the charges and, as part of a plea agreement, gave the Library of Congress all of the photographs from 28 rolls of film seized from him during his arrest. The photographs were to be attributed to an anonymous donor.

In Pennsylvania, photographer William Wendt and his assistant, Daniel Mahoney, were arrested for defiant trespass while on assignment for *The New York Times Magazine*. The two men allegedly lost their way to the press tent and were arrested after walking 50 yards off course and into a restricted area near the crash site of United Airlines Flight 93. The two pleaded guilty, and paid fines and court fees.

Restricted images of war

If any theme developed with stateside bans following the attacks of Sept. 11, it had to do with restricted images.

In an Oct. 10, 2001, conference call with broadcast network executives one month after the attacks, National Security Adviser Condoleezza Rice warned that videotapes from bin Laden and his "henchmen" could be used to frighten Americans, gain supporters and send messages about future terrorist attacks.

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

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

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

Two months later, the administration did not interfere with broadcasters when they aired a videotape of bin Laden boasting about the terrorist attacks. However, in spring 2002 the government pressured CBS News when the network announced it would air portions of the Pearl videotape, a propaganda piece created by his captors and titled "The Slaughter of the Spy-Journalist, the Jew Daniel Pearl."

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

CBS declined, and anchor Dan Rather defended the May 14, 2002, broadcast as necessary to "understand the full impact and danger of the propaganda war being waged."

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

Two years later, in May 2004, the U.S. government stayed out of the media's business following the release of another tape, this one made in Iraq, showing the decapitation of Nicolas Berg of West Chester, Pa. According to the CIA, Berg was murdered by Abu Musab Zarqawi, an Islamic extremist with alleged ties to al Qaeda. First released through an Islamic group's Web site, the video was picked up by media groups throughout the world.

Many independent Internet publishers in the U.S. made the entire content of the video available online, while the major broadcast networks aired only non-graphic images. No one from the Bush administration publicly asked the media not to broadcast the video.

Similarly, the government remained silent as news organizations throughout the country independently grappled over how to cover gruesome events — including the murder and mutilation of four U.S. contractors in Fallujah, Iraq, as well as the beheading of U.S. military contractor Paul Johnson in Saudi Arabia and South Korean translator Kim Sun-il in Iraq — without offending audiences.

In late 2004, the State Department banned from U.S. airwaves Al-Manar, a television network popular in the Arabic-speaking world, citing it as a supporter of terrorism. "It's not a question of freedom of speech," State Department Spokesman Richard A. Boucher told *The Washington Post*. "It's a question of incitement of violence. We don't see why here, or anywhere else, a terrorist organization should be allowed to spread its hatred and incitement through the television airwaves."

When newsgathering involves the death of U.S. soldiers overseas, the Pentagon said no request for access to returning coffins will be granted.

In March 2003, the Bush administration dusted off a 13-year-old policy that bans the photographing of coffins containing the remains of U.S. military personnel who died overseas. Set in place by President George H.W. Bush before the 1991 Gulf War, the policy has prevented journalists from showing the public how — and how often — flag-draped coffins arrive in the U.S. from abroad.

Weeks before the start of the war in Iraq, the Pentagon informed military bases throughout the country that the often-ignored policy must be enforced. Exceptions were made to the media ban throughout President Bill Clinton's two terms in office, which included U.S. military operations in Somalia and Bosnia. The ban also was occasionally ignored during the war in Afghanistan, which received widespread public support in the United States.

Media observers alleged that the Bush administration was attempting to curb the press's ability to report the unpleasant realities of the Iraq war. However, thanks to a federal Freedom of Information request by Russ Kick, publisher of the Web site TheMemoryHole.org, more than 360 photographs of flag-draped caskets and honor guard ceremonies were publicly released by the government. The pictures were taken by the U.S. military.

The ban on photographing the loading and unloading of caskets containing military personnel remains. City and regional governments have also implemented prohibitions against photography, both by professionals and tourists.

Interference on the homefront

Government officials have not always been "hands off" with the media, though. Under the guise of "homeland security," government restrictions on photojournalism have increasingly shielded public buildings, financial offices and public transportation systems from the lens of TV and still cameras.

On March 19, 2002, Pentagon police officers seized a videotape from a Fox News cameraman shooting a traffic stop on a Virginia highway that runs along the northern side of the Pentagon. Officials said they confiscated the tape because the cameraman had been on government land where photography is not permitted unless journalists have an official escort.

Police handcuffed the cameraman, who held security clearances and credentials to film at the Pentagon, after he refused to turn over the tape. Pentagon officials and Washington bureau chiefs later spent several weeks hashing out new policies concerning newsgathering on military property.

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

A ban on interviewing soldiers, constant military escorts and potential unannounced searches were among 14 ground rules that the military ordered reporters to agree to before covering the court martial of U.S. Army Sgt. Hasan Akbar at Fort Bragg, N.C., in April 2005, according to a report in the Easton, Pa., *Express-Times*.

The rules are an "affront to the First Amendment rights of free speech and press," a coalition of media groups led by Military Reporters & Editors and joined by the Reporters Committee wrote in an April 26 letter to Defense Secretary Donald Rumsfeld.

Army Brig. Gen. Vincent K. Brooks wrote in response that some of the rules were designed to protect attorney-client privilege issues and "other privacy concerns," while other rules are media ground rules always in effect on the base. "Our goal

remains to balance the right of access by the public and the news media with the legal rights of those accused, alleged victims and witnesses."

Even in non-military situations, the credentialing process for journalists has tightened in many areas of the country. New rules requiring background checks were implemented for capitol reporters working in Harrisburg, Pa., in September 2002. Police reporters in Chicago were required to undergo background checks, and were initially going to be fingerprinted as part of the process.

In spring 2004, the New York City Transit Authority announced a proposal to prohibit all photography, filming and videotaping on subways, buses and commuter trains. Terrorists could use the images to organize an attack, authority officials said. Similar restrictions already exist in Massachusetts, New Jersey and parts of Florida.

On June 6, 2004, nearly 100 professional and amateur photographers staged an underground protest in New York, snapping pictures throughout the subway system for more than an hour.

"The point is really to make everyday people wake up and realize that photographers are not terrorists," Joe Anastasio, who organized the event, told *The New York Times*. "In the last few years, photographers near anything vaguely important have been getting harassed."

New York police and city transit officials tossed the plan to ban photography on the city's subway system, the *New York Daily News* reported May 24, 2005. Civil libertarians and free press groups, including the Reporters Committee, had criticized the plan.

In August 2004, an intern at a small newspaper in Washington, D.C., was detained by U.S. Capitol Police for nearly an hour after taking pictures of security checkpoints near the Capitol. Michael Hoffman, a rising junior at American University, was ordered to show his driver's license and provide his social security number even after explaining he was on assignment for *The Common Denominator* newspaper.

An officer confiscated Hoffman's disposable camera, and later developed the film before returning the negatives and a copy of the prints to the paper's office. A second set of prints the Capitol Police Department held for its records were also turned over to the *Denominator* one day later.

Similarly, in August 2003, American University journalism graduate student Dena Gudaitis had her reporter's notebook confiscated by U.S. Secret Service officers while on assignment outside the British Embassy in Washington, D.C. The embassy is located next to the U.S. Naval Observatory, where Vice President Dick Cheney's residence is located.

Gudaitis, of Solon, Ohio, was among 33 graduate students sent throughout Washington to write a "slice-of-life" article as part of a class project. Upon approaching the British Embassy, nearby U.S. Secret Service personnel took her notes and searched her purse; Captain Tommy Taylor personally returned the notes and apologized for his officers' overreaction, according to American University.

Others in the news industry have spent time behind bars simply for doing their jobs.

While perhaps not directly related to Sept. 11, at least 17 reporters were arrested during World Bank and IMF protests in Washington, D.C., in September 2002. Journalists covering the protests were swept up in the mass arrests of more than 600 individuals, handcuffed and detained for several hours. The post-Sept. 11 climate of fear in Washington, D.C., certainly contributed to law enforcement's refusal to give leeway to journalists covering the protests.

Various media organizations, including The Reporters Committee for Freedom of the Press, have asked the police department to reconsider how to better treat journalists covering protests. During the IMF protests, journalists with press credentials were still arrested by police officers. Media organizations want to make sure that police officers acknowledge a journalist's press rights in covering protests.

While covering a demonstration protesting the war in Iraq, Nick Varanelli, a photographer for *The* (Sacramento City College) *Express*, was arrested in spring 2003 on charges of rioting and blocking traffic while taking pictures of one of the protests. He repeatedly displayed his press pass, but was told that it was not valid because it had not been issued by the San Francisco Police Department.

Lee Nichols, an editor at *The Austin Chronicle*, filed a complaint with the Austin Police Department for being pepper-sprayed in the face while covering a March 20, 2003, antiwar protest. According to Nichols, he was standing between two cameras in an obvious group of journalists.

And the restrictions also occurred in the skies. Many television stations could not use news helicopters after the Federal Aviation Administration grounded aircraft immediately after Sept. 11. Even after the FAA began restoring the right to the nation's airspace, the agency's restrictions kept the helicopters out of the sky.

After two months of halted flights for newsgathering and traffic watches, many helicopters returned to the air on a limited basis in early December. A few weeks later, on Dec. 19, 2001, the FAA restored general aviation access to airspace above the nation's 30 largest metropolitan areas.

While restrictions stifled news helicopter flights, they did not apply to student pilots, such as the Florida teenager who died in January 2002 after ramming a stolen plane into the Bank of America building in Tampa. Broadcasters still have not gotten an explanation as to why news helicopters were among the last aircraft to return to the sky.

In Washington, security concerns continue to hamper journalists sporadically more than three years after the attacks. A freelance photographer covering a 2005 presidential inaugural protest for alternative media network Indymedia was hit with pepper spray and had his cameras confiscated before District of Columbia police arrested him as he filmed a group of protestors. Earlier on Inauguration Day, as many as 15 percent of the 1,000 television reporters and cameramen who applied for special credentials to be allowed into a high security zone for the ceremony did not get them, The Associated Press reported. Credentialing was denied to several print journalists who were fingerprinted and photographed and had background checks.

In March 2005, Bill Arkin, a military analyst for NBC News and the author of several books, including one on code names assigned to U.S. military and intelligence operations, was accused in a forged Defense Department document of being a spy for Saddam Hussein. Arkin is a former Army intelligence analyst. The origins of the forged document, which was sent to a *Washington Times* reporter, are unclear.

Lyng-Hou Ramirez, a journalist with the Miami-based Grupo de Diarios America, which compiles information from 11 newspapers in Latin America, filed a complaint with the Organization of American States after more than a dozen local law enforcement officers and Secret Service agents detained her without explanation at a June 2005 OAS meeting in Fort Lauderdale, Fla.

Newsgathering and the Department of Justice

Sadly, such infringements upon newsgatherers' rights are nothing new. One of the most ominous post-Sept. 11 events occurred after The Associated Press began exploring why a package mailed from its Philippines bureau in September 2002 never reached assistant Washington Bureau Chief John Solomon. Federal Express claimed the package was lost, but the AP discovered that the FBI had the package, which contained an unclassified, eight-year-old crime lab report from a terrorism case.

According to the AP, the package was intercepted by the Customs Service and turned over to the FBI without a warrant. It was kept without notice or due process. AP would never even have known about the interference had it not pressed for answers.

The FBI later admitted it acted wrongly and returned the package — more than nine months after it was first sent. More chilling: the FBI admitted that it kept the package to prevent Solomon from reporting certain contents of the report.

Sen. Charles Grassley (R-Iowa) asked the FBI to explain its actions in this case and in others, including an earlier decision to obtain Solomon's home phone records from May 2-7, 2001, as a result of an unrelated story.

In a letter to Grassley, Assistant Attorney General Daniel J. Bryant said the Justice Department believes obtaining a reporter's home or work phone records is a perfectly legitimate and potentially quicker way to ascertain the identity of confidential sources.

"It is our view that obtaining a reporter's home telephone records in order to identify a media source revealing protected wiretap information is completely justified in some cases," Bryant wrote. "Determining the identity of, locating and interviewing and/or giving polygraph tests to all of the agents, prosecutors and defendants, secretaries, private attorneys, staff or other individuals with access to wiretap information may not be a reasonable alternative to issuing a subpoena for telephone toll records."

Interference at the borders

Many reporters have endured a different set of difficulties in dealing with the U.S. government at international borders.

Roger Calero, a native Nicaraguan and permanent U.S. resident, was stopped in December 2002 at George Bush Intercontinental Airport in Houston by Immigration and Naturalization Service officials on his way back into the Unites States from assignments in Cuba and Mexico. Associate editor of the monthly Spanish-language news publication *Perspectiva Mundial* and staff writer for the labor-oriented newsweekly *The Militant*, Calero was detained in an INS facility and his press credentials, digital camera and laptop computer were seized by INS officials. The basis for his detention was a 14-year-old marijuana conviction — when he was a high school student in Los Angeles.

Calero received his permanent green card and his Nicaraguan passport from the Department of Homeland Security on May 15, 2003, after a six-month legal battle.

But even those with spotless records face hurdles, due to how the government handles visas for journalists.

Members of the foreign news media are not eligible for a Department of Homeland Security visa waiver program that allows citizens from 27 "friendly" nations to travel visa-free to the United States for up to 90 days for tourism or business. Journalism is the only profession singled out for visa purposes.

At least 14 foreign journalists have been detained and sent home by U.S. officials since March 2003, according to Rep. Zoe Lofgren (D-Calif.) who introduced a bill in September 2004 that would allow foreign reporters into the United States without special journalist visas. The bill never made it out of a House subcommittee and has not been reintroduced.

"The problem is not misinterpretation of the law administered incorrectly by a few immigration agents," Lofgren wrote in an e-mail to the Reporters Committee. "It is with our immigration law that singles out the foreign press, radio, film or other foreign information media."

In May 2003, six French journalists traveling to the United States to cover a video game trade show in California were detained at Los Angeles International Airport and later sent back to France for not having press visas. Instead of obtaining the required "I" visas, the French reporters tried to enter the U.S. only with valid passports.

One year later, British journalist Elena Lappin was also detained upon arriving at Los Angeles International Airport on May 3. Traveling with a valid passport but no visa, Lappin was taken in handcuffs to a detention center after informing U.S. customs officials she was on a freelance assignment for the British daily newspaper *The Guardian*. Lappin was sent back to London the following day.

Weeks later, the U.S. Customs & Border Protection bureau announced it would begin granting foreign media a one-time break if they arrive in the United States on assignment without an I visa. Citing the "high number" of foreign journalists who have been arriving at U.S. airports with the wrong visa or no visa at all since Sept. 11, 2001, customs officials said the policy shift is to educate members of the media without preventing them from doing their jobs.

"It makes us look overly bureaucratic, and we don't want to look that way," said Bill Anthony, a spokesperson for Customs & Border Protection, who noted that the policy was directed at journalists who arrive in the U.S. with the wrong visa, not those who have "no visa or passport whatsoever."

"We want to keep terrorists and terrorists' weapons out of the country," Anthony added. "We don't want to keep journalists out of the country."

That hasn't always been the case. In February 2003, a U.S.-based Iraqi journalist, Mohammed Hussan Allawi, was ordered to leave the country following State Department charges that he had engaged in activities considered harmful to national security. Allawi, the United Nations reporter for the Iraqi News Agency, was not formally charged and authorities were unclear on what exactly his "harmful activities" were. In response, the Iraq government ordered Fox News correspondent Greg Palkot to leave Baghdad.

Also in February 2003, FBI agents questioned journalist Nayyar Zaidi for allegedly dialing from his home a handful of phone numbers linked to the Sept. 11 terrorist attacks. Zaidi, who has been a U.S. citizen for 27 years, is the Washington bureau chief of the newspaper *Urdu Daily Jang*, the flagship publication of Pakistan's largest media company.

Zaidi claimed the information the FBI alleged it had about him is fabricated and that the agency wanted to get to his sources. The FBI reportedly asked Zaidi to provide them with his personal work-related phone book, but he refused. The investigation has since been dropped, according to the Pakistani Embassy.

Financial institutions in the United States also turned a cold shoulder to foreign journalists, particularly those from Middle Eastern nations.

In March 2003, the New York Stock Exchange revoked the credentials of reporters for the Qatar-based television network

Al-Jazeera. NYSE made the move after the Arab network, which serves 35 million people and had covered the stock exchange for more than five years without incident, aired controversial video of captured and dead American soldiers during the war in Iraq.

The Nasdaq Stock Market also refused to allow Al-Jazeera to use its facilities to broadcast live reports. Nasdaq explicitly linked its ban to the network's broadcast of captured and killed U.S. soldiers. "In light of Al- Jazeera's recent conduct during the war, in which they have broadcast footage of U.S. POWs in alleged violation of the Geneva Convention[s], they are not welcome to broadcast from our facility at this time," Nasdaq spokesman Scott Peterson said.

Media organizations argued that no such provision existed in the Geneva Conventions that regulates what journalists may publish or broadcast. The network was readmitted to the stock exchanges in May 2003.

Stemming from concerns about how intelligence issues are covered, intelligence officials and members of the press started meeting in 2002 for informal, off-the-record discussions in Washington, D.C. Known simply as "Dialogue," the group met every few weeks over dinner. The gatherings received little publicity, but they attracted officials from the Central Intelligence Agency, the National Security Council and the Department of Defense as well as several Washington, D.C.-based journalists. Investigative reporter and National Security Archive founder Scott Armstrong and former CIA General Counsel Jeffrey Smith brought the group together to discuss anti-leaks legislation in light of the worries of both government and media.

The Department of Homeland Security

On Jan. 24, 2003, the doors opened at a new law enforcement and investigatory agency with functions taken from as many as 22 other federal agencies. The reorganization of these operations reportedly marked the biggest government bureaucratic shake-up since the creation of the Department of Defense half a century ago.

The Department of Homeland Security's first secretary, former Pennsylvania Gov. Tom Ridge had a mixed record on openness issues (he fought in 2001 to substantially improve the state's open records law, yet was earlier accused of violating the law when he refused to reveal details of a $145 million payment to an emissions testing company in 1995). Michael Chertoff , a judge for the U.S. Court of Appeals in Philadelphia (3rd Cir.) from 2003 to 2005, was sworn in as the second department secretary after a 98-0 vote Feb. 15, 2005.

Before being named to the appellate court, Chertoff worked as a prosecutor in New Jersey, the Southern District of New York and in the Criminal Division of the U.S. Department of Justice. He also served as special counsel for the Senate committee investigating the Whitewater political scandal and in the law firm Latham & Watkins.

One month after Chertoff started in the job, a federal report on terrorism threats — such as exploding chlorine tanks and infecting cattle with foot-and-mouth disease — disappeared from the Internet where it was briefly posted. In explaining why the report should have been, and from now on will be, confidential, Chertoff said, "What I want to resist is . . . a temptation to feed the desire for information by putting something out that we are not in a position to speak about definitively."

A day later, in his first public appearance before reporters, Chertoff said he plans a "disciplined" approach to sharing threat-related information with the public.

In June 2005, the Reporters Committee wrote Chertoff urging him to adopt guidelines restricting how agents seek to obtain information from journalists, similar to regulations that have been in place at the Department of Justice for more than three decades. The letter was sent after a leaked memo from the investigative arm of the Department of Homeland Security sparked its officials to visit the home and workplace of Bill Conroy in an attempt to discover his source for an article on the online news service *Narco News*.

The USA PATRIOT Act and beyond

ELEVATED
SIGNIFICANT RISK TO A FREE PRESS

It is still unclear how or when the FBI's expanded wiretapping and warrantless search powers will affect journalists, but the Justice Department has shown that it intends to use its powers aggressively, even making clear that a law barring newsroom searches is trumped by the USA PATRIOT Act when it comes to terrorism investigations.

The USA PATRIOT Act's impact on newsgathering is still largely theoretical nearly four years after Congress rushed to enact the law. No newsrooms are known to have been searched and apparently no documents have been taken from reporters under the law — although those subject to such a search and seizure would be prohibited from talking about it.

Nevertheless, journalists should be concerned about certain provisions of the law, which grant broad new powers to government agents to investigate terrorism and make previous statutory protections for newsrooms almost irrelevant when it comes to terrorism investigations.

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

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

Although aimed at trapping terrorists, those provisions of the law could ensnare journalists and compromise their ability to report on the war on terrorism. Journalists should be aware of this law and future amendments and proposals that attempt to expand government surveillance powers and increase secrecy surrounding the government's efforts to combat terrorism.

Some of the most controversial parts of the law, including the sections of most concern to journalists, are set to expire at the end of 2005. With critics calling for those sections to be allowed to expire and the Bush administration asking for them to be made permanent, bills have been working through both houses of Congress that will make most of the provisions permanent and extend two others for another five years.

Secret court orders

The USA PATRIOT Act amended certain provisions of the Foreign Intelligence Surveillance Act (FISA), thereby expanding the government's ability to conduct surveillance of foreign powers and agents of foreign powers in the United States.

Enacted in 1978, FISA set forth procedures governing foreign intelligence investigations and established a secret court that approves or denies the use of electronic surveillance by the government for foreign intelligence purposes.

The Foreign Intelligence Surveillance Court's 11 judges, who come from different federal circuits, meet twice a month in Washington, D.C., with three judges always available in Washington. The PATRIOT Act increased the number of FISA judges to 11 from the previous seven. If the court denies an application for surveillance, the government may appeal to the Foreign Intelligence Surveillance Court of Review, a panel of three federal judges appointed by Chief Justice William Rehnquist.

Secrecy permeates the process of obtaining the court order. The FISA court that issues the surveillance order meets and decides its cases in secret. As a result, the public is left in the dark about the number of FISA search warrants issued against U.S. citizens, who are never informed of the surveillance and are not represented before the court. Not only is the public uninformed, but Congress is kept in the dark about how the FISA court interprets provisions of the PATRIOT Act drafted by Congress. The FISA court is not required to reveal its legal opinions, thereby establishing a secret body of case law unprecedented in American jurisprudence.

The court's secrecy remained intact from its inception in 1979 until three years ago, when a conflict between the court and

the Justice Department was revealed to the Senate Judiciary Committee in August 2002.

The conflict centered around interpretation of amendments made by the PATRIOT Act to FISA. Prior to the PATRIOT Act, FISA surveillance orders were limited to investigations where the primary purpose was gathering foreign intelligence information. FISA provisions required strict limits on such power-sharing between criminal prosecutors and foreign intelligence investigators because foreign intelligence investigations are not required to follow the same strict constitutional safeguards as criminal prosecutions. For example, a FISA surveillance order only requires probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power; whereas, under the Fourth Amendment, a criminal search warrant requires probable cause of criminal activity.

In its May 2002 opinion, revealed to the Senate Judiciary Committee in August 2002, the FISA court rejected the Justice Department's argument that the PATRIOT Act enables the government to obtain a surveillance order where the primary purpose is a criminal investigation. The court scaled back the information-sharing regulations, still allowing prosecutors to consult with intelligence investigators on how to "preserve the option of a criminal prosecution" and to benefit from information obtained during a FISA investigation, but not allowing them to steer those investigations to further prosecutions. As a result, the Justice Department could not apply PATRIOT Act provisions to FISA in such a way as to allow criminal prosecutors to actually control or direct foreign intelligence investigations.

The government appealed the court's decision. In September 2002, the Court of Review met for the first time in its history, reversing the FISA court's decision and ruling in favor of the government. It found that the PATRIOT Act enables the government to obtain a surveillance order from the FISA court where the primary purpose is a criminal investigation as long as gathering foreign intelligence information is also "a significant purpose" of the investigation. If "the government entertains a realistic option of dealing with the [foreign] agent other than through criminal prosecution, it satisfies the significant purpose test," the Court of Review wrote in its opinion.

The Court of Review noted that FISA surveillance orders could not be authorized against journalists who were not agents of foreign powers or, as the House of Representatives explained in its report when it enacted FISA, "against an American reporter merely because he gathers information for publication in a newspaper, even if the information was classified by the Government. Nor would it be authorized against a Government employee or former employee who reveals secrets to a reporter or in a book for the purpose of informing the American people."

In February 2003, the American Civil Liberties Union and a number of other civil liberties organizations asked the U.S. Supreme Court to review the decision. The ACLU group, which had filed a friend-of-the-court brief before the Court of Review, asked the Supreme Court to allow it to file the petition because no other party is involved in the case and able to contest the government's surveillance request or the FISA order.

"Traditionally, the warrant and probable cause requirements have served as important safeguards of First Amendment interests by preventing the government from intruding into an individual's protected sphere merely because of that individual's exercise of First Amendment rights," the ACLU wrote in its petition.

Expanding the government's surveillance powers under the PATRIOT Act will "chill" speech protected by the First Amendment, the ACLU argued. Such a chilling effect could possibly restrict sources from speaking to reporters.

On March 24, 2003 the Supreme Court denied the ACLU's motion to intervene, allowing the Court of Review's decision to stand. (*In re Sealed Case*)

In April 2004, The Associated Press reported that the number of secret surveillance warrants requested by the FBI and approved under FISA had increased 85 percent in three years, from 934 in 2001 to 1,724 in 2003. One year later, AP reported that 1,754 warrants were approved in 2004. In 2000 there were 1,003 warrants approved. Pursuant to a Freedom of Information Act request, AP was able to report in January 2005 that the FBI conducted eight Internet wiretaps in 2003 and five in 2002.

How do FISA and the USA PATRIOT Act affect journalists?

Under Section 215 of the PATRIOT Act, the FBI can seek an order requiring the production of "any tangible thing" — which the law says includes books, records, papers, documents and other items — from anyone for investigations involving foreign intelligence or international terrorism. The person or business receiving the order cannot tell anyone that the FBI sought or obtained the "tangible things."

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

The short answer is that the PATRIOT Act does allow the search of newsrooms in connection with terrorism investigations. Another federal law, the Privacy Protection Act of 1980, spells out when newsroom searches are forbidden and the limited exceptions in which they are allowed. However, it only applies to criminal investigations, and the FBI has made it clear that the PATRIOT Act's application to any "investigation to protect against international terrorism or clandestine intelligence activities" does not subject it to the limits of criminal investigations.

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

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

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

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

allows journalists to recover attorney's fees and court costs.

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

On Jan. 29, 2003, the library association passed a formal resolution objecting to certain provisions of the PATRIOT Act and warned that "the activities of library users, including their use of computers to browse the Web or access e-mail, may be under government surveillance without their knowledge or consent." Likewise, on Feb. 10, 2003, the American Bar Association adopted a formal resolution that calls for congressional oversight of FISA investigations to ensure that the government is complying with the constitution and limiting improper government intrusion.

Confusion over use and implementation

It remains unclear whether or how often provisions of the PATRIOT Act have been used to obtain records, although libraries started reporting visits from FBI agents early on. The Associated Press reported in 2002 that of the 1,020 public libraries surveyed by the Library Research Center at the University of Illinois, 85 said they had been asked by federal or local law enforcement officers for information about patrons related to September 11. In June 2005, the American Library Association released the results of a survey that revealed that state and federal officials had asked librarians for information about their patrons 268 times since 2001, although it is unknown how many of these requests were made under provisions of the PATRIOT Act.

In September 2003, the Justice Department reported that it had never actually used Section 215, according to a confidential memo from Attorney General John D. Ashcroft obtained by the *Washington Post* and The Associated Press. Ashcroft said in the memo to FBI Director Robert S. Mueller III that he had decided to declassify that previously secret information because of his "concern that the public not be misled about the manner in which the U.S. Department of Justice, and the FBI in particular, have been utilizing the authorities provided in the USA Patriot Act."

However, in June 2004, *The Washington Post* reported that government documents disclosed to the ACLU under court order show that the FBI asked the Justice Department the previous fall to seek permission from a secret federal court to use Section 215, four weeks after Ashcroft said that part of the law had never been used. The memo did not indicate the nature of the search, whether the Justice Department ever asked the FISA court to approve the search or whether the court granted the request. The records do not indicate how many times the FBI has invoked Section 215 since October 2003.

The confusion over use of Section 215 can largely be blamed on the department's lack of cooperation with Congress, which prompted complaints of interference with congressional oversight.

The House Judiciary Committee, which oversees how the Justice Department enforces the PATRIOT Act, asked the Justice Department for a detailed accounting after the 2002 library survey was announced. On June 13, 2002, committee chairman Rep. F. James Sensenbrenner Jr. (R-Wis.) and ranking member Rep. John Conyers Jr. (D-Mich.) sent a list of 50 detailed questions to Attorney General John Ashcroft.

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

In a written response on July 26, 2002, Assistant Attorney General Daniel J. Bryant conceded that newspapers were not exempt from the secret court orders.

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

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

Senator Patrick Leahy (D-Vt.) again sought answers to this question and others after an oversight hearing in July 2002. Of the 93 questions posed by Leahy, 37 remain unanswered.

This type of stonewalling and secrecy was cited in a February 2003 interim report by Senators Leahy, Charles Grassley (R-Iowa), and Arlen Specter (R-Penn.) as "mak[ing] exercise of our oversight responsibilities difficult."

In addition, the interim report found that the refusal of the Department of Justice to disclose the legal opinions and operating rules of the FISA court "contributed to the deficiencies that have hamstrung the implementation of the FISA." Even though members of the Senate Judiciary Committee authored provisions in the PATRIOT Act, they were unaware of how the Department of Justice was interpreting these provisions before the FISA court.

In a bid to shore up support for the Act, the Justice Department unveiled extensive new details of its use of the Act on July 13, 2004, asserting that it has helped thwart al Qaeda plots and led to scores of criminal convictions since the Sept. 11, 2001, attacks, *The Washington Post* reported. According to a 29-page report to Congress released by Attorney General John D. Ashcroft, Justice Department terrorism investigations have resulted in charges against 310 people and have yielded 179 convictions or guilty pleas — although not necessary on terrorism-related charges. The report says the expanded law enforcement powers of the PATRIOT Act were central to those cases.

In December 2004, Congress created the Privacy and Civil Liberties Oversight Board in response to a recommendation by the Sept. 11 Commission. President Bush delayed appointments to the five-member board for six months, and as of August 2005 the board had still not met for the first time.

Post-PATRIOT amendments

In response to this secrecy, Senators Leahy, Grassley and Specter joined together in February 2003 to introduce the Domestic Surveillance Oversight Act of 2003 (S. 436). The bill would have required that the rules and procedures of the FISA courts be shared with the U.S. Supreme Court and the Intelligence and Judiciary committees of the Senate and House. In addition, the attorney general would have been required to submit an annual public report detailing portions of the applications and opinions of the FISA courts that contain significant legal interpretations of FISA or the constitution. "This type of disclosure . . . will prevent secret case law from developing which interprets both FISA and the Constitution in ways unknown to Congress and the public," said Senator Leahy in a Feb. 25 statement made upon introduction of the bill.

The bill also would have required annual reporting on the aggregate number of FISA wiretaps and surveillance orders against Americans and requests for information from libraries.

According to Leahy: "This bill does not in any way diminish the government's powers, but it does allow Congress and the public to monitor their use. We cannot fight terrorism effectively or safely with the lights turned out and with little or no accountability. It is time to harness the power of the sun to enable us to better win this fight."

On October 1, 2003, Senators Leahy, Craig, Durbin, Sununu and Reed introduced the PATRIOT Oversight Restoration Act of 2003 (S. 1695), which would expand the PATRIOT Act sunset provision. The bill would add 12 more sections of the Act to the current sunset provision, which lets portions of the Act expire on December 31, 2005. Sen. Leahy explained: "It will allow Congress to re-examine some of the important legal issues that abruptly confronted us in the weeks following September 11, and to re-assess our efforts with the benefit of hindsight and the luxury of time."

The next day, Senator Craig and others introduced a bipartisan bill, the Safety and Freedom Assured (SAFE) Act, which would have limited roving wiretaps under the PATRIOT Act, curtail delayed notification of searches, and increase privacy protections for library users and others. (S. 1709)

All three bills were referred to the Judiciary Committee, but no further action was taken before the end of the 2003-2004 session.

However, on December 13, 2003, President Bush signed into law broad new law enforcement powers as a part of the second installment of the PATRIOT Act. The original PATRIOT Act provisions allow the FBI to probe individuals' records at "financial institutions" by presenting a "national security letter," and it gags the institutions from revealing that happened. The newly signed law redefines "financial institution" to include not only banks but stockbrokers, casinos, airlines and any other institution "whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters" even if federal officials don't suspect any involvement in crime or terrorism. The old PATRIOT Act provision checked the issuance of the letters by requiring that they be reported to Congress. The new PATRIOT provisions eliminate that requirement. In the Spring of 2004, Bush began to call on Congress to pass a permanent version of the Act.

The December 2003 expansion of PATRIOT Act powers caught many by surprise, mainly because of the way the provisions went through Congress. It all started in February 2003, when the Center for Public Integrity revealed that the Department of Justice was considering a new comprehensive legislative proposal, the Domestic Security Enhancement Act of 2003, dubbed "PATRIOT II," that would provide the government with even greater intelligence-gathering powers and limit public access to information. Provisions included the expansion of the "financial institution" definition, an expansion of the definition of terrorism to possibly include political protesters, a prohibition on disclosure of information on detainees being held and investigated by the government on suspected terrorism activity, and prohibitions on disclosure of "worst case scenario" reports submitted to the Environmental Protection Agency by private companies that use potentially dangerous chemicals.

Civil liberties groups and First Amendment advocates expressed their concern and outrage over the Justice Department's expansion of the PATRIOT Act, and attempts to pursue the act as a whole soon died. But key provisions were inserted — with no debate, and on a voice vote — as amendments in the Intelligence Authorization Act for Fiscal Year 2004, which Bush signed in December.

Another effort to curb government powers granted under the Act was narrowly defeated by one vote on July 9, 2004 in the U.S. House of Representatives. The measure would have prevented the government from accessing library and bookseller records — including library patron reading lists and book customer lists. Although the measure seemed to have enough support the day before the vote, the *Washington Post* reported that House Republicans, under intense pressure from the White House and the threat of a Presidential veto, prolonged the vote "for 23 tumultuous minutes while they corralled dissident members."

A number of bills were introduced in the current Congress to deal with the expiring portions of the PATRIOT Act. One bill before both houses of Congress, the USA PATRIOT Improvement and Reauthorization Act of 2005 (S. 1389, H.R. 3199), introduced by Sen. Arlen Spector (R-Penn.) and Rep. James Sensenbrenner (R-Wis.), would make 14 of the 16 expiring provisions permanent, but place a five-year sunset on provisions that allow roving wiretaps and searches of library and business records. The bill passed both houses in July 2005, but differences between the House and Senate versions are still being reconciled.

On June 16, 2005, Sen. Pat Roberts (R-Kan.) introduced a bill to reauthorize a provision of the Intelligence Reform and Terrorism Prevention Act of 2004 and to "provide additional investigative tools necessary to protect the national security." (S. 1266) In addition to making expiring portions of the PATRIOT Act permanent, the bill would permit the FBI to secretly issue administrative subpoenas for business records without court oversight. The bill was approved by the Senate Intelligence Committee on June 16, 2005.

Challenging the PATRIOT Act

The American Civil Liberties Union filed suit challenging the constitutionality of Section 215 in July 2003, arguing among other things that the law violates the First Amendment by allowing the government to easily obtain information about reading habits and expressive activities that will be "chilled" by the threat of a federal investigation, and by imposing a gag order on the third party, such as a library, newspaper or broadcaster, whose records have been taken under such an order. Two years after the suit was filed, U.S. District Judge Denise Page Hood of Detroit has yet to rule. (*Muslim Community Center of Ann Arbor v. Ashcroft*)

In another legal challenge to the PATRIOT Act, the American Civil Liberties Union (ACLU) filed a lawsuit challenging the Act's provisions in the U.S. District Court in New York in April 2004. The lawsuit challenged the FBI's use of national security letters to obtain business records from Internet service providers. Provisions in the PATRIOT Act required that the case itself be kept under seal, until the ACLU worked with the Justice Department to reach an agreement that allowed the group to release a heavily redacted version of the complaint. According to the *Washington Post*, Ann Beeson of the ACLU said, "It is remarkable that a gag provision in the PATRIOT Act kept the public in the dark about the mere fact that a constitutional challenge had been filed in court." The complaint alleged that the National Security Letters (NSLs), which pursuant to the PATRIOT Act allow the FBI to request financial records and other documents from businesses without judicial approval, are unconstitutional.

In May 2004, the *Washington Post* reported that the ACLU was forced to remove two paragraphs from a press release about the organization's lawsuit challenging provisions of the PATRIOT Act, after the government complained that the ACLU had

violated a sealing order in the case. U.S. District Judge Victor Marrero, of New York, ordered the group to delete two seemingly innocuous paragraphs — one laying out the briefing schedule in the case, the other describing in general terms the statutory provision being challenged. In an April 30 letter opposing the ACLU's attempts to unseal the case, an assistant U.S. Attorney in New York, Meredith Kotler, made the remarkable assertion that "the ACLU essentially seeks a presumption that all information in this case shall be publicly available. [REDACTED] it is critical that the opposite presumption prevail . . . ."

Later that month, the ACLU made public its brief and supporting documents. Among the documents was a heavily censored declaration that confirms, for the first time, the existence of the ACLU's anonymous client in the case.

On September 28, 2004, Judge Victor Marrero ruled that the FBI's use of national security letters was unconstitutional. Because the FBI could issue the letters without judicial supervision or review, their use violated the Fourth Amendment's prohibitions on unreasonable searches and seizures and unconstitutionally chilled Internet subscribers' First Amendment right to anonymous speech. Marrero also ruled that the non-disclosure provision was an unconstitutional prior restraint and content-based speech regulation in violation of the First Amendment. He enjoined the FBI from using the national security letters, but stayed the order pending appeal.

Electronic surveillance

As long as a reporter is not an "agent of a foreign power," the PATRIOT Act does not make it easier for the government to wiretap a reporter's phone. As was the case before the law passed, investigators still must have probable cause to believe a person has committed a crime before they can bug that person's phone.

However, it is now easier for investigators to eavesdrop on a terrorism 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."

Though these legislative initiatives do not directly address journalists, any rollback in protection of private communications can affect reporters' relations with sources. Furthermore, these actions provide insight on where the future of antiterrorism law may lead — a road that may pose grave danger to the First Amendment rights of the press.

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

Understanding the law requires a basic familiarity with the tools government investigators use in conducting electronic surveillance: wiretaps, pen registers and "trap and trace" devices. The following is an explanation of those procedures, when they are used and how they changed under the 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 PATRIOT Act added several terrorism offenses to the list of crimes for which a wiretap order could be granted. The added crimes are chemical weapons offenses, use of weapons of mass destruction, violent acts of terrorism transcending national borders, financial transactions with countries that support terrorism, and material support of terrorists or terrorist organizations. (18 U.S.C. § 2516).

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

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

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

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

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

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

What is a roving wiretap?

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

Previously, wiretaps were issued for a particular phone or specific communication device, such as a computer. The 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 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.

Rovings wiretaps have been of particular concern because of the possibility that the phone of a journalist working on a terrorism investigation could come within the scope of these broad wiretap authorizations.

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

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

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

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

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

The PATRIOT Act allows the devices to be installed on cell phones, Internet accounts and e-mail to gather dialing, routing, addressing and signaling information — but not content.

For example, a government investigator with a court order could install the device on a person's e-mail account and get a list of all the e-mail addresses flowing in and out of the account, but the investigator could not read the contents of the e-mail.

What does this mean for journalists?

As was the case before the PATRIOT Act passed, government investigators cannot wiretap a 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, because the government agent has to certify to a secret court only that the information likely to be obtained would be relevant to an ongoing foreign intelligence investigation. Once approved, the devices give investigators a list of every e-mail address and phone number the reporter is contacting, although not the contents of those communications.

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

How likely is this to happen?

No one knows. In their June 2002 letter to Ashcroft seeking information on how the Justice Department was implementing the PATRIOT Act, Reps. Sensenbrenner and Conyers of the House Judiciary Committee asked how many times the department had obtained permission for roving wiretaps, pen registers and trap-and-trace devices. The congressmen did not ask how many times journalists had been caught up in such investigations.

Bryant, the assistant attorney general who responded to the letter, did not provide the information to Sensenbrenner and Conyers. Instead, he wrote them that the information on roving wiretaps was classified; he did not respond at all to the question on pen registers and trap-and-trace devices.

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

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

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

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

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

The Solomon subpoena was issued before September 11 and before Congress enacted the 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 — with the PATRIOT-aided twist of no longer notifying journalists when they are implicated in these investigations.

The reporter's privilege

SEVERE
Severe Risk To A Free Press

An imprisoned journalist, ongoing leak investigations, increased use by investigators of blanket confidentiality waiver forms, and recent court decisions heighten worries that law enforcement officials are more likely to treat journalists as government agents.

With the increase in national security concerns since the Sept. 11, 2001 terrorist attacks, U.S. journalists face an increased likelihood of being seen as government informants with no constitutional right to keep sources confidential or to withhold unpublished materials from prosecutors. Crackdowns on government leaks also threaten the availability of confidential sources.

This scenario was inevitable when the government moved toward greater secrecy following the terror attacks. What once was merely a prediction, however, turned to reality in July 2005 when the first journalist who received terrorism-related leaks, Judith Miller of *The New York Times*, went to jail for refusing to reveal her sources. But one positive outcome of the subpoena crisis may be the adoption of a "shield law" granting a privilege for journalists to protect confidential sources in federal proceedings.

Subpoenas to journalists

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

Over the years, journalists have had significant, although not consistent, success fighting subpoenas using reporter shield laws in 31 states and Washington, D.C., and the reporter's privilege developed under the First Amendment to protect the news media from unnecessary intrusion. While it varies from jurisdiction to jurisdiction, the privilege generally requires a court faced with a subpoena to a journalist to weigh the subpoenaing party's need for the information sought against the public's interest in maintaining a free and unfettered press. Often enough, the news media have been able to win the balancing contest.

But journalists should be aware that since the terrorist attacks and the war with Iraq, courts may be more likely to decide that the balance falls in favor of disclosure, especially where national security issues are at stake. Leaks of sensitive information to the news media have angered government officials and sometimes the public, prompting a number of investigations. At least nine U.S. courts have faced the issue thus far, and seven of those courts have demonstrated a willingness to force a journalist to give up information in war or terrorism-related proceedings.

Valerie Plame leak investigation

The most alarming leak investigation, in which one reporter has been jailed, another was held in contempt but narrowly avoided jail, and several others unsuccessfully fought subpoenas, involves the leak of undercover CIA officer Valerie Plame's identity. The investigation began after two unidentified senior administration officials revealed Plame's identity to columnist Robert Novak, who published her name in a July 2003 column, and other Washington-area journalists.

Plame's husband, former ambassador Joseph C. Wilson IV, publicly criticized the Bush administration in a *New York Times* op-ed article for asserting that Iraq tried to buy uranium from Niger. Wilson had traveled to Africa on a CIA mission in 2002 and determined that such a deal was unlikely. The purpose of leaking Plame's identity hinges on political perspective: it was either an attempt to show Wilson was unqualified for the mission, only being chosen because his wife suggested him for it, or it was an act of revenge to punish him for speaking out against the administration.

In September 2003, after an official CIA request for an investigation and calls for a probe from administration critics and others, including *The New York Times*, the Department of Justice launched an investigation into whether Plame's identity was illegally leaked.

In December 2003, Attorney General John Ashcroft recused himself from the Justice Department's investigation into the leak and Special Prosecutor Patrick J. Fitzgerald, the U.S. Attorney in Chicago, was appointed to head the investigation, which may lead to charges under a federal law that makes it a crime to knowingly leak the name of an undercover officer — the Intelligence Identities Protection Act of 1982.

In an effort to release reporters from confidentiality agreements with possible White House sources, FBI investigators asked administration officials in January 2004 to sign waivers of their rights to have private conversations with reporters.

On January 22, 2004, the federal grand jury Fitzgerald was using for his investigation issued three subpoenas to the White House, asking the Executive Office of President Bush to produce records of Air Force One telephone calls in the week before Plame's identity was revealed in Novak's column. Also sought were records created in the White House Iraq Group and a transcript of a White House press briefing in Nigeria. One subpoena sought records of White House contacts with more than two dozen journalists and news organizations, including Novak, Chris Matthews, Andrea Mitchell and reporters for *Newsday*, *The Washington Post*, and *The New York Times*.

In May 2004, Fitzgerald sought to question several reporters at *The Washington Post*, the newspaper reported. In addition, *The Los Angeles Times* reported that reporters for *Newsday* were also being asked for interviews. On May 24, NBC's Tim Russert, host of "Meet the Press," and *Time* magazine reporter Matthew Cooper were subpoenaed to appear before the federal grand jury. Explaining why the network was seeking to have the subpoenas quashed, NBC News president Neal Shapiro said in a statement that "sources will simply stop speaking to the press if they fear those conversations will become public."

Washington Post reporter Glenn Kessler agreed to an interview with prosecutors in June 2004. Kessler stated that he had been urged to discuss conversations he had with Vice President Cheney's chief of staff, I. Lewis "Scooter" Libby. In a statement, Kessler explained: "I face an unusual situation. Mr. Libby signed a waiver in which he asked me to discuss with the Special Counsel whether the Wilson matter was raised in two conversations that I had with him in 2003. Under these circumstances, at the request of my source, I am giving a deposition regarding these questions."

On July 20, Russert and Cooper were ordered to testify after Chief Judge Thomas F. Hogan of the U.S. District Court in Washington, D.C., rejected motions to quash the subpoenas. Russert was questioned under oath by prosecutors on August 7. In a statement, NBC said that Russert only testified about what he said during a conversation with Libby, who had waived his interest in confidentiality and reportedly wanted Russert to testify.

On August 6, 2004, Cooper was held in contempt of court after he failed to comply with the July 20 order. Hogan ordered Cooper to jail and fined the magazine $1,000 per day until Cooper complied with the order. The sanctions were stayed pending appeal to the U.S. Court of Appeals in Washington, D.C., but before the appeal was heard, Cooper reached an agreement with investigators to offer limited testimony. He agreed to testify, according to a statement released by *Time* magazine that echoed the points made by NBC and Kessler earlier, because the one source the special counsel asked about — again, Libby — had waived the confidentiality agreement he had with Cooper. Cooper was interviewed on Aug. 23 by prosecutors and was immediately cleared of the contempt citation.

Washington Post reporter Walter Pincus, who wrote that a *Post* reporter received information about Plame from a Bush administration official, and *New York Times* reporter Judith Miller were also subpoenaed to testify in August. In September, Cooper and *Time* received a new, broader subpoena and Pincus reached a deal with prosecutors. Pincus agreed to limited testimony about conversations with a confidential source who had already revealed himself to prosecutors and granted Pincus permission, but Pincus still did not testify as to the name of the source.

On Oct. 7 and 13, Hogan held Miller and then Cooper and *Time* in contempt, fined them each $1,000 per day and ordered Miller and Cooper to jail until they testify. The fines and sentences were stayed pending a consolidated appeal.

The U.S. Court of Appeals (D.C. Cir) heard oral arguments on Dec. 8 and released its decision on Feb. 15, 2005, holding that no privilege protects journalists from being compelled to reveal their confidential sources when called to testify before grand juries. The judges unanimously agreed that the First Amendment does not provide a privilege from testimony before a grand jury, but split on the issue of whether a "common law" privilege — one rooted in previous court decisions, not the constitution — exists. In any case, all agreed that a common law privilege would have been overcome by the prosecutor by apparently showing that the information was critical and only available from the journalists — although that part of the court's opinion was redacted from the public version.

Also in February, Ashcroft's replacement as Attorney General, former White House Counsel Alberto Gonzales, recused himself from the investigation. Gonzales had been in charge of the White House's response to the investigation.

A request for reconsideration by the entire court of appeals was rejected on April 19. Miller, Cooper and *Time* appealed their cases to the U.S. Supreme Court. Briefs asking the court to accept the case were filed May 9 and 10. Two friend-of-the-court briefs were filed by media organizations on May 18, and a coalition of state attorneys general filed a brief in support of the reporters on May 27. The government's brief was filed on May 31. On June 27 the Supreme Court declined to review the case, and it was sent back to Judge Hogan.

Miller and Cooper indicated at a June 29 hearing that they still did not intend to comply with the subpoenas and Hogan set a final hearing for July 6. On July 1, Time Inc. told the court that it decided to comply with the subpoena, and had given Cooper's notes to the grand jury over Cooper's objection.

At the final hearing on July 6, Cooper announced that while he believed the government issued confidentiality waivers were coercive and "not worth the paper they're written on," he had received a "personal, unambiguous, uncoerced" waiver from his source and would testify before the grand jury. Hogan revoked the contempt citation against him. Miller continued to refuse to testify, and was taken into custody on the civil contempt charge. Unless she decides to testify, which she has repeatedly said she will not do, she will remain in prison until the grand jury expires in late October 2005. Fitzgerald has also suggested that he might bring criminal contempt of court charges against her, which could result in a longer sentence.

Cooper testified before the grand jury on July 13, and on July 17 he confirmed for the first time in a *Time* magazine column that presidential advisor Karl Rove, along with Libby and possibly others, were his sources. (*In re Special Counsel Investigation*)

Global Relief Foundation leak investigation

The media has so far been more successful in another case involving two figures from the Valerie Plame investigation. A Chicago grand jury is investigating the leak of information about a planned FBI raid on the Global Relief Foundation, an Islamic charity suspected of funding terrorism. Representatives of the charity have said they were tipped off the day before the Dec. 14, 2001, raid by reporters calling for comment. Patrick Fitzgerald, acting in his capacity as U.S. Attorney for Chicago, was denied permission in 2003 by the Department of Justice to subpoena

reporters' telephone records. DOJ regulations require that "[a]ll reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media," or for "telephone toll records of any member of the news media." However, in early Sept. 2004, Fitzgerald was granted permission and subpoenaed the telephone records of two reporters, Judith Miller and Phillip Shenon of *The New York Times*, from the *Times*' telephone company. It is unknown whether Fitzgerald has obtained the records. The *Times* filed a lawsuit Sept. 28 to block the subpoena.

On Dec. 1, 2004, the U.S. Court of Appeals in Chicago (7th Cir.) dismissed a libel suit filed by Global Relief against the *Times* and other news organizations for their reporting on the government's investigation.

On Feb. 24, 2005, a federal district judge in New York City held that the *Times* had the right to keep its phone records confidential. U.S. District Judge Robert W. Sweet held that the records are protected by a qualified privilege under the First Amendment and under common law, and that prosecutors had failed to overcome the privilege.

"To deny the relief sought by *The Times* under these circumstances, i.e., without any showing on the part of the government that the sought records are necessary, relevant, material and unavailable from other sources, has the potential to significantly affect the reporting of news based upon information provided by confidential sources," Sweet wrote.

Fitzgerald has appealed the ruling the to U.S. Court of Appeals in New York (2nd Cir.). (*The New York Times Company v. Gonzales*)

Dr. Steven Hatfill anthrax investigation and Privacy Act lawsuit

Although it is not a government investigation of journalists, a private lawsuit stemming from a federal terrorism investigation has resulted in a number of subpoenas issued to news organizations. Dr. Steven J. Hatfill sued Attorney General John Ashcroft and other government officials under the Privacy Act in federal court in Washington, D.C., over government leaks and being publicly named a "person of interest" in the investigation into the 2001 anthrax attacks that killed five people and sickened 17. Although he has not been charged, Hatfill lost his job as a government contractor and has been unable to find employment since being identified in the investigation.

Hatfill also sued *The New York Times* and reporter Nicholas Kristof in a separate case for libel over their coverage of the investigation. The libel suit was dismissed in Nov. 2004 but reinstated on appeal on July 28, 2005.

Because the Department of Justice claimed that submitting to Hatfill's discovery requests in the Privacy Act case would hamper the ongoing anthrax investigation, in February 2004 Judge Reggie B. Walton approved the use of news media subpoenas. Hatfill's attorneys initially declined because of anticipated legal challenges by the media. In October, Walton approved their use again, and in December he ordered as many as 100 federal agents to waive any confidentiality agreements they had with the media. Beginning Dec.15, a number of news organizations received subpoenas to provide documents and testimony in the case.

At least 13 subpoenas were served. Four subpoenas — served on National Public Radio, *The Baltimore Sun*, CNN and UPI — were voluntarily withdrawn early on. Another nine subpoenas — served on ABC, CBS, NBC, The Associated Press, *The Washington Post*, *Newsweek*, Gannett Co., *The Los Angeles Times*, and former *Baltimore Sun* reporter Scott Shane — were contested primarily in the U.S. District Court in Washington, D.C. (the *Times* subpoena was challenged in federal court in Los Angeles). Another subpoena was served in federal court in New York on Don Foster, a professor at Vassar College who wrote about the FBI's investigation.

In late May, after the government made federal employees available as witnesses, the subpoenas against the news media parties were voluntarily withdrawn. They may, however, be served again if Hatfill is not able to obtain the information he seeks from those individuals. (*Hatfill v. Ashcroft*)

Lynne Stewart "material support" trial

Several reporters from *The New York Times*, Reuters and *Newsday* were subpoenaed in June 2004 to testify in the trial of Lynne Stewart, a New York criminal defense attorney charged with providing "material support" to terrorists after she allegedly helped her client Sheik Omar Abdel-Rahman communicate with terrorist followers. Prosecutors insisted that they are only seeking to confirm published information.

Attorneys for all three organizations sought to quash the subpoenas of their reporters. On Aug. 19, with Stewart's criminal trial well underway, U.S. District Judge John Koeltl ruled that Reuters reporter Esmat Salaheddin could be called to testify about his conversation with Stewart, which led to an article saying the sheik no longer supported a cease-fire in Egypt. Salaheddin testified Sept. 13, 2004 about the accuracy of the published story.

Prosecutors dropped the subpoena of *Newsday* reporter Patricia Hurtado after she successfully argued that it would interfere with her ability to cover the trial as a courts reporter. Joseph Fried of *The New York Times*, and George Packer, a freelancer for *The New York Times* were not called to testify before the close of the trial.

Stewart was convicted on Feb. 10, 2005, but has requested a new trial because of bias by members of the anonymous jury. If she is re-tried, the reporters could be subpoenaed again. (*U.S. v. Sattar*)

John Walker Lindh trial

In the summer of 2002, federal prosecutors wanted to use CNN freelancer Robert Pelton's videotaped interview with American Taliban fighter John Walker Lindh as evidence in Lindh's terrorism trial. Pelton interviewed the injured Lindh in December 2001 in Afghanistan before Lindh was taken into U.S. custody and charged with crimes including conspiring to murder U.S. citizens and contributing services to terrorist group al-Qaida.

Lindh subpoenaed Pelton on June 27, 2002, to testify in a hearing to suppress the videotaped interview as evidence. Lindh argued that Pelton was acting as an agent of the U.S. government during the interview and did not notify Lindh of his right to remain silent, so the videotape was not admissible at trial.

Pelton resisted the subpoena, and several national media organizations, including The Reporters Committee for Freedom of the Press, supported him by urging the court to preserve Pelton's First Amendment right not to testify. U.S. District Judge T.S. Ellis III in Alexandria, Va., ordered Pelton to testify and in his ruling wrote:

"There is no doubt that Pelton's testimony is material to Lindh's non-frivolous argument that Pelton was acting as a

government agent at the time he interviewed Lindh, an assertion that Pelton . . . strongly denies."

Judge Ellis's order became moot on July 15, 2002, when Lindh pleaded guilty to two charges of aiding the Taliban and carrying explosives.

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

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

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

Brian Regan espionage trial

In another war-related subpoena case, U.S. District Judge Gerald Bruce Lee of Alexandria, Va., was more sympathetic to the media's concerns. On Aug. 8, 2002, Lee rejected an accused spy's attempt to compel a reporter for *The New York Times* to testify about confidential sources.

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

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

Regan, a retired Air Force master sergeant, was arrested in 2001 and charged with trying to sell classified information from American satellites to China, Libya and Iraq. He was convicted on Feb. 20, 2003, and was sentenced in March 2003 to life in prison.

Regan wanted Schmitt to testify about his sources for a July 5, 2002, story that described military plans for a possible attack on Iraq. The story relied on confidential sources.

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

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

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

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

Michael McKevitt Irish terrorism trial

In another case, three Chicago reporters were forced to hand over interview tapes to an Irish terrorism defendant and to U.S. authorities who claimed a national security interest in the case.

Abdon Pallasch and Robert C. Herguth, of the *Chicago Sun-Times*, and Flynn McRoberts, of the *Chicago Tribune*, interviewed FBI informant David Rupert for a book they planned to write about Rupert's experiences spying on the Irish Republican Army. Rupert was a witness in a trial against Michael McKevitt, who allegedly lead a terrorist organization known as the "Real IRA." McKevitt's attorneys asked a U.S. court to order the reporters to produce their tapes to them before they cross-examined Rupert at trial.

The reporters objected to the request, but neither the district court nor the federal appeals court hearing the case agreed with their argument that a First Amendment privilege protected their source materials from compelled disclosure. They were ordered to hand over the tapes or go to jail.

Although the underlying prosecution concerned a terrorist faction operating mainly in Ireland, the United States submitted a statement of interest in the case, asserting American security concerns. The government made an unusual request to prescreen the tapes and redact any sensitive information before their contents were made public at the trial.

United States District Judge Ronald A. Guzman granted the government's request. He called the government's desire to prevent against the public disclosure of national security information a "highly compelling interest." The U.S. Court of Appeals in Chicago (7th Cir.) refused to stay the decision.

On July 4, 2003, Pallasch, Herguth and McRoberts handed the interview tapes over to FBI agents, who reviewed and redacted them before passing them on to McKevitt's attorneys. McKevitt was convicted on Aug. 6, 2003, of directing terrorism.

Although they had already turned over the tapes, the reporters asked the appellate court to reconsider or rehear their case on the issue of whether a First Amendment privilege should have protected their work. The U.S. Court of Appeals in Chicago (7th Cir.) denied the reporters' request for an emergency stay of the order and, in an unusual move, issued an opinion one month later on August 8, explaining that decision. Judge Richard Posner, writing on behalf of the three-judge panel, dismissed any argument for a constitutionally based reporter's privilege, stating that subpoenas to journalists should only be required to meet the general requirement of reasonableness, applicable to all subpoenas. (*McKevitt v. Pallasch*)

Jesselyn Radack leak investigation

The Justice Department concluded its investigation in September 2003 into whether former government attorney Jesselyn Radack leaked e-mail messages relating to the John Walker Lindh prosecution to *Newsweek*. The magazine had reported in June 2002 that the Justice Department attorneys, in their e-mail messages, worried that interrogations of Lindh might not be admissible in court.

Radack, who worked in the department's Professional Responsibility Office at the time, had advised prosecutors that the interrogations were improper. She admits having spoken to *Newsweek*'s Michael Isikoff, and more recently has acknowledged that she gave him materials for the article.

Ellis, the federal judge presiding over Lindh's case, asked the government in June 2002 to investigate the leak of the e-mail messages, which he had sealed. In July 2002, government officials told the judge that several Justice Department employees who had access to the messages had been questioned. Lindh pleaded guilty, presumably ending the judge's involvement in the investigation, but the leaks inquiry continued.

Radack said that when she declined to speak with an official from the Justice Department's inspector general's office, an investigator called the law firm she joined after leaving the government. The investigator's inquiries and Radack's refusal to sign a statement swearing she was not Isikoff's source caused the law firm to suspend her.

The department closed its investigation after concluding that Radack had turned over the materials to Isikoff. It did not subpoena Isikoff during the investigation, but had subpoenaed the law firm for records of all calls to *Newsweek* phone numbers. The manner in which the government conducted its investigation did nothing to dispel the notion that it may have used the investigation to retaliate against Radack for giving unpopular advice on Lindh's prosecution, and for making it public.

Lawrence Franklin leak prosecution

In May 2005, federal agents speaking on condition of anonymity told *The New York Times* that four reporters had been questioned in the investigation of leaks of classified information on terrorism, American forces in Iraq, and Middle East strategy to the American Israel Public Affairs Committee and the news media. Former Pentagon analyst Lawrence A. Franklin was charged in May with knowingly disclosing classified information, and in August, two former AIPAC staff members, Steven J. Rosen and Keith Weissman, were charged with conspiracy to distribute national defense information.

The reporters were not identified by the federal agents, who said that at least one worked for a newspaper and the others published on the Internet. The reporters were not subpoenaed and only questioned on a voluntary basis, but could be called before the federal grand jury convened in Alexandria, Va., to investigate the case. The federal agents also said it is possible that more journalists could be questioned in the case.

War correspondents

As media advocates argued (without success) about the need to protect war correspondents in the Lindh case, reporters in war zones are particularly at risk when journalists are seen as agents of government.

War correspondents deal daily with suspicions that they are spies. Michael Ware, *Time*'s reporter in Kabul, Afghanistan, wrote in the magazine's Aug. 12, 2002, issue: "In Afghanistan, every Westerner is a spy until proven otherwise. . . . Sensitive questions can provoke accusations of espionage." Journalists in Iraq face similar hostilities.

Luckily, a development in a major war crimes tribunal in The Hague may soothe some war correspondents' worries. The United Nations International Criminal Tribunal for the former Yugoslavia on Dec. 11, 2002, adopted a qualified reporter's privilege to prevent war correspondents from being forced to provide evidence in the court's prosecutions of war criminals. The decision provides considerable protection for journalists who cover conflict zones and who are subpoenaed to testify before the Tribunal.

The ruling arose from an appeal by former *Washington Post* correspondent Jonathan Randal, who was ordered on June 7, 2002, to comply with a subpoena to appear as a witness before the court. The subpoena sought Randal's testimony in the prosecution of former Bosnian Serb Deputy Prime Minister Radoslav Brdjanin, who is on trial for genocide and deportation of non-Serbs during the 1992-95 Bosnian war. Randal was subpoenaed because he interviewed Brdjanin for a story published in 1993.

The court, adopting arguments made by Randal and the more than 30 news organizations that submitted an amicus brief in the case, said: "If war correspondents were to be perceived as potential witnesses for the Prosecution, two consequences may follow: First, they may have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations, may talk less freely with them and may deny them access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk."

Under the privilege established by the tribunal, a subpoena may be issued to a war correspondent only if the evidence sought is of direct and important value in determining a core issue in the case, and the evidence cannot reasonably be obtained elsewhere.

The privilege currently applies only to cases brought before the U.N. Tribunal for the former Yugoslavia, but advocates hope it will serve as precedent in other international courts.

State Department Saudi visa leak

Joel Mowbray, a reporter for the *National Review*, was detained for 30 minutes on July 12, 2002, after a State Department briefing. Guards and a federal agent demanded that Mowbray answer questions about his reporting on a classified cable concerning the U.S. system of issuing visas to Saudis. The guards who stopped Mowbray wanted to know who gave him the cable. Mowbray denied having the confidential cable and was not searched. He was released without explanation after his editors contacted the State Department.

Sen. Charles E. Grassley (R-Iowa) and Rep. Dave Weldon (R-Fla.) demanded an explanation for the detainment from Powell. In a July 16, 2002, letter, Grassley, a senior member of the Senate Judiciary Committee, and Weldon, chairman of the House Government Reform Subcommittee on Civil Service, asked then-Secretary of State Colin Powell to explain who made the decision to question Mowbray, to name the officials involved and to state whether they were armed.

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

A leak of congressional intelligence

Rep. Porter Goss (R-Fla.) and Sen. Bob Graham (D-Fla.), former chairmen of the House and Senate intelligence committees, asked Ashcroft on June 20, 2002, to investigate the leak of classified information from a closed-door meeting of a joint congressional intelligence panel with the National Security Agency.

NSA officials told the panel that they had intercepted al-Qaida phone conversations on Sept. 10, 2001. The conversations included these statements: "The match is about to begin," and "Tomorrow is zero hour." However, the NSA did not translate the messages until Sept. 12.

In June 2002, CNN and other media reported the intercepted messages and the NSA's failure to translate them before the September 11 tragedy. Those reports prompted an angry phone call from Vice President Dick Cheney to Goss and Graham, who ordered the investigation into who leaked the information.

By early August 2002, the FBI had questioned nearly all 37

members of the Senate and House intelligence committees, 100 congressional staffers, and dozens of officials at the CIA, NSA and Defense Department, according to *The Washington Post*. The FBI asked congressmen whether they would be willing to submit to lie-detector tests. Most said they would not.

Goss refused to exempt reporters from the investigation, although The Associated Press reported that Goss noted the "time-honored tradition" of reporters protecting sources when he was asked whether reporters would be questioned about the leaks. But, Goss told the AP: "I think when we're dealing with national security it is useful for reporters to cooperate with people who are conducting bona fide investigations." In August 2004, President Bush nominated Goss to replace George Tenet as CIA Director, and he was sworn into office September 24, one day after being confirmed by the Senate.

In August 2004, *The New York Times* reported that after two years of investigation, the FBI decided that Senator Richard C. Shelby, an Alabama Republican and former chairman of the Senate Intelligence Committee, was almost definitely a source of the leak. According to the *Times*, the Justice Department referred the matter to the Senate Ethics Committee.

Pentagon efforts to plug leaks

An angry Defense Secretary Donald Rumsfeld spoke out against press leaks over the summer of 2002.

During a July 22, 2002, press briefing, Rumsfeld urged Pentagon employees to reveal the name of an official who leaked an alleged U.S. plan to invade Iraq to *The New York Times*.

"I think that anyone who has a position where they touch a war plan has an obligation to not leak it to the press or anybody else because it kills people," Rumsfeld said during the press briefing. "It's inexcusable, and they ought to be in jail."

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

In a July 12, 2002, memo attached to an unclassified assessment of war-related leaks prepared by the CIA, Rumsfeld denounced the improper disclosure of classified information and encouraged defense staff members to put an end to them.

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

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

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

By late July 2002, parking lot guards were stopping every 30th car leaving the Pentagon to ask if anyone was smuggling out classified documents, and the CIA had suspended two contractors for talking to the press, according to *U.S. News & World Report*.

Reporters covering the Pentagon were also meeting tighter requirements for unescorted access to the building. Only those reporters who work full-time within the Pentagon or who visit at least twice a week will be issued a press pass and allowed unescorted access to the Pentagon. Other reporters must have an escort.

Federal Shield Bill

Responding to these and other cases where the news media has been subpoenaed, members of Congress have introduced legislation in the House of Representatives and Senate to create a federal reporter's shield law. Currently, 31 states and Washington, D.C. have such statutes, and 18 of the remaining states have created protection through judicial decisions (only Wyoming has not addressed the issue). Although most federal courts recognize some form of privilege, since the U.S. Supreme Court's 1972 split decision in *Branzburg v. Hayes* that the First Amendment does not provide journalists with a privilege not to testify in grand jury proceedings, those lower federal courts have differed significantly over what protections exist. A federal shield law would provide protection in those jurisdictions that have not recognized a privilege, and bring some uniformity for reporters who might not know at the time they are promising a source confidentiality what court they might later be called to testify before.

Sen. Christopher Dodd (D-Conn.) introduced the first of these bills, the Free Speech Protection Act of 2004, in November 2004, although it was too late in the session to be acted on. Reps. Mike Pence (R-Ind.) and Rick Boucher (D-Va.) introduced the Free Flow of Information Act of 2005 (H.R. 581) in the House on February 2, 2005. Sen. Richard Lugar (R-Ind.) introduced an identical bill in the Senate on February 9 (S. 340). Dodd reintroduced his bill on February 14 (S. 369), and cosponsored Lugar's bill. Both Pence and Lugar's bills attracted numerous bipartisan cosponsors, 54 in the House and 10 in the Senate.

As originally introduced, the Free Flow of Information Act of 2005 would provide journalists with absolute protection from being compelled to reveal confidential sources, and a qualified privilege from providing testimony, notes or other materials regarding non-confidential sources. The qualified privilege could only be overcome by showing "clear and convincing evidence" that the information could not reasonably be obtained from another source and is essential to proving an issue of substantial importance in a civil case or essential to the investigation, prosecution or defense of a criminal case.

Responding to concerns by the Department of Justice that a federal reporter's shield law would harm national security, the Free Flow of Information Act of 2005 was amended and reintroduced on July 18 (H.R. 3323, S. 1419). As amended, the absolute protection provided for confidential sources could be overcome when "necessary to prevent imminent and actual harm to national security" and "the harm sought to be redressed by requiring disclosure clearly outweighs the public interest in protecting the free flow of information." The Senate held a hearing on the bill July 27. As of early August the reintroduced bill has 48 cosponsors in the House and 9 in the Senate.

Freedom of information

SEVERE
Severe Risk To A Free Press

Federal FOI Act officers now act under directions to give strong consideration to exemptions before handing out information, and to protect "sensitive but unclassified" information. Federal Web sites have come down, a measure to protect "homeland security" records became law in 2002, and federal courts have ruled that the government is owed deference in its FOI Act denials when it claims national security might be affected — even if the records are not classified.

Since Sept. 11, 2001, the media have had to contend with a new reluctance on the part of federal and state governments to release information. There have been many and continual roll-backs in disclosure. The names of terrorism-suspect detainees stateside and in captivity on foreign soil are considered secret. The predictions of water flow from a dam burst or a worst-case scenario for a manufacturing accident are now considered somehow useful to terrorists and no longer available to a public seeking environmental safety reforms. The change in attitude can be traced straight back to the top, as seen in the policy statement released by the Attorney General in October 2001 that has come to be known as "The Ashcroft Memorandum."

In late March 2003, the administration also amended the Clinton Executive Order on classification, allowing more classification than the existing memorandum anticipated. The memo reverted to an allowance of reclassification of documents that already had been made public.

The increasing push for secrecy is often curious. For instance, in July 2004, *Forbes Magazine* reported that the Department of Justice had denied an FOI Act request from a private party for copies of press releases issued by the agency concerning terrorism-related indictments. In January 2004, a *Washington Post* editorial decried the failure of the government to make Iraqi government records, seized during the invasion, available to Iraqi people or anyone else other than investigators seeking weapons of mass destruction. *Secrecy News* reported in October 2003 that Patent and Trademark Office secrecy orders imposed upon inventors (even those who are not funded by government) to keep secret their discoveries that might be "detrimental to the national security" were issued 75 times in 2003, more by half than the 18 to 44 totals for each of the previous four years. In November 2003, the *Post* reported that the new Transportation Safety Administration had not made public test results on the new pilot program to test whether public or private airport screeners are more effective.

The government's commitment to "secrecy-as-security" thwarts not only reporters but others as well. Sen. Susan Collins (R-Maine) wrote in a December 2003 opinion column in *The Wall Street Journal* about her own frustration at trying to check out allegations of citizenship and residency grants to suspected terrorists and being refused information by the FBI because disclosure could "gravely damage the nation's security."

Clearly the FOI Act is increasingly less effective. At an FOI oversight hearing in May 2005, Rep. Todd Platts (R-Pa.), chairman of the House Subcommittee on Government Management, Finance and Accountability, called for effective FOI policy that balances security with access, but the panel he convened cited big backlogs of requests and a lack of enforcement in agencies, which often ignore or delay response to requests.

The Ashcroft Memorandum

In his confirmation hearings and in interviews with reporters Attorney Gen. Alberto Gonzales agreed to take a new look at the "Ashcroft Memorandum," his predecessor's instruction to federal FOI officers and specialists that has greatly troubled FOI requesters over the last few years. Gonzales is from a state with a strong open records program and he has undoubtedly heard the many and strong criticisms of his predecessor's apparent disdain for disclosure. But no attorney general thus far has changed FOI guidance without a change in the presidency.

A month and a day after the events of Sept. 11, then-Attorney General John Ashcroft revoked what had been a seemingly permissive Clinton-era FOI 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 the withholding.

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, Ashcroft 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 2002 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 Justice 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 on Oct. 18, 2001, 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 Sept. 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.

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.

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

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

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 FOI Act and to determine if agencies were accepting electronically filed FOI requests, particularly since the anthrax threat following Sept. 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.

GAO issued its report Aug. 30, 2002. Although it had interviewed representatives of the FOI requester community in Washington, D.C., it found the data it collected "largely anecdotal" and did not attempt to analyze them, other than to note that agency FOI officials and the requester community viewed the impacts of the events of Sept. 11 differently.

After reaching agreements with congressional staff, GAO limited the rest of its report to how agencies were progressing in meeting deadlines and putting information online and how the Justice Department was implementing GAO's recommendations in a study one year earlier.

Because of new and better reporting instructions, it was difficult to assess if agencies had improved their processing times for FOI requests. But GAO said that government-wide backlogs are substantial and growing, indicating that agencies are falling behind.

GAO found substantial progress in making required information available online but all information required by the Electronic FOI Act was not yet there, and when it was, it was not always easy to find. Agencies were also taking information down.

GAO found that the Justice Department had told other agencies how to make improvements under the Electronic FOI Act, but that numerous anomalies remain.

GAO did a second study at Leahy's request to evaluate the effects of the Ashcroft policies on FOI programs. The Reno memorandum had established an overall "presumption of disclosure" and promoted discretionary disclosures to achieve "maximum responsible disclosure." Had the Ashcroft's replacement policies to guarantee defense of an agency's withholding information for a "sound legal basis" changed the way the government responded to requesters?

In September 2003, GAO issued a report showing one-third of federal FOI officers said they were less likely since the Ashcroft memorandum to make discretionary disclosures of information and, of those, 75 percent cited the Ashcroft memorandum as persuasive in influencing the change.

On March 7, 2002, the House committee with FOI oversight edited its guidebook for FOI users to specifically reject the Ashcroft memorandum. Rep. Henry Waxman (D-Calif.), ranking minority member of the House Government Reform Committee, proposed the changes, and the committee's chairman, Rep. Dan Burton, (R-Ind.), approved them. The guide says,

"Contrary to the instructions issued by the Department of Justice on Oct. 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 admonished: "Above all, the statute requires Federal agencies to provide the fullest possible disclosure of information to the public."

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

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

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

The Card Memorandum

Reviving the contentious phrase "sensitive but unclassified information," White House Chief of Staff Andrew Card Jr. in late March 2002 ordered federal agencies to withhold information for national security reasons even when the FOI Act's exemption for national security does not apply.

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

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

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

The authors of this section, Richard Huff and Dan Metcalfe, co-directors of the Justice Department's Office of Information and Privacy, emphasize that FOI requests for this information should only be processed in accordance with Ashcroft's Oct. 12, 2001, memorandum "by giving full and careful consideration to all applicable FOIA exemptions."

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

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

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

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

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

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

In late August 2002, officials at the Office of Management and Budget were contemplating new guidance for the anticipated Department of Homeland Security that would address "sensitive but unclassified" information.

The Department of Homeland Security in May 2004 issued its own directive for safeguarding "sensitive but unclassified" information that originated within the new department or was "received from other government and non-governmental activities," and it is discussed below.

The classification order amendment

In April 2005, the Inter-agency Security Oversight Office reported that the federal government in 2004 had a record 15.5 million classification actions, breaking the record set in 2003. The steady rise in classification has kept pace over time with the paperwork generated by the War on Terrorism. But there were changes in policy as well.

On March 25, 2003, the Bush administration amended the classification order that had been issued by President Clinton in 1995. The amendments made few but significant changes that will extend classification. The change eliminated a major feature of the Clinton memorandum, the provision that there would be no classification of records where there was "significant doubt" that disclosure could harm national security.

A key draftsman told public interest attorneys and others that the revisions represent a "change in tone." William Leonard, director of the Information Security Oversight Office (ISOO), told the group that the timing of the amendment was driven less by any wartime need to protect national security than by an approaching April deadline for releasing records slated for automatic declassification absent government action and the amendment extended that deadline through 2006.

But the Bush amendment does more. It calls for automatic classification of foreign government information where disclosure is not authorized, under a presumption that release would damage national security.

It gives the director of the Central Intelligence Agency new veto power over decisions by the Interagency Security Classification Appeals Panel (ISCAP), which hears appeals of agency refusals to declassify information. The CIA veto power is narrow

and not necessarily final (provisions in the new order allow for presidential review of the veto) but it represents an additional check on ISCAP decisions that information should be disclosed.

It also allows reclassification of records that already have been disclosed or declassified when the head of the agency rules that it is necessary to do so and that the information can be reasonably recovered. The 1995 Clinton order, the first issued since 1982, responded to increasingly frequent complaints that vast overclassification of records was crippling the ability of outside researchers and even of federal agencies to understand national security matters. It limited the circumstances for classifying records, called for automatic declassification after 10 or 25 years absent compelling reasons, and set up the ISCAP review board which Leonard said in March 2003 had released at least 70 percent of the records it had reviewed.

Reclassification reappears

Federal agents from the CIA, Defense Department and Department of Energy in February 2005 searched the University of Washington's library archives to reclassify records once donated by the late Sen. Henry "Scoop" Jackson.

In 2005 the Department of Energy classified its intelligence budget — and while it was at it, retroactively classified all its earlier intelligence budgets.

The classification of records already made public has been a contentious issue in the Sibel Edmonds case discussed below.

The text of the classification order is critical to the release of information on national security matters as the courts traditionally defer to agency decisions under the order on what will be secret and what will not. The first exemption to the federal FOI Act is for records "properly classified."

Classification and declassification activity

At a hearing in August 2004 before the House Committee on Government Reform's subcommittee on national security, ISOO director William Leonard warned that "In some quarters, when it comes to classification in times of national security challenges, when available resources are distracted elsewhere," the approach to classification can be to "err on the side of caution," and to delay declassification "when in doubt," saving questions for later. It is no secret, he said, that agencies classify too much information. Most troubling, he said, is that some agencies have no real idea about the increases and decreases in classification and the reasons behind them.

Leonard emphasized that security classification is permissive, not mandatory, and that decisions to classify information should occur only where allowed by standards set by the executive order on classification. The exercise of the classification prerogative has a ripple effect, he said, and can impede the sharing with other agencies or the public who have a need to know information.

The hearing followed findings by the National Commission on Terrorist Attacks Upon the United States, published July 22, 2004. Its executive summary concluded:

> Secrecy stifles oversight, accountability, and information sharing. Unfortunately, all the current organizational incentives encourage overclassification. This balance should change; and as a start open information should be provided about the overall size of agency intelligence budgets.

There were concerns that part of the 9/11 Commission's own report may have been classified by the executive branch in an abundance of misplaced caution. But the classification of sections of other reports also raised concerns. Leonard called classification of portions of Maj. General Antonio Taguba's investigation of Abu Ghraib prisoner abuse a "bureaucratic impulse" to "almost reflexively reach out to the classification system."

In a Congressional Research Service report updated on Aug. 26, 2004, Harold Relyea cites the Taguba report example and others sparking controversy over competing needs for secrecy and openness in the classification of reports resulting from congressional investigations. He discusses legislation introduced by Sen. Ron Wyden (D-Ore.) and Rep. Robert Cramer (D-Ala.) to establish a three-member board to review and make recommendations on overhauling standards and processes used in classifying national security information.

Secrecy training for disclosure officers

Just to make sure that FOI Act officers and specialists know what they are expected to withhold under the administration's more crabbed interpretations of the FOI Act, the Department of Justice, which assumes leadership of the FOI Act function for the federal government, convened agency FOI Act officers and specialists shortly after the October 2001 Ashcroft memorandum, a meeting discussed above — and then convened them again in June 2003 to discuss what else they should withhold.

Justice's Office of Information and Privacy co-directors, Huff and Metcalfe, along with a representative of the National Security Council, brought them together June 25, 2003, in a meeting that was not attended by anyone outside government. OIP issued a wrap-up of that session in early July on its Web site.

The conference leaders reviewed their earlier guidance that agencies should make broad use of Exemption 2 to protect information that might be useful to terrorists, the Card memorandum on safeguarding "sensitive but unclassified information," and the anticipated government-wide effects of the proposed rules under the Homeland Security Act. Those rules would make the confidentiality requirements Congress levied on business information on the critical infrastructure shared with Homeland Security applicable to business information shared among all agencies.

They discussed the additional requirements of the Homeland Security Act for agencies to develop procedures for identifying and safeguarding "sensitive but unclassified" homeland security information and predicted that a presidential delegation of authority will be issued soon for developing procedures — expected to be produced for public review and comment — for protecting sensitive but unclassified material.

The training included guidance on an amendment to the FOI Act passed by Congress in December 2002 in the Intelligence Authorization Act that for the first time cuts back on the act's requirement that "any person" be able to use the act by barring the response to foreign government requests made to intelligence agencies.

It also reviewed three 2003 decisions in which federal courts have allowed national security concerns to justify agency use of exemptions other than the FOI Act's Exemption 1, the exemption Congress devoted to the protection of national security concerns.

In *Coastal Delivery Corp. v. U.S. Customs Service*, decided March 17, 2003, the U.S. District Court in Los Angeles allowed the U.S. Customs Service to invoke Exemption 2 protecting internal documents to deny information on its inspections of seaport operations because "terrorists" could learn how often

inspections occurred and send their containers to "vulnerable ports."

In *Living Rivers, Inc., v. the U.S. Bureau of Reclamation*, decided March 25, 2003, the U.S. District Court in Salt Lake City allowed law enforcement maps of flood areas below Hoover and Glen Canyon dams to be withheld because they might aid terrorists in carrying out an attack.

The conference leaders also discussed the deference appeals court judges afforded government claims of "national security" in deciding that release of detainee names could interfere with law enforcement investigation in *Center for National Security Studies v. Department of Justice*, discussed below.

Access to the detainees' names

Among the government's best kept secrets in its war on terrorism are the identities of the hundreds of people it has locked up (and in many cases the reasons for their detention). Names, numbers and reasons are not only secret in Iraq, Afghanistan and Guantanamo Bay, they are secret in the United States. And an appeals court decision that the U.S. Supreme Court refused to review keeps them so. The court says the names can be secret for "national security" reasons. The government says they can also be secret because disclosure of the fact of incarceration could be stigmatizing, intruding upon the detainees' personal privacy.

The privacy excuse has also been used to keep secret records about people who have challenged their detentions in court. People for the American Way in late August 2004 filed a lawsuit to find out under the FOI Act how often the Justice Department has asked judges to seal such records. The court pleadings say that the group will not push for the identity of the individual detainees. (Its FOI request was denied ostensibly for the purpose of protecting the detainees' privacy.) And the group said it is willing to accept editing for national security reasons.

A divided panel of the U.S. Court of Appeals in Washington, D.C., ruled in June 2003 that the government can withhold information about the more than 1,100 non-U.S. citizens detained in the United States at some point in connection with the Sept. 11 tragedy, finding that the law enforcement exemption to the FOI Act applies because "national security" investigations were underway. The U.S. Supreme Court refused to hear an appeal of that decision.

The plaintiffs in the case were led by the Center for National Security Studies (CNSS), a Washington, D.C.-based public interest organization and 27 other civil rights and public interest groups including The Reporters Committee for Freedom of the Press. They had filed an FOI request with the Justice Department and some of its components in October 2001.

Several news organizations had urged the high court to review the case.

The appeals court's decision opined that, because of these "national security" concerns, the court should take the Justice Department's word that disclosure might interfere with its investigations. The agency was in a better position than the court to know what should be withheld, Judge David Sentelle wrote.

Judge David Tatel, in a strong and lengthy dissent, accused the majority of "abdicating" the court's responsibility" to enforce the FOI Act as Congress intended.

The FOI Act does contain an exemption for information that is classified to protect national security, and the courts have traditionally given deference to the government's decisions to classify information, but the information sought in this case is not classified information and the government did not claim the exemption that protects classified information.

The lower court in August 2002 had ordered the names of detainees disclosed. U.S. District Court Judge Gladys Kessler in Washington, D.C., wrote, "Secret arrests are a concept odious to a democratic society." She stayed her order at the government's request, allowing it to appeal her ruling.

Kessler's ruling specifically denied information about the dates and location of the detainees' arrests, detentions and release. Those issues were being litigated in state and federal courts. A significant state appeals court decision in New Jersey condoned secrecy about the jailings under a new set of regulations issued by the Justice Department's Immigration and Naturalization Service. Those new rules prohibit state jailers from releasing information on federal prisoners housed there. Those rules trump requirements for disclosure in that state's open records law, the state appellate court ruled.

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

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

The appeals panel did not address the privacy exemptions claimed by the government and refuted by the lower court.

Kessler had rejected entirely the government's claim that release of the names could interfere with its investigation, the basis of the appeals panel decision that would overrule her. She said the government failed to show that disclosure of the names could deter cooperation or enable terrorist groups to map its investigation or help terrorists create false and misleading evidence. *(Center for National Security Studies v. Department of Justice)*

Substantial numbers of unidentified prisoners spent many months in jail and most of their names have been secret since shortly after the events of Sept. 11.

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

"It would be a violation of the privacy rights of individuals for me to create some kind of list," he said at a Nov. 26, 2001, 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 anonymity to these detainees. Under that 1974 act, the government may not disclose information retrieved from its files by name or personal identifier of citizens and lawfully admitted aliens. Most of the detainees have questionable immigration status.

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

At a hearing in late November 2001 before the Senate Judiciary Committee, then Assistant Attorney General Michael Chertoff said: "I need to be clear. I don't know that there is a specific law that bars disclosure of the names."

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

Those disclosures were not in response to CNSS's FOI request discussed above. The requesters still did not have information on 11 of the individuals held on federal criminal charges; they did not have names of the detainees or of their lawyers; and they had gotten from the Justice Department no information on where detainees were currently held.

The Justice Department disclosures had provided 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 had 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 2001, the FOI requesters filed the lawsuit. They had received little information in response to their FOI request. Although the Justice Department had agreed to expedite its review of it, some Justice agencies had not responded 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 also were exempt for privacy reasons.

In late January 2002, the Justice Department released other information in response to the lawsuit, including a major list showing the status of detainees' 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.

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."

Access to information on detainees

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

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

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

In late March 2002, a New Jersey trial court ordered the jailers in Hudson and Passaic counties to release the names of federal prisoners detained in their jails. The state's open records law required disclosure, it said. The federal government appealed.

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

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

In mid-June 2002, the appeals court ruled that an INS regulation, as a federal regulation, would pre-empt a state law like the open records law. The new rules were appropriate, the appeals panel said. They were adopted quickly "for good cause." *(ACLU v. Hudson County)*

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

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

The INS issued final regulations on Jan. 29, 2003, requiring state and local jails that house detainees under federal government contracts to release no information about the individuals.

Before the INS regulations were issued and with no mention of terrorism, the government had already argued successfully before a federal court in Illinois that privacy interests would protect the identities of federal inmates held by contract in Illinois jails. A federal district judge in Springfield, Ill., ruled in February 2002 that a DeWitt County sheriff could not name any federal inmates housed in his jail to a reporter because disclosure would "stigmatize the individuals and cause irreparable damage to their reputations."

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

of federal inmates.

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

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

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

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

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

Access to records on overseas detainees

At a press briefing in December 2003, reporters asked Secretary of Defense Donald Rumsfeld how the Pentagon could square its release of unflattering photographs of the newly captured Saddam Hussein with its continued refusal to routinely release photographs of detainees or even to allow photos to be taken. The Geneva Convention, the Defense Department claims, does not allow photographs of prisoners as that would diminish their dignity.

"Oh come on, now," Rumsfeld told the reporters. The Red Cross, he said, was "crawling around down there," and there was no question about prisoner treatment. "They're being treated very, very well by fine young men and women who went to the high schools that you went to. And any implication to the contrary would be false."

But on January 16, 2004, the U.S. Command issued a one-paragraph press release stating: "An investigation has been initiated into reported incidents of detainee abuse at a Coalition Forces detention facility. The release of specific information concerning the incidents could hinder the investigation, which is in its early stages. The investigation will be conducted in a thorough and professional manner."

In a May 2004 *New Yorker* article, Seymour Hersh described torture of detainees at Abu Ghraib as outlined in a report by Major Gen. Antonio Taguba that had not been intended for release to the public. The article appeared shortly after publication and broadcast of prisoner abuse photos from Abu Ghraib.

The January press release had scooped the media in Rumsfeld's eyes, according to American Journalism Review writer Sherry Ricchiardi. She wrote that because of the paragraph-long press release, Rumsfeld noted "smugly" at a town-hall type meeting in May 2004 with Pentagon workers that "the military, not the media" had discovered and reported on the prisoner abuse at Abu Ghraib.

Also in May 2004, *The Washington Post* printed the names of 370 of the nearly 600 detainees held in Guantanamo Bay, Cuba, a list it put together from non-governmental sources. The government has refused to provide the names for privacy and national security reasons, just as it has refused to provide the names of detainees held in U.S. jails.

The pressure after Abu Ghraib disclosures

The American Civil Liberties Union, FOI litigant against several agencies for information on the treatment of detainees at Abu Ghraib and other foreign detention centers, was still in court on contentious disclosure issues in August 2005. But by then the ACLU requests had forced the release of hundreds of documents on how detainees were treated, on underlying debate among officials as to what constituted "torture," and on what was officially acceptable treatment under the Geneva Conventions.

Those records did not come to light quickly. In October 2003 the ACLU and other groups filed a FOI request for records on prisoner treatment of detainees held on foreign soil. There were no responses until after they filed a lawsuit in June 2004 and after the federal district court in Manhattan in August 2004 ordered agencies to begin responding to their requests.

On Aug. 14, 2004, the court ordered the Department of Defense to provide records by Aug. 23 or identify FOI Act exemptions that might apply. Judge Alvin K. Hellerstein chastised the government for not responding to the ACLU 10 months earlier — before the public announcements of the abuses at Abu Ghraib. He said, "The information may be unpleasant, the information may be exempt or producible. To allow a process of this nature to go on so long as to be part of a lawsuit doesn't seem to be an exercise in good sense and judgment."

Over the next year the ACLU requests would produce an FBI memo describing detainees shackled in fetal position without food, water or bathroom breaks for 24 hours at a time; details conflicts between the Defense Department and the FBI on how detainees should be treated; Defense Intelligence Agency instructions to personnel to "keep quiet," avoiding descriptions of treatment; and descriptions of Pentagon officials engaged in torture posing as FBI agents. One FBI memo claimed, "You won't believe it." Another described the destruction of photos and videos of prisoner abuse after the disclosures of the Abu Ghraib pictures. The U.S. Navy released 10,000 files regarding detainee abuse — with all names redacted.

But the government has not budged in its determination to withhold some of the torture pictures.

In early 2004 military policeman Joseph Darby had turned over pictures of detainee torture to the Army and some of those photographs were leaked to the news media. The ACLU wanted the rest and the government refused to provide them.

In June 2005 Hellerstein rejected the government's contention that privacy exemptions to the FOI Act allowed it to withhold the rest of the Darby photographs. Obscure the identities and release them, he said.

But in August 2005, the government filed new pleadings — under seal — claiming that the photographs were so incendiary they would lead to violence and rioting. Hellerstein ordered an unclassified summary of its arguments made public. The Reporters Committee and 13 other press groups filed an amicus brief saying that the public should not be shielded from disclosures of government activities simply because they are so horrible they could incite retaliatory conduct.

Under pressure to address public outcry over the abuses depicted at Abu Ghraib, the President had released a stack of selected memoranda addressing administration policy on the treatment of prisoners on June 22, 2004, and White House counsel spent time with reporters going over those documents.

When it first filed the FOI requests, the ACLU in a press release said, "The government's blanket assurances that it is not engaging in torture or illegal interrogations, while welcome, are not enough . . . ." It referred to a statement issued in January 2003 by President Bush that the United States "is committed to the world-wide elimination of torture and we are leading this fight by example." In light of news accounts of abuses of detainees, the ACLU's press release said, responses to the FOI query were important.

Other FOI actions for war information

The news media have devoted much attention to the detainee information uncovered by the ACLU in its lawsuit, but other lawsuits are also before the courts and other requests have provided explanations not otherwise available.

Reviewing another claim that release of prisoner's names would violate their privacy, Judge Jed Rakoff, also of the federal district court in Manhattan, told the government to ask detainees in Guantanamo whether they cared. The judge noted that the substantial majority of them for at least two years were not charged with war crimes, not told why they were detained, not permitted access to counsel, and held virtually incommunicado until the Supreme Court ruled that they were entitled to a hearing before military review tribunals.

In November 2004 The Associated Press requested the hearing transcripts, but the request was ignored until they filed a lawsuit in April 2005. At that time, the Defense Department produced the transcripts but with redactions mostly related to identities. The information was exempt, it said, because the stigma of incarceration is a privacy matter. Just ask them, the judge said.

The AP also successfully defended against an invasion of privacy claim by the wife of a Navy Seal. She sued in federal court in Los Angeles after the AP published photographs of pictures of detainee treatment she posted on the Internet. Her case was dismissed in July 2005.

And in July 2005 AP received records on detainee attacks on their guards and other provocative incidents. In May it published individual accounts by Guantanamo detainees that it also obtained through FOI requests.

The Defense Department's photos of military coffins returned to Dover, Del., were released in August 2005 in response to a lawsuit by Delaware journalism professor Ralph Begleiter. The Pentagon had objected to the release photos in response to an earlier request to the Air Force. However it began releasing its photos with the honor guards' faces blacked out to protect "privacy," and now is providing unredacted photographs.

Other FOI requests have unearthed war information. In June 2005 *The Des Moines Register* reported on a Justice Department memorandum expanding the definition of "terrorism."

In November 2004 *The Deseret News* reported on records showing police, firefighters and doctors are ill-prepared to respond to attacks against Army bases with weapons of mass destruction despite Army efforts to improve their preparedness after the Sept. 11, 2001, attacks.

In October 2005, *The Salt Lake City Tribune* reported on a database of 4,611 tort claims filed by Iraqi civilians against the United States and obtained through an FOI request.

In September 2004 the National Security Archive published Taliban-related cables obtained from the State Department through an FOI request.

Concealing the 'infrastructure'

On Nov. 19, 2002, the Senate defeated by 52 to 47 a last-ditch effort by Democrats to block passage of the Homeland Security Act, which Sen. Leahy called the "most severe weakening of the FOI Act in its 36-year history." The act's mandatory confidentiality for information businesses submit concerning their vulnerabilities, he said, is "a big business wish list gussied up in security garb."

The act criminalizes agency disclosures of critical infrastructure information without consent of the businesses who gave it to the department. Companies that voluntarily share information with the government not only gained the promise that the government will keep the information secret, they also gained immunity from civil liability if the information reveals wrongdoing and immunity from antitrust suits for sharing the information with the government and each other.

Legislative efforts to revise the CII mandates continued in the 109th Congress. Sen. John Cornyn (R-Texas) in March 2005 teamed with Leahy to propose major FOI Act reforms in their Open the Government Act, also introduced in the House *(S.394 and H.R.867)* Among the reforms, the measures call for the Comptroller General of the United States to gather agency data and report on effectiveness of the secret exchanges in the CII program. Leahy then reintroduced the "Restore FOIA" Act. *(S. 622)*

Leahy had first introduced that measure in March 2003. But it and its House companion languished in committees. The measures would delete criminal penalties for disclosures, protect whistleblowers and eliminate the prohibitions on use of the information in civil cases against the companies who submit the information. *(S.609 and H.R. 2526)*

Critics of the secrecy provisions in the Homeland Security Act pointed out that just a few months before its passage Congress had agreed not to renew efforts to criminalize leaks of classified information. The administration had advised that the measure was neither wise nor necessary to protect national security. Congress did not advocate routine penalties for release of classified information. It was strange, the critics said, that disclosure of industry information would trigger more blanket and punitive consequences than disclosure of national security information.

The Bush administration, several members of Congress and friends in industry for some time had been adamant about protecting industry-submitted information that they said might be exploited by terrorists.

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

Access advocates fought the measure from the beginning. Knowing about vulnerabilities was a first step to seeing that something would be done about them.

After the House in July 2002 passed a homeland security measure with strong critical infrastructure protections, Leahy, Levin and Sen. Robert Bennett (R-Utah) worked on a substitute bill that would provide limited protections without decimating public access to infrastructure issues.

By August 2002, the fight for new protections of the information had centered on the President's push for a new Department of Homeland Security. FOI battles were now focused on the

language in that legislation. When Congress took its August break, the House and Senate had very different measures up for consideration.

Industry representatives were vocally cold to the idea of sharing, claiming that their information could become public under the FOI Act. If they did not have better legal assurance of secrecy, they would not share. Even if they stood to benefit from better, more informed, protection of the information systems they depended on, they would not want the government to have that information without mandatory confidentiality written into the law.

Citizen activist groups and environmental groups insisted that the FOI Act already protected against any legitimate risk of harmful disclosure. They said that the government had used the existing exemptions regularly and well, and that the courts had given broad protection to industry information. In addition, a Reagan-era executive order already required agencies to let industry review FOI requests for much of its information before disclosing it. They contended that the dangers of ignorance of these vulnerabilities, ignorance that would prohibit demand that they be fixed, trumped more speculative danger of terrorist exploitation.

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

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

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

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

The better language agreed upon by Leahy and Levin in late July 2002 was not to become law either.

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

Bennett, Levin and Leahy worked together to hammer out an amendment to the Bush proposal in markup in the Government Affairs Committee. Levin and Bennett offered it on July 24, 2002, and Bennett vowed that he would stand by the compromise as the Senate considered the Homeland Security measure.

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

The compromise would have limited the protection to information submitted "voluntarily" and not in the pursuit of a government benefit or grant. And it would not have criminalized disclosure.

Reps. Tom Davis (R-Va.) and Jim Moran (D-Va.) had pushed a critical infrastructure measure entitled the Cyber Security Information Act in the 106th Congress.

Numerous public interest groups, including The Reporters Committee for Freedom of the Press, wrote senators in December 2001 saying that, however lofty the goals of the original Bennett bill, it would have serious after-effects if enacted:

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

Critical Infrastructure rules at Homeland Security

The Department of Homeland Security was charged in 2004 with writing regulations that would allow confidential exchanges of critical infrastructure information between the new agency and private, primarily commercial, entities in the hope that the sharing would somehow help to alert the government to vulnerabilities that could be exploited by terrorists, and allow it to share the information with others of its choosing.

The effort to write regulations was highly controversial, as had been the earlier push to pass legislation enabling and encouraging the secretive exchanges. Exemption 3 to the Freedom of Information Act allows agencies to withhold information made confidential by other laws. The Homeland Security Act's Sec. 214 provided for confidential treatment of critical infrastructure information at the department, but viewpoints differed wildly as to what could or should be protected by that section. Government officials and private corporations maintained that information private companies gave the government voluntarily in describing their weaknesses should be withheld from the public — should not be allowed to harm their reputations or subject them to liability. If the information was going to become public, they just would not participate, many of them had told the new agency. But news media and public interest groups argued instead that the public needs to understand those vulnerabilities in order to protect itself. More eyes on the problems, more oversight, could only lead to better solutions to those weaknesses.

On Feb. 20, 2004, the department published interim critical infrastructure information rules. The rules would only protect information submitted to DHS, at least for now. However, commentary accompanying the regulations suggested that the department was looking hard for ways to protect information submitted by these businesses to other federal agencies as well. DHS sought a second round of public comments before final regulations would be written. In late August 2004, the interim regulations were still in effect and final regulations had not been published.

The Justice Department's Office of Information and Privacy posted a notice of the DHS regulations, noting the comment that DHS "anticipates the development of appropriate mecha-

nisms to allow for indirect submissions in the final rule." As a heads-up to FOI officers throughout the government, OIP warned that "there remains the stated prospect of [CII protection] being expanded to operate beyond DHS on an 'indirect' basis at some point in the future."

That "stated prospect" had figured prominently in the DHS proposed regulations that had appeared in April 2003. The department had planned to go farther than the act in doling out protections for critical infrastructure information submitted by businesses. The proposals would have extended the critical infrastructure information protections to all federal agencies even though the law itself covers only information submitted to the DHS. They would have required other federal agencies that receive critical infrastructure information to pass it on to the department and have it returned and this supposedly would have made it subject to the protections of the law.

Those proposed rules belied promises made by Director of Homeland Security Tom Ridge at his confirmation hearings in January 2003. Ridge heard Sen. Levin of the Committee on Governmental Affairs outline the problems with the new law making unclassified information received by the department not subject to the FOI Act.

"You could get information that, for instance, a company is leaking material into a river that you could not turn over to the EPA. If that company was the source of the information, you could not even turn it over to another agency," Levin said. A member of Congress who found out the information from oversight "would be stymied from acting on it, making it public."

Calling the FOI provisions in the act "much too broad," Levin told Ridge he needed to "look at the language."

Ridge said, "It certainly wasn't the intent . . . to give wrongdoers protection or to protect illegal activity. And I'll certainly work with you to clarify that language."

Ridge had always intended, however, for the department to protect information about vulnerabilities in the critical infrastructure. He testified on June 26, 2002, on an earlier homeland security bill, that the secrecy provision the administration sought had "the design and intent" to be "a limited exception, information volunteered to help us with our vulnerability assessment." But he emphasized to the House Judiciary Committee that the office did not want to give terrorists a road map. It may be "good competitive information," he said, but if it's subject to the FOI Act not only terrorists but others in the marketplace can get it. He did not discuss the FOI Act's existing exemption that protects competitive business information.

The President's orders on CII

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

The order interpreted the critical infrastructure legislation in anticipation of its passage. It parses out responsibilities for carrying out that law. It directs the board to set up various committees, including one to address records access and information policy.

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

Two months before the regulations on critical infrastructure information were published in the Federal Register, the President on Dec. 17, 2003, issued another order. This directive, addressed to *all* federal agencies, targeted their handling of "voluntarily submitted information." With no mention of the FOI Act, the presidential directive told *all* agencies that they must abide by the Homeland Security Act's prohibition against disclosures of "voluntarily submitted information and information that would facilitate terrorist targeting of critical infrastructure and key resources." The act stipulates that the CII protections are for information delivered to the Department of Homeland Security.

Homeland Security and the FOI Act

The new department was quick to issue interim FOI regulations. They were effective on Jan. 27, 2003, deferring largely to personnel and policies already in place at various agencies, which moved to the department. Several media groups, including the Reporters Committee, commented that the new department should expand the circumstances for granting expedited review to news requesters to match the criteria at the Justice Department, from which several agencies had transferred. Final FOI regulations had not been issued by late August 2004.

The Office of Homeland Security, which existed for nearly a year in the White House before the department came into being, had been the subject of a FOI lawsuit by the Electronic Privacy Information Center. The agency claimed that, until it became a department, it had existed solely to advise the President and so did not have to respond to any FOI requests. But Judge Colleen Kollar-Kotelly ruled in December 2002 that the Electronic Privacy Information Center could take discovery from the office on that claim. After that ruling, EPIC voluntarily dropped its lawsuit.

'Sensitive but unclassified' records: The new protections

Congress passed the Homeland Security Information Sharing Act as part of the Homeland Security Act requiring the federal government to both safeguard and share "sensitive homeland security information" (SHSI) with officials and others who might also be working against terrorism. How the Department of Homeland Security might implement that act greatly concerns journalists and public interest groups. In August 2004, the department's rules on handling SHSI had not yet been published.

Over the summer of 2003, government officials were considering rules to implement the act, which would protect what OMB Watch, a Washington-D.C.-based public interest group that monitors information resources at agencies, called "a vaguely defined set of information between firefighters, police officers, public health researchers and federal, state and local governments."

Seventy-five public interest groups, including news media groups, sent a letter to Secretary Tom Ridge on Aug. 27, 2003, to urge that any rules be published as proposed and that public comment be considered before they take effect. The groups voiced concern that a series of nondisclosure agreements between the federal agencies and other entities could keep community residents, parents, journalists and others from obtaining information they need to make their communities safer, inform the public and serve other purposes. In January 2005 the department eliminated the nondisclosure agreements, opting instead for an "education program" for employees.

Even though policy was not set for handling SHSI, the notion had caught on.

Protections of "Sensitive Security Information," a concept that had long been in place in aviation law, were being expanded in the merging of agencies and their transfer to DHS, and state and federal officials were already withholding information as "sensitive homeland security information." The Air Transportation Security Act of 1974 (modified in 1990) empowered the Federal Aviation Administrator to withhold information relating to civil aviation security. That withholding authority was expanded to the Under Secretary of Transportation for Security who could decide to withhold the information upon finding that it was an unwarranted invasion of personal privacy, revealed a trade secret or privileged or confidential commercial or financial information or would be detrimental to the security of transportation. The FAA regulations were incorporated into Transportation Security Administration regulations and authority for them traveled to the Department of Homeland Security when TSA became a part of that agency. SSI would now apply to transportation, not just aviation. And the Coast Guard incorporated SSI regulations into its directives for responding to maritime threats.

As the Congressional Research Service noted in an issues and options paper, SSI is "born protected" unlike classified information, which requires government officials to determine that it contains national security, intelligence or foreign relations information that qualifies it to be withheld from the public. Unlike the mandate for classification, the SSI rules do not require justifications for protecting transportation security information, they do not distinguish among classes of information (such as top secret, secret or confidential), and they do not set time limits for declassification and release.

Because the mandate for protecting SSI is statutory, SSI enjoys great protection under the exemption to the FOI Act for information that is protected by other statutes.

But SSI confidentiality would not be absolute. In June 2004, Judge Charles Breyer of the U.S. District Court in San Francisco ruled that the Transportation Security Administration had improperly categorized "innocuous" information as "sensitive security information" in a case by two women contesting their placement on federal "no fly" lists who had been unable to obtain records about how their names had gotten there. *(Gordon v. FBI)*

On May 11, 2004, DHS issued a management directive on safeguarding sensitive but unclassified information, which it said would be stamped "For Official Use Only" or "FOUO." The memo spelled out that various information is deserving of safeguarding because it is protected by statute or regulation — such as Tax Return Information, Privacy Act Information, Sensitive Security Information, Critical Infrastructure Information, Grand Jury Information. Information is designated as sensitive to control and restricted access if its release could cause harm to a person's privacy or welfare, adversely impact economic or industrial institutions, or compromise programs or operations essential to the safeguarding of our national interests. The memorandum lays out procedures for giving FOUO information only to people who have a "need to know."

A critical part of the memorandum however emphasizes that FOUO information is not necessarily withheld under the exemptions to the FOI Act. The FOUO designation has to do only with safeguarding information and not with granting or denying it when the agency has received an FOI request for it.

The Federal Energy Regulatory Commission published rules for safeguarding critical energy infrastructure information as final in February 2003, ignoring comments by the Reporters Committee and the Society of Environmental Journalists that existing FOI exemptions, particularly as currently interpreted, are adequate to protect information submitted by businesses. The media groups had also pointed out that the agency's removal of the authority for protecting that information from the FOI offices would inhibit the public's ability to get needed information on vulnerabilities. FERC's Web site in August 2004 made clear that where the FOI Act makes disclosure mandatory, information will be released in response to FOI requests — but access professionals are not involved in those decisions and CEII was not on the Web for public review.

The proliferation of new categories of information that are not really classified but signal some other need for secrecy troubled Rep. Christopher Shays (R-Conn.) who called an oversight hearing in March 2005 of his subcommittee on National Security, Emerging Threats and International Relations.

"Homeland": The new confidentiality catchword

The City of Chicago's 1998 FOI request for government database records associated with gun sales and ownership records was set to go before the U.S. Supreme Court in early 2003. Lower courts had said that the Bureau of Alcohol, Tobacco, Firearms and Explosives, then located in the Department of the Treasury, would have to disclose its gun sales database as the city requested, but the government had appealed. *(Department of Treasury v. City of Chicago.)*

Apparently acting on behalf of his constituents and campaign contributors in the National Rifle Association, Rep. George Nethercutt (R-Wash.) introduced a last-minute provision in a 2003 spending package that precluded the Bureau from spending any money to release government database records associated with gun sales and ownership.

The President signed the 2003 Consolidated Appropriations Resolution on Feb. 20, 2003. The House report on the bill claims that releasing the data "would not only pose a risk to law enforcement and homeland security, but also to the privacy of innocent citizens." There was no explanation of the relationship to homeland security. The Supreme Court canceled the hearing and asked the U.S. Court of Appeals (7th Cir.) in Chicago to determine what effect the legislation would have on the case. Chicago wants the database to help track the illegal use of guns in city crimes. Reporters frequently have made similar uses of the information.

But before the appeals court heard the case, Congress enacted the Consolidated Appropriations Act of 2004 and then added language making the information secret again in a 2005 appropriations measure, which included even stronger language prohibiting expenditure of funds to process FOI requests for the information.

The full U.S. Court of Appeals in Chicago heard the case in February but had not decided it by late August.

Taking down Web sites

The ability to gain access to information on the Web site at the Nuclear Regulatory Commission has fluctuated. In October 2004 NRC removed its entire Internet reading room after "sensitive" documents were noted on it. In June it began restoring 70,000 documents.

NRC was one of the first federal agencies to offer the public a useful reading room. Its FOI office once actually invited user

groups in to talk about how they might be better served. Its record for openness was not perfect but, among agencies, it has traditionally enjoyed a strong reputation for being responsive to the public.

Shortly after Sept. 11, NRC removed its entire Web site following a request from the Department of Defense to 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 2002, 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.

NRC further modified its directions on the availability of security information for all nuclear plants on Aug. 5, 2004. Its announcement by Chairman Nils Diaz notes that the commission deliberated for many months about the agency's "commitment to openness" and the concern that "sensitive information might be misused by those who wish us harm." It decided that the results of its inspections of nuclear facilities will no longer be publicly available and "will be exempt from FOI Act requests." Enforcement information associated with the physical protection of nuclear facilities will be withheld as well, he said.

The agency continues to be wary of disclosures. It removed large sections of a draft environmental impact statement in considering whether to license a Louisiana company to build a uranium enrichment plant in Eunice, N.Y. KLFY-TV in Lafayette complained in January 2005 that the segments the public could not see concerned health and risks of accidents.

OMB Watch tracked the Web site removals following September 11 until May 2002. Although no other agencies removed their entire Web site, OMB Watch found information removed from the Department of Energy; the Interior Department's Geological Survey; the Federal Energy Regulatory Commission; the Environmental Protection Agency; the Federal Aviation Administration; the Department of Transportation's Office of Pipeline Safety and its Bureau of Transportation Statistics' Geographic Information Service; the National Archives and Records Administration; the NASA Glenn Research Center; the International Nuclear Safety Center; the Internal Revenue Service; the Los Alamos National Laboratory; and the National Imagery and Mapping Agency.

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

In their announcements of homeland security measures, agencies became increasingly cavalier in promising that information would be exempt under the FOI Act without addressing the deference to trained FOI officers who actually make decisions as to whether requested information is lawfully exempt under the FOI Act.

The Federal Communications Commission approved measures to block public access to reports of telecommunications service disruptions on Aug. 4, 2004, at a public meeting reported by Caitlin Harrington of *Congressional Quarterly*. The Department of Homeland Security sought the rule saying the information about outages could supply a "roadmap for terrorists." Harrington wrote that FCC special counsel Kent Nilsson said the commission concluded that the information did not have to be routinely available for public inspection and had determined that all outage reports filed with the FCC would be presumptively confidential under the FOI Act.

The Air Force Space Command issued a notice Aug. 3, 2004, that space surveillance data would now be provided to non-government entities who must promise not to redistribute them without express permission of the secretary. These new distribution rules were set in a law enacted in November 2003.

In July 2004, the Federation of American Scientists' *Secrecy News* reported the Army took "extraordinary steps" to limit access to its critical study of Operation Iraqi Freedom entitled "On Point," coding it on the Army Web site so that it could not be copied, downloaded or printed, apparently in an effort to limit readership to that site only. However, the newsletter reports that GlobalSecurity.org overcame the agency's coding and had made the report available. It reveals, among other things, that the seemingly spontaneous toppling of the statute of Saddam Hussein in Baghdad was engineered by Army Psychological Operations officers.

In an embarrassing FOI denial for the Justice Department, Thomas McIntyre, FOI chief at the agency's criminal division, wrote the Center for Public Integrity that it could not have an electronic copy of a public database on foreign lobbyists because making it available would crash an outdated computer system. The Center noted in the press release it issued on the May 24, 2004, denial that the government continues to use the dainty database.

It was not the only database embarrassment for the government. In February 2004, an army security officer ordered the Federation of American Scientists to "remove all Army publications ASAP," suggesting that he would contact the FBI. *Secrecy News* reported that "cooler heads" advised the author to "stand down," and the documents are still up.

In early October 2003, the Department of Defense removed all of its unclassified policy directives, which had been public for years. But The Memory Hole, a Web cite which purports to "rescue" information, had downloaded them. It posted them soon after and before the month was up DOD had returned them to its Web site.

One federally funded study questioned the usefulness of Web site removal. A Rand Corp. study released March 25, 2004, concluded that publicly available federal geospatial information on all but four Web sites would be of little use to terrorists. It might show location and key features of particular places, the report states, but attackers are likely to need more detailed and current information — better acquired from direct observation or other sources.

The secrecy continues. Citing "security and privacy," the military refused in July 2005 to release the names of four enemy combatant detainees who escaped in Afghanistan, only to watch Afghan authorities disclose their identities.

A federal district judge in Washington, D.C., tried to thwart federal authorities' refusal to release information about steps it has taken to protect rail shipments from terrorists. When the city passed a law requiring hazardous rail shipments be routed around the city to curb its vulnerability to terrorist attack, the federal government asked the court to stop enforcing the law, but refused to give the city's counsel any information on federal rail security. The judge ordered disclosure in March and when the government refused, refused in April to grant its requested injunction against enforcement of the law. The court of appeals however sided with the government and in May 2005 granted the injunction without allowing D.C. officials to learn about their city's rail hazards.

Blowing whistles, or just even talking

The federal government is bloated not only with secrecy, but with paper. For journalists hoping to navigate through these records of the unknown, the FOI Act often only works when it is used hand in hand with guidance from government insiders — not just leakers who are willing to share secrets in exchange for confidentiality, but rank and file employees willing to discuss how the government does what it does.

But the government has become increasingly unwilling to allow talk. Two federal government employees were fired for their comments about government actions in the face of new security needs after Sept. 11 and others have been disciplined or gagged.

U.S. Park Police Chief Teresa Chambers was fired in July 2004 after seven months of administrative leave in which she was prohibited from talking about her work at the Department of the Interior. In early December, she told *Washington Post* reporter David Fahrenthold that her 620-member force needed expansion and that she had operated with less budget than she needed for the extra security called for around national monuments after Sept. 11. Political appointees at the agency accused her of "lobbying," placed her on leave and gagged her from further talk with the news media.

Her firing came two hours after she pushed for reinstatement at the Merit Systems Protection Board. She lost her appeal in October 2004.

Sibel Edmonds, a contract translator in Middle Eastern languages at the FBI, was terminated in March 2002 for, she was advised, the "convenience" of the FBI. She had complained that despite a critical need for translations by FBI investigators in the field, her supervisor had insisted that she slow down her translations so that it would appear that the office needed more translators and more funds. She found translations erased on her computer — erasures that needed to be redone were called "a lesson" by her supervisor, she said. Edmonds also reported that a colleague with ties to a "semi-legitimate" organization had misidentified documents about that organization as not relevant.

In October 2002, Edmonds filed a whistleblower suit in federal district court in Washington, D.C., to get her job back, but Judge Reggie Walton accepted the government's arguments that hearing the case would reveal "state secrets," and dismissed the case on July 6, 2004. In the course of the litigation and Edmonds' agreement to testify in the cases brought by the families of Sept. 11 victims, the government reclassified information that was part of her suit and that had been widely discussed in Congress and in an appearance by Edmonds and Sen. Charles Grassley (R-Iowa) on CBS's "60 Minutes" in 2002 shortly after her suit was filed. The court also held that she could not present the classified information in testimony on behalf of the families.

In May 2005 the U.S. Court of Appeals in Washington, D.C., upheld the government's claim of "state secrets" and refused to hear Edmond's case. The ACLU in August 2005 asked the Supreme Court to review the case.

Army Chaplain James Yee, cleared after several months of facing charges of spying for al Qaida, received a gag order on April 6, 2004, from his commander. Yee's attorney told ABC News it prohibits speech so broadly that it effectively bars Yee from speaking about his experiences.

Policies to keep the government's business from the public sometimes single out reporters as especially off limits. The Office of Information and Privacy at the Department of Justice, the office which gives guidance to FOI officers and specialists government-wide, has claimed to run an ombudsman service for FOI requesters who encounter difficulties in getting responses to requests — but reporters are now not allowed to use the service. They must instead direct their questions to the Justice Department's public information officers who may, or may not, have expertise in FOI issues. FOI specialists who run the "ombudsman" hotline at (202) 514-FOIA terminate discussions once they learn that a caller is a reporter.

Contracting

From the beginning, the contracts for post-war reconstruction have been controversial and secretive. Most recent audits of Halliburton's actions were turned over to a United Nations monitoring board for the development of Iraq fund, but with redactions. Rep. Christopher Shays (R-Conn.) in June 2005 threatened a congressional subpoena for the Halliburton audits.

In November 2002, months before the U.S.-led invasion of Iraq, Bush administration officials secretly began preparing to award post-war reconstruction contracts to private American companies. Normally, the government contracting process requires the government to publicly request proposals and bids from interested companies. The proposals are scored and ranked — based on price, experience and other criteria — and a contract is awarded based on the highest-ranked proposal.

In this case, however, the Army Corps of Engineers and the U.S. Agency for International Development (USAID), the State Department agency responsible for awarding many of the reconstruction contracts, decided that the normal contracting process would not work. First reported by *The Wall Street Journal*, a secret "emergency" bidding process was used because, they said, reconstruction efforts needed to be deployed more quickly than the normal process would have allowed.

USAID selected seven companies with security clearances and previous experience working with the government — about half the number that would normally bid — and allowed them to bid on the initial reconstruction contracts. Many of these initial contracts, worth more than $2 billion, were awarded to a sole bidder with no competition at all. Although the contracts were signed in early-March 2003, the information was not disclosed until a few days after the March 19 invasion.

Not long after the contracts were announced, questions and criticisms began to arise over the lack of transparency and accountability. Details of the contracts — including exactly what work was being performed, which subcontractors were performing the work, and how much they were charging — were not publicly available.

Many of the contracts were awarded on a "cost-plus" basis, whereby the contracted company is reimbursed by the government for whatever it spends. The company is then paid a percentage of those expenditures in profit. Such contracts make it difficult to determine how much profit a company is making from a contract, and encourages companies to run up large bills to increase profits.

The criticisms were fueled by allegations of impropriety in the process. A number of major news outlets reported that the companies selected for the no-bid and limited-bid contracts were prominent campaign contributors to President Bush, including Bechtel and Halliburton, the company led by Vice President Dick Cheney before he ran for office in 2000.

In May 2004, *Time* magazine reported that Douglas Feith, a senior Pentagon official, wrote in an internal e-mail message

that a contract awarded to Halliburton subsidiary Kellogg, Brown & Root had been "coordinated" with Cheney's office. Both the Pentagon and Cheney's office denied that Feith meant Cheney had been involved in the awarding of the contract.

Numerous examples of possible and actual financial impropriety also came to light.

Allegations that KBR had overcharged for fuel imported into Iraq from Kuwait under one of the no-bid contracts strengthened the calls for a more transparent process. It was eventually discovered that the overcharge, possibly as much as $61 million, was due to the high prices charged by a Kuwaiti subcontractor.

An audit completed by the Pentagon on Aug. 4, 2004, but not made public, showed that Halliburton had failed to account for more than $1.8 billion of the $4.2 billion it had received to provide logistical support to coalition troops in Iraq. A copy of the audit was made available to *The New York Times* by a person outside government, the newspaper reported.

An audit released July 30, 2004, by the inspector general for the Coalition Provisional Authority, which ruled Iraq from May 2003 until the transfer of sovereignty on June 28, 2004, found instances of fraud, mismanagement and manipulation in the contracting process. Many other such examples were reported throughout 2004.

Attempts to open the contracting process to public scrutiny have been largely unsuccessful. On April 10, 2004, Sens. Ron Wyden (D-Ore.), Susan Collins (R-Maine), Hillary Clinton (D-N.Y.), Robert Byrd (D-W.Va.) and Joseph Lieberman (D-Conn.) introduced the Sunshine in Iraq Reconstruction Contracting Act. *(S. 876)* On Oct. 8, 2003, Reps. Carolyn Maloney (D-N.Y.) and Henry Waxman (D-Calif.) introduced the Clean Contracting in Iraq Act. *(H.R. 3275)* Those bills requiring more disclosure died in committee.

As part of the $87 billion Iraqi spending bill Congress passed in October 2003, a new Program Management Office was created to oversee the $18.6 billion allocated in the bill for reconstruction of civilian infrastructure. After failing to provide much of the promised transparency during its existence, the office ceased operations when sovereignty was transferred to Iraq.

Missile defense and secrecy

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

But top White House military officials made it clear in 2002 that the public won't have enough information to determine whether that money is well spent.

The fiscal year 2003 defense appropriations budget of $355.4 billion — a 12 percent increase over the previous year — approved by the Senate in August 2002 includes $7.7 billion for missile defense, along with $878 million that the Pentagon can spend on either the missile defense program or to fight terrorism. Under the Bush White House, the defense budget is expected to substantially increase by billions more through 2007.

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

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

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

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

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

Pete Aldridge, the Undersecretary of Defense for Acquisition, Technology and Logistics, scoffed at any suggestions that the Defense Department would evade congressional oversight or disregard planning and reporting requirements. Those requirements, he said in a June 2002 *USA Today* opinion piece, merely "have been modified to accommodate the peculiarities of a development program without precedent."

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

Critics have said such secrecy proposals are designed to deflect scrutiny of mission failures, such as the $10 million prototype booster rocket for the missile defense system that veered off course in December 2001 and crashed into the ocean near Vandenberg Air Force Base in California.

The previous year, a $100 million experiment failed when a U.S. missile warhead did not hit a dummy warhead in a test at the same air force base.

In February through May 2002, the Pentagon's new PAC-3 missile defense weapon failed numerous tests when interceptors failed to fire. Even when they did, they missed about half the time.

Journalism and public interest groups continue to press for details — and to show that they understand the line between fair public disclosure of funding and effectiveness of missile defense systems and an unsafe release of the intricate details of military operational strategy.

The rollback in state openness

ELEVATED
SIGNIFICANT RISK TO A FREE PRESS

A number of states jumped into the legislative fray soon after Sept. 11. Four years later, the flurry of activity has subsided but many new laws to curb information access in the name of fighting terrorism are restricting access for reporters.

Four years after the Sept. 11, 2001, terrorist attacks, the flurry of legislation restricting access to public records has finally slowed. Many laws to curb information in the name of protection from terrorism remain on the books, however, and even more restrictions are being regularly proposed.

Generally, state legislatures meeting in 2005 continue to consider legislation affecting openness, but they are passing such legislation with much less frequency than in 2002, 2003, and 2004. In some cases, careful consideration has been given over time to the impact these laws will have on open government.

A few states are even beginning to roll back hastily passed measures in favor of a more tempered approach.

In Colorado, officials can no longer hide how they spend emergency preparedness funds, while Connecticut has seen a successful legal challenge to a security-related exemption claim in electronic Geographic Information System records.

However, many laws passed in response to terrorism still hinder public access to government. Federal laws affect state openness, too. In June 2005 the Homeland Security Department used the Critical Infrastructure Information Act of 2002 to designate a New Jersey township's electronic map records as information exempt from open records disclosure. The law was passed by Congress to encourage private industries to share infrastructure security information with the government by promising confidentiality for those records.

When the Sept. 11 attacks occurred, most state legislatures had either adjourned or neared the end of the 2001 session. Their first opportunities to address the terrorist attacks came in 2002. For states whose legislatures meet biennially, the first chance to pass new laws was in 2003.

Initially, many states considered creating their own versions of an Office of Homeland Security, to coordinate efforts with the federal government to prevent another terrorist attack. As the sessions progressed, legislatures focused on bioterrorism and what to do in a public health emergency, especially if and when people were sick or dying from anthrax exposure.

Enacted under the dubious assumption that states could guard themselves against terrorism by operating under a veil of secrecy, open record and open meeting law exemptions are the anti-terrorism legislation with the most negative impact on journalists. Ironically, no one has ever shown that open government played a material role in the Sept. 11 attacks.

States have enacted measures that would make secret any discussions of evacuation plans, emergency response plans, security measures or emergency health procedures in case of a terrorist attack, as well as the security plans and manuals themselves. Another common bill exempted from open records laws architectural drawings of city buildings and infrastructure, including utility plants, bridges, water lines, sewer lines and transportation lines.

Here are some of the bills that have been proposed, statutes that have passed, and controversies that have sprouted in the states as a result of the events of Sept. 11, 2001.

Alabama

• The state enacted significant legislation in the Alabama Homeland Security Act of 2003. It creates a state Department of Homeland Security and calls for the appointment of a department director, deputy director, possible assistant directors and a Homeland Security Task Force. Alabama was the first state to create this type of agency. *(2003-276)* At one point, the legislation contained itemized exemptions to the state's public records law. But in the final version, disclosure is subject to existing state and federal laws.

• A law was enacted in May 2004 that exempts records, information or discussions concerning security plans, procedures or other security-related information from disclosure under the state Open Records Law, Sunshine Law, Competitive Bid Law and Public Works Law. *(SB 205)*

• A 2005 bill replaced the state's 90-year-old open meetings law and contains an exemption for discussion of homeland security plans. Violations will result in fines of up to $1,000, plus

attorney's fees, to be paid by the official(s) in violation, not the agency. No one had ever been prosecuted under the criminal provisions of the old law. The bill, signed by Gov. Bob Riley in March, voids state Supreme Court decisions that held the open meetings law did not apply to public corporations, or governmental bodies' committees or subcommittees. *(SB 101)*

Alaska

• A law exempts state infrastructure and security plans from disclosure. It was introduced at the request of then-Gov. Tony Knowles (D) in January 2002 and signed into law in June 2002. *(SB 238; 2002 Alaska Sess. Laws 36)*

• Alaska lawmakers passed a resolution adding public safety to the list of reasons they can use to exclude members of the public from legislative meetings. The exclusion, effective as of May 2003, allows closed discussions when public knowledge would adversely affect the security of the state, nation or government. *(H.C.R. 7)*

Arizona

• A 2003 law addressing "terrorism" concerns prohibits public disclosure of information about drinking water systems. *(SB 1167)*

• The Arizona Press Association lobbied in 2004 for better provisions in a bill setting procedures for classifying and disclosing confidential information currently required to be submitted to governmental agencies by the petroleum industry. It passed as an aggregate bill and did not require the governor's signature. *(SB1275)* Gov. Janet Napolitano (D) vetoed a second bill that would have set reporting requirements for petroleum-based motor fuel producers, sellers and pipeline transporters. *(HB 2615)*

Arkansas

• Gov. Mike Huckabee (R) signed into law a 2003 bill closing water system security records. The law sunsets in 2005. Its primary purpose is to protect the security of public water systems, such as reservoirs and pipelines. *(Act 763)*

• Another 2003 law allows water distribution boards to meet in executive session. *(Act 1210)*

California

• A law enacted in September 2002 limits access to meetings where there is discussion of matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or public facilities. It also permits closure for security personnel issues, such as the safety and delivery of essential public services such as drinking water, wastewater treatment and electricity. *(AB 2645)*

• Another law enacted in September 2002 makes it a crime for public officials to disclose information discussed in a closed meeting. *(AB 1945)*

• A bill to authorize the state to develop a plan in case of a public health emergency, included powers to collect and record data, to make certain individuals' health information accessible, and to take and use property as needed for the safety, care and treatment of individuals. It died in committee in November 2002. *(AB 1763)*

• A state body may hold closed meetings when faced with a threat or potential threat of criminal activity against state personnel or property, under a law passed in September 2002. *(AB 2072)*

• Meetings called in response to the threat of terrorism, considered by the law to be a "dire" emergency, may be held secretly pursuant to a law enacted in July 2002. It shortened the notification time for the media before emergency meetings take place. *(SE 1643)*

• In 2003, the assembly passed legislation exempting information about building safety from public disclosure. Language was removed from the bill that would have allowed closed sessions to consider matters that pose a threat of criminal or terrorist activity. The bill would have made secret public agencies' plans to lessen the threat of terrorism and information about facility security.

The bill was greatly reduced, however, later in the session by the Senate Judicial Committee. As amended in August 2003, it simply substitutes the word "public" for the word "local" in the existing California Public Records Act exemption added in 2002 that applies to "A document prepared by a local agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session." *(AB 1209)*

• A law that went into effect in January 2003 calls for a report on how to protect a public safety official's home information and broadens the subject matter meriting closed legislative sessions to include threats to drinking water, natural gas and electrical services. *(AB 2238)*

• Gov. Arnold Schwarzenegger (R) signed a bill in 2004 that seeks to increase public security by shielding information about government efforts to combat security threats. It exempts the following from public disclosure: vulnerability assessments that identify potential targets of terrorist attacks, plans for how public agencies will "mitigate the potential of terrorist or other criminal attacks," and any information related to facility security that "could be used to aid a potential terrorist or other criminal attack." *(AB 1209)*

• In 2004, the state legislature approved a constitutional amendment guaranteeing public access to government meetings and records. The measure was voted on in a statewide referendum in November, and passed with 83 percent of voters' support. California is now one of only a handful of states with detailed open government language in its constitution. A constitutional amendment must be approved by two-thirds majorities in the state Senate and Assembly (but does not require the governor's signature) and a majority of the voting public. *(SCA 1)*

Colorado

• Gov. Bill Owens (R) signed into law in 2003 a bill exempting from public disclosure certain records from the Office of Preparedness, Security and Fire Safety in the Department of Public Safety, including details of security arrangements or investigations. *(HB 1335)*

• Another 2003 law amends an existing statute that makes communicable disease reports and similar records confidential. Under the law, information can be released to the FBI, federal law enforcement agencies or prosecutors if necessary to investigate or prosecute bioterrorism. *(HB 1026)*

• After state legislators and local governments spent more than two years struggling to operate under many of the secrecy provisions passed in response to the 2001 terrorism attacks, Colorado legislators enacted a law in 2005 to dilute some of the secrecy. Under the new law, Colorado can no longer completely obscure how it spent $130 million in homeland security grants from the federal government. Though security investments are now open, the law still allows some records posing a threat to health and security to be withheld. *(SB 131)*

Connecticut

• A law signed in June 2002 provides that procedures for sabotage prevention and response will not be available under the Freedom of Information Act. It specifically addresses water supply infrastructure and applies to all large water suppliers. It outlines the need for a water-source assessment plan and a determination on how susceptible that water is to contamination. *(HB 5153; 2002 Conn. Acts 02-102 (Spec. Sess.))*

• A House bill proposed to give power to the governor to declare a public health emergency, and power to the Public Health Commissioner to implement any procedures necessary to deal with the emergency. Any emergency response plan would not be subject to the FOI Act. The bill died in committee in 2002. *(HB 5286)*

• A House bill would have created a biological agents registry, requiring all persons who possess biological agents to register with the state. It exempted the registration from public access. The bill died in committee in 2002. *(HB 5288)*

• Representatives also proposed legislation giving heads of any division of the state broad discretion to exempt from disclosure any records that they have "reasonable grounds to believe may result in a safety risk." They would include security plans and architectural drawings of the infrastructure, such as bridges, sewer lines and water lines. The bill died after a public hearing on March 6, 2002. *(HB 5624)*

• Another law exempts certain security information and records from the FOI Act. It prohibits disclosure of security manuals and drawings, engineering and architectural drawings of government buildings, and training manuals that include security procedures. It was signed into law by then-Gov. John Rowland (R) on June 13, 2002. *(HB 5627; 2002 Conn. Acts 02-133 (Spec. Sess.))*

• A Senate bill would have given the chair of the Public Utilities Control Authority discretion to exempt from disclosure any records that relate to the security and emergency plans of utility companies that he has "reasonable grounds to believe may result in a safety risk." These records also include architectural drawings of utility plants. The bill passed the Senate and was introduced in the House, but died in April 2002. *(SB 486)*

• Legislation affecting geographical information system data was discussed in 2003 in a public hearing, but received no further attention. As written, the proposal would have exempted from the FOI Act disclosure of data concerning privately owned residences and buildings. *(HB 5014, 5039)*

• The Connecticut Supreme Court ruled in June 2005 that the Town of Greenwich, Connecticut, must release electronic maps, or Geographic Information System data, to an open records requester despite the town's claim that the information could compromise public safety. "Generalized claims of a possible safety risk" are not enough to satisfy the government's burden of proof on an exemption claim, Justice Christine S. Vertefeuille wrote for the unanimous majority.

Delaware

• A law amends the Delaware Freedom of Information Act exempting information that could jeopardize the physical safety of state residents. Exempted records include emergency response procedures, vulnerability assessments, and building plans and blueprints. It was introduced May 8, 2002 and signed into law by Gov. Ruth Ann Miller (D) on July 3, 2002. *(SB 371; 73 Del. Laws 354 (2002))*

• In March 2004, the Senate passed a bill to extend whistleblower protection to private-sector employees. Such protections are already available to government workers. *(SB 173)* The bill is awaiting action in the House, and applies to all part-time and full-time workers, including independent contractors. The bill would protect any worker from being fired, threatened or discriminated against for reporting that a violation of a state or federal law had occurred or is about to occur.

District of Columbia

• A bill known as the "Omnibus Anti-Terrorism Act of 2002" exempts from the city's Freedom of Information Act and any other publication requirements all response plans and any vulnerability assessments intended to prevent or mitigate a terrorist attack. The measure also defines the crime of terrorism and sets up a response plan to deal with threats of bioterrorism. The measure was passed in April 2002. *(B14-0373)*

Florida

Because of the high number of anti-terrorism bills passed in special sessions prior to the 2002 regular session, the list below is but a sampling of the most recent legislation in Florida.

• A Senate bill proposing to expand an existing exemption to the state FOI law to cover threat assessments, threat-response plans, emergency-evacuation plans and manuals for various security measures was withdrawn in January 2002, but its companion bill was signed into law on April 22, 2002. The Senate proposal would have closed any portions of meetings that would reveal security system plans. Another failed Senate bill would have exempted building security plans from disclosure. *(S 486, S 982, H 735; 2002 Fla. Laws ch. 67)*

• A House bill proposed to exempt any emergency management plans that detail the response of public and private hospitals to a terrorism threat. The exemption includes any security systems, vulnerability analyses, sheltering arrangements and drug caches. The measure died on March 22, 2002, in the House Committee on State Administration. *(H 729)*

• Because of the apparent interest of terrorists in bioterrorism and in aircraft used in the aerial application of pesticides and fertilizers, Senate and House bills proposed to exempt all restricted-use pilot license numbers from the public records laws. The bills also would have exempted all flight plans until 24 hours after a flight is completed. The measures died on the Senate and House calendars on March 22, 2002. *(H 731, S 970)*

• A bill that originated in the House attempted to exempt information on the type, location or amount of pharmaceutical materials in a depository maintained by a state agency as a response to an act of terrorism. However, it would have required that the certification of the sufficiency of the amount or type of pharmaceutical material remain an open record. The bill died in the House Committee on State Administration on March 22, 2002. *(H 733)*

• Senate and House bills would have expanded wiretapping powers for crimes of terrorism. Although these bills died in committees in March 2002, a comparable bill, HB 1439, was passed on April 22, 2002. *(S 446, H 725; S 1774, H 1439, 2002 Fla. Laws ch. 72)*

• A Senate bill would have required law enforcement agencies to coordinate efforts to combat terrorism. It would have exempted information and records shared with another federal, state or local agency. The bill died in January 2002. *(S 450)*

• A Senate bill proposed creation of a public records exemption for emergency response plans for public or private hospitals

during acts of terrorism. It also would have closed any portions of meetings that would reveal such plans. The bill died in the Committee on Criminal Justice in March 2002. *(S 488)*

• Another Senate bill proposed creation of a public records exemption for pharmaceutical depositories maintained in response to terrorism. Any certification to the amount of the pharmaceutical or the security of the depository would not have been included in the exemption. This bill was withdrawn from consideration shortly after it was introduced in January 2002. *(S 490)*

• The Senate also considered creation of a public records exemption to ease transmission of public documents between law enforcement agencies. Only public documents that related to an active investigation would be exempt. The law enforcement agency would have had the responsibility to tell the custodial agency that the investigation was no longer active. The bill was withdrawn shortly after it was introduced. *(S 492)*

• A Senate bill would have allowed the Florida Department of Law Enforcement to automatically delay access to public records normally open to inspection and copying for up to seven days when there was a viable threat of terrorist attack. The department would have been required to show evidence of the threat and that inspection or copying of the record would jeopardize the investigation. It was withdrawn shortly after it was introduced in January 2002. *(S 494)*

• Several so-called "shell bills" that have no specific language attached to them were introduced in March 2003 on subjects including wastewater treatment, public utilities, seaport security, transportation security and identity theft.

• 2003 legislation re-enacts, with minor changes, a law stipulating that when the Accidental Release Prevention Program under the federal Clean Air Act allows a "stationary source" to exclude trade secret information from its risk management plan, the owner or operator must provide such information to the State Hazardous Materials Emergency Response Commission upon request, and prove that such information, when held by the Department of Community Affairs, is exempt from public disclosure. It also exempts trade secret information held by DCA in the process of conducting an inspection, audit or investigation pursuant to the federal Clean Air Act until a determination has been made by the Administrator of the Environmental Protection Agency that such information is no longer entitled to trade secret protection. *(HB 2003-103)*

• Legislators will find it more difficult to pass new exemptions to state public record and Sunshine laws under a 2003 amendment to the Florida Constitution. Article I, Section 24 — the right of access to information — was amended to require a two-thirds majority approval in each chamber for any exemption to open records laws.

Georgia

• A Senate bill would have required most state agencies to prepare a safety plan to address the threat of terrorism and detail agency response to such a threat. It would have exempted from disclosure all information related to site surveys, or safety and vulnerability assessments of public buildings and facilities. The bill died in April 2002. *(SB 365)*

• A law signed by then-Gov. Roy Barnes (D) on May 16, 2002, grants the governor and the state public health department power to declare a public health emergency in bioterrorism cases. It authorizes the public health agency to require notification to the state health department of certain illnesses or unusual prescription trends. All reports are required to be confidential and not released to the public except when the state health department chooses to release a statistical report. *(SB 385)*

• In 2002, a Senate bill failed that would have protected records about the security of government facilities during a terrorist attack. It would have exempted government records, including all documents, papers, letters, maps, books, tapes and photographs maintained by the governor, the lieutenant governor, and each member of the General Assembly or any other person acting on their behalf. *(SB 396)*

• A 2003 House bill made records that would assist terrorists exempt from disclosure. These include security plans, vulnerability assessments for certain types of facilities, and various blueprints. Meetings where security measures are discussed would also be kept closed. *(HB 384)*

• A new sweeping terrorism-related exemption to Georgia's open records and meetings law took effect June 4, 2003; the legislation closes meetings when security-related documents are discussed. Documents made confidential under the law include security plans and vulnerability assessments for any public utility, building or function; plans for preventing attacks; documents revealing the existence, nature and location of security devices; and "any plan, blue print or other material" that, if made public, would compromise security. *(SB 113)*

• Records of farm water use will be private under a 2004 measure closing records of water use procedures and monitoring. *(SB 436)*

Hawaii

• A bill introduced in the House attempts to define terrorism, unlawful possession of biological, chemical and nuclear weapons, and the penalties associated with these various crimes. Terrorism was broadly defined as attempting to "terrorize" five or more people or attempting to influence government policy using terror. The bill carried over to the 2004 legislative session, but was not acted on. *(HB 1123)*

Idaho

• A House bill would have exempted from disclosure records that provide detailed evacuation plans and emergency response plans, the release of which would "have a likelihood of threatening public safety." The bill did not make it through the House in 2002. *(HB 457)*

• Another House bill proposed giving courts the discretion to exempt records from disclosure requirements if the custodian was able to show with 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. The custodian also would need to prove that the interests favoring restriction of access clearly outweigh interests favoring access. Although this bill passed in the House, it did not make it through Senate committees in 2002. *(HB 459A)*

• The state enacted legislation that exempted from disclosure evacuation and emergency response plans of buildings, facilities, infrastructures and systems held by or in the custody of any public agency — but only when the disclosure of such information would jeopardize the public safety. The bill was signed by Gov. Dirk Kempthorne (R) on March 4, 2002. *(HB 560; 2002 Idaho Sess. Laws 62)*

Illinois

• A House bill attempted to exempt from the open meetings act all discussions of homeland security issues, including terror-

ism response planning and procedures. After a few amendments, the bill was tabled in July 2002. *(HB 4411)*

• A Senate bill exempting computer geographic system information from the state's Freedom of Information Act became law on July 11, 2002. *(SB 1706; P.A. 92-0645, eff. July 11, 2002)* In June 2003, an exemption allowing media access to the information was added. *(SB 539, eff. July 1, 2003)*

• A 2003 law allows for closed meetings to consider security procedures that prevent public danger. *(HB 105)*

• Another 2003 law exempts from public copying and inspection architects' plans and engineers' technical submissions of specified utility, transportation, public and government facilities. *(SB 1034)*

• Legislation enacted in early August 2003 exempts from public inspection and copying some construction documents, vulnerability assessments, security measures, response procedures and maps showing the location of utilities. *(HB 954, enrolled as Public Act 93-0422)*

Indiana

• The major issue regarding the state's access laws in the 2002 session concerned the veto of a bill that would have exempted the legislature entirely from the public records act. Then-Gov. Frank O'Bannon (D) vetoed the bill, which had been passed by large majorities during the previous legislative session. *(HB 1038)*

• A 2003 law covering various public record matters gives public agencies the authority to decide whether the "public disclosure of a record or a part of a record has reasonable likelihood of threatening public safety and exposing vulnerability to terrorist attacks." *(HB 1935)*

Iowa

• A law allows state agencies to close meetings when discussing information contained in the records of public airports, municipal corporations, utilities and water districts that could potentially jeopardize the public health and safety of the citizens. These confidential records include vulnerability assessments, security response plans, and architectural drawings and diagrams. The records would also be exempt from any disclosure requirements under the public records laws of the state. The bill was signed into law by Gov. Tom Vilsack (D) on April 8, 2002. *(SF 2277; 2002 Iowa Acts 1076)*

• School security procedures and emergency preparedness information must be kept confidential if disclosure could reasonably be expected to jeopardize student, staff or visitor safety, under a measure signed into law on April 1, 2002. *(HF 2151; 2002 Iowa Acts 1038)*

• A bill was introduced in the House that would have made government security procedures or emergency preparedness information confidential if disclosure could reasonably be expected to jeopardize government employees, visitors, persons or property. According to the Iowa Newspaper Association, the information is already adequately protected by homeland security legislation adopted in 2002. The bill failed to make it out of the State Government Committee in 2004. *(HSB 640)*

Kansas

• A law was passed that exempts from disclosure records that "pose a substantial likelihood of revealing security measures" that protect utility, sewer treatment, water and communication systems from criminal terrorism. The law was signed by then-Gov. Bill Graves (R) in May 2002. *(S 112)*

• A bill was signed into law by Gov. Kathleen Sebelius (D) in April 2003 that allows energy companies to recover terrorism-related expenses and makes information about how the utilities are spending the money confidential. When an electric or gas utility company requests a rate increase from state regulators, the regulators are required to keep confidential information about the amount of recovery requested and the amount of recovery allowed. Any increase in rates for security costs is also unidentifiable on a customer's utility bill. *(HB 2374)*

• All existing exceptions to the Open Records Act are under review. The more than 360 exceptions are scheduled to expire in July 2005 unless the legislature re-enacts them.

• Exemptions from the open meetings and open records acts for a broad range of "security measures" — including public infrastructure and private property or personal security — were passed by the House in 2004, but did not make it out of committee after being referred to the Senate. *(HB 2489, HB 2490)*

Kentucky

• Senators proposed amendments to the open meetings law that would have allowed the closure of meetings when secure records are discussed. The bill would have exempted from the open records law security matters such as hospital emergency plans, public agency communications plans, airport security plans and security system plans for public agencies. Introduced in the Senate on Jan. 25, 2002, the bill did not survive committee hearings. *(SB 136)*

• A House bill would have established the state's emergency disaster response program, called the Division of Emergency Management, to deal with issues relating to chemical and biological terrorism. The measure did not pass in 2002. *(HB 199)*

• A bill created a Task Force on Homeland Security, which has been assigned to study ways to increase the security of records related to the war on terror. These include compiling critical infrastructure lists, vulnerability assessments, protective measures, counter measures and needs assessments. The task force was required to report its recommendations to the legislature on Nov. 15, 2003. *(03 RS BR 818)*

• The House unanimously passed a "homeland security" exception to the state Open Records Act for "public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act." The Senate amended the bill to allow the University of Louisville to withhold the names of donors, and the bill died when it was sent back to the House in 2004. The bill is expected to be reintroduced without the Senate amendment when the legislature meets again in January 2005. *(HB 188)*

• Gov. Ernie Fletcher (R) signed a bill in 2005 allowing an exemption to the state's open records for documents such as "vulnerability assessments" and an open meetings law exemption for discussions about homeland security issues. *(HB 59)*

Louisiana

• A law signed by then-Gov. Mike Foster Jr. (R) in April 2002 outlines the state's anti-terrorism measures. It exempts from disclosure any record or information pertaining to security procedures, vulnerability assessments or any criminal intelligence information pertaining to terrorist activity held by a state agency or water utility company. *(HB 53; 2002 La. 128)*

• In 2003, Foster signed into law an exemption from disclosure for records containing information about security proce-

dures, criminal intelligence information (if it pertains to terrorist-related activity), or threat or vulnerability assessments created, obtained or collected in the prevention of terrorist activity. Originally, all records "pertaining to" security procedures would have been exempt from public records laws. The Louisiana Press Association worked to amend the bill to apply only to records "containing" this type of information. *(Act 413)*

• Legislation that exempts certain pipeline security procedures from public records laws was also enacted in 2003.*(Act 658)*

• Another 2003 law makes confidential all security and safety plans for ports and privately owned or operated facilities, vessels and fleets as "security sensitive information." Additionally, information related to such plans or related vulnerability assessments is exempt from the public records requirement. *(Act 667)*

Maine

• A law exempts information regarding security plans or procedures of agencies of state and local government from the definition of public records in the freedom of access laws. The measure was signed into law by then-Gov. Angus King (I) on April 11, 2002. *(LD 2153; P.L. 675)*

Maryland

• A law passed on April 9, 2002, that authorizes a custodian to deny access to a public record if access would endanger the public. *(SB 240; HB 297; 2002 Md. Laws 3)*

• Another law creates a Biological Agents Registry program, which would require any person who possesses a particular biological agent to report to a central state registry. It also exempts the registry information from the open records act. The law was signed by then-Gov. Parris Glendening (D) on May 6, 2002. *(HB 361; 2002 Md. Laws 361)*

• Bills in each house were proposed to deny the inspection of specific information in a public record that relates to specified water and wastewater system plans, emergency response plans, communication and security systems, essential personnel and building plans of specified public buildings. The proposed legislation provided judicial review for those who are denied inspection of a specified public record and also established a specified burden of proof in certain cases. The Senate version was withdrawn in March 2002. The House version failed as well. *(HB 916; SB 720)*

• The Maryland Security Protection Act of 2002, which expands pen registers and other wiretapping provisions, was enacted in April 2002. It gives any nuclear power plant facility license holder the ability to authorize a security officer to stop any person whom they have reasonable grounds to suspect trespassed on the premises. *(HB 1036; SB 639; 2002 Md. Laws 100)*

• The Maryland Security Council was established under law and requires state agencies to cooperate with the council under certain circumstances. The Senate version was signed into law on April 9, 2002. *(HB 305; SB 242; 2002 Md. Laws 4)*

• A proposed bill required those who store hazardous waste to analyze their security measures and implement any improvements that may be necessary. These analyses, to be submitted to the state, would have been exempt from disclosure. The bill received an unfavorable report by a House committee in April 2003 and no further action was taken. *(HB 796)*

• A 2003 law allows a custodian of public records relating to public security to withhold information on any building owned or operated by the state or any of its political subdivisions. *(SB 733)*

• Legislators enacted a measure, signed into law by Gov. Robert Ehrlich on May 11, 2004, amending the Public Information Act to exempt personally identifiable information about those who maintain an alarm or security system at their home or office. *(SB 377)*

Massachusetts

• A law signed by then-Gov. Jane Swift (R) on Sept. 5, 2002, exempts from public release blueprints of certain buildings, security measures, emergency preparedness plans and vulnerability assessments, the disclosure of which, in the judgment of the record custodian, would be likely to jeopardize public safety. *(Bill 2122)*

• Proposed legislation in 2003 would close a catalog of biological agents listed in a biohazard registry *(SB 511)* and information in an environmental illness registry *(SB 695)*. Both bills were referred to and remained in committees throughout 2004.

Michigan

• A Senate bill would have exempted from disclosure any information relating to the records or information of security measures, including emergency response plans, risk planning documents, threat assessments, domestic preparedness strategies, and capabilities and plans for responding to acts of terrorism or similar threats. The bill passed both the House and Senate by mid-December 2001, after which point it died in the Judiciary Committee. *(SB 933; Amends sec. 13 of 1976 PA 442)*

• A law exempts from disclosure any information relating to the state's critical infrastructure, or anything that would have a debilitating impact on the security and welfare of the state. It was signed by then-Gov. John Engler (R) on April 9, 2002. *(HB 5349; 2002 Mich. 130)*

• A proposal introduced in the Senate in 2003 would increase penalties for violating the state's Whistleblowers Protection Act. It was referred to committee on Jan. 30, 2003, and no further action was taken. *(SB 127)*

• On Oct. 21, 2003, Gov. Jennifer Granholm (D) signed into law a bill that makes search warrants public information after 56 days. *(HB 4715)*

Minnesota

• A proposed House bill would have authorized the closure of meetings in which security issues— any related briefings, vulnerability assessments, and emergency response preparedness — are discussed. However, any discussions of financial decisions relating to security measures were required to be discussed at an open meeting. The measure died shortly after it was introduced in 2002. *(HF 2849)*

• Gov. Tim Pawlenty (R) signed a bill in 2004 that permits public bodies to close meetings when receiving security briefings and reports. Any meeting involving the discussion of security systems, emergency response procedures and security deficiencies, or recommendations regarding public services, infrastructure and facilities can be closed if disclosure of the information would pose a danger to public safety or compromise security procedures or responses. However, all financial issues related to security matters must be made open to the public. *(SF 1889)*

Mississippi

• Mississippi's legislature tried to pass an anti-terrorism bill that would have defined terrorism and set up an emergency

response system to coordinate with the federal government. No provisions that would affect public records laws were included. It died in committee in February 2002. *(HB390)*

Missouri

• A House proposal would have exempted from disclosure existing or proposed security systems for any building or property owned or leased by the government. Such records may include photographs, schematic diagrams or recommendations made to analyze or enhance security of the building or property. The bill died in April 2002. *(HB 1445)*

• A law expands the emergency powers of the governor when there is a major natural or man-made disaster, an act of biological terrorism or an imminent threat of a disaster. It was signed by then-Gov. Bob Holden (D) on July 1, 2002. *(SB 712)*

• A House bill would have authorized closed meetings any time security measures and response plans to prevent terrorism or contamination of water supply systems are discussed. The measure was introduced in December 2001; the bill died on Feb. 20, 2002. *(HB 1098)*

• A Senate bill would have established the Joint Committee on Terrorism, Bioterrorism and Homeland Security. This act also would have added an exemption to the Sunshine Law, allowing closure of meetings and records regarding specific information on certain terrorism readiness issues. Discussions of financial decisions relating to security measures would not be considered closed. It died on the House calendar in May 2002. *(SB 1112)*

• A Senate bill would have let public safety officials shield from the public all emergency response plans, procedures and protocols developed in case of an attack by terrorists or criminals. This bill was the subject of a committee hearing in late February 2003, but no further action was taken. *(SB 411)*

• In the first major improvement to the state's Open Records Law and Open Meetings Law since 1998, Holden signed a bill in 2004 granting the public broad access to electronic records and "virtual" meetings. Legislators responded to changes in communications technology by expanding the definition of "public meetings" to include conference calls, video conference calls, Internet chat rooms and online message boards, as well as requiring public access to computer records and digitized government data, including e-mail messages. The law also toughens penalties for violations of the state's sunshine laws by significantly increasing fines and lowering the burden of proof for potential plaintiffs.

The new law includes homeland security exemptions for records outlining operational policies developed by first responders — police, fire and ambulance personnel — and information voluntarily submitted by non-public entities, such as private utility companies, to state or local governments about the security of their infrastructure. *(SB 1020)*

Montana

• A proposed bill would have banned the release of publicly held information if federal law prohibits its release. The information could also be withheld if public safety, the safety of an elected official or privacy rights would be threatened if the information were released. The bill passed the Senate, but died in committee in April 2003. *(SB 142)*

Nebraska

• The Emergency Health Powers Act would have provided public access to individual health information in cases of emergency. In some cases, it also would have given the government the power to confine individuals who are infected with a contagious disease or reasonably believed to be infected. Further discussion on the bill was postponed indefinitely in April 2002. *(LB 1224)*

Nevada

• A proposed bill defined terrorism broadly as including violent acts intended to coerce or intimidate civilian populations or influence government policy. The bill also set tough new penalties for the crime of terrorism. The time limit for action to be taken on the bill expired. *(SB 38)*

• An anti-terrorism law enacted in 2003 allows the governor to declare certain records confidential if they were prepared to prevent or respond to a terrorist attack and their release would substantially threaten the public's safety. The law covers records that reveal the susceptibility of fire and law enforcement stations, the critical infrastructure for storing and transmitting energy, details of a specific emergency response plan, response agency procedures for reacting to attack, special equipment used in emergency operations, and the security of radio-transmission frequencies used by response agencies.

Reports on any records declared confidential must be submitted to legislators along with the reason they are confidential. The law also creates a state commission on homeland security that can hold closed meetings to receive security briefings and discuss emergency-response procedures and security deficiencies. *(A.B. 441)*

• A bill that would have created an open meetings exemption for local government boards to discuss terrorism issues was killed in the Nevada Assembly by a vote of 24-17 in 2005. The Nevada Press Association and the ACLU had fought the measure, arguing that the closed-door meetings were not necessary and that the bill's vague language would close too many meetings that should remain open. *(SB 115)*

New Hampshire

• A law exempts matters pertaining to terrorism or to preparations for emergency functions from the state's law requiring that minutes of all nonpublic meetings be disclosed within 72 hours. The bill was signed by then-Gov. Jeanne Shaheen (D) in 2002. *(HB 1423; 2002 N.H. Sess. Laws. 222)*

New Jersey

• Then-Gov. James E. McGreevey (D) signed an executive order July 9, 2002, that allowed government agencies to exempt from disclosure 483 categories of public records in order to protect the state from terrorists or to protect privacy. The order came a day after the state's revised Open Public Records Act went into effect.

The act had opened up records in what was considered one of the most difficult states to get access to government information. *(Executive Order 21)* After protests from state open-government advocates, McGreevey amended the order the next week to limit the closures to about 80 categories. *(Executive Order 26)*

• After New Jersey resident R. Bradley Tombs requested a copy of Brick Township's electronic Geographic Information System (GIS) data, the township submitted the records to the federal Homeland Security Department ("DHS") for designation as protected critical infrastructure information ("PCII") under the Critical Infrastructure Act of 2002 (the "CII Act"), which exempts PCII from state open records law disclosure

requirements. DHS approved the designation in June 2005. The CII Act's primary purpose is to encourage private industry to share information with the government pertaining to the security of the nation's infrastructure.

New Mexico

• A new law went into effect July 30, 2003, that creates a public records exemption for "tactical response plans." It covers response plans of the state and its political subdivisions that could reveal vulnerabilities, risk assessments and emergency security procedures. *(§14-2-1; HB 254)*

New York

• A Senate measure would have denied access to any materials obtained or compiled in terrorist activity investigations at the discretion of the Office of Public Security. The measure failed to pass in 2002. *(S 6906)*

• Two bills in the House and Senate attempted to exempt from disclosure information relating to critical infrastructure, such as electric lines, natural gas, steam or telecommunications systems. The measure passed the Senate but died in a House committee in 2002. *(A 9841; S 6077)*

• In September 2003, New York's Counter-Terrorism Network moved to a nondisclosed location. The network disseminates confidential "terrorism-related" memorandums to police, health, education, fire and emergency personnel, and has been criticized as a method of weakening public accountability and keeping information from being disclosed under New York's freedom of information laws.

• Gov. George Pataki (R) signed a law in 2004 requiring operators of power generation and transmission facilities to report their ongoing security efforts to the state. The bill makes the reports subject to the state Freedom of Information Law, even though the law allows for the shielding of certain documents in the interest of public health and safety. *(A 9718)*

• The Senate introduced a bill in 2004 requiring all nonprofit corporations to be subject to freedom of information and open meetings laws. However, records identified as a public security threat by the Office of Public Security or the state police would not be subject to the freedom of information law and the open meetings law. *(S 06459)*

• The New York City police and health departments struck an accord with the FBI in November 2004 promising to keep victims' sensitive medical data confidential in case of a biological attack. The new set of rules reflect the novel nature of joint law enforcement-health professional investigations. Health professionals, of course, have a long history of protecting medical history data that identifies a patient by name.

• In a decision made public March 24, 2005, the New York Court of Appeals ruled that New York City employee interviews about Sept. 11 must be released to the public, with redactions for potentially painful and embarrassing details. In the same opinion, the court ordered the disclosure of portions of the city's emergency response dispatches that day, and one side of 911 calls — the operators' voices. The tapes were requested by *The New York Times*.

• New York authorities responded to *The Journal News*'s freedom of information request for bridge safety reports in June 2005 with near-total redactions, and a complete refusal to produce a 10-volume inspection report. The New York Thruway Authority said that terrorists might be able to use the information to carry out an attack.

North Carolina

• A House bill would have established a procedure for the state to prepare for a public health or bioterrorism emergency. It requires confidentiality of all health records, but allows release to other state agencies to prevent or control a public health threat or to help investigate an act of terrorism. The measure failed to pass in both houses in 2002. *(H 1508; S 1166)*

• The General Assembly passed a measure that adds exemptions to state public records laws for security purposes. The law, signed by Gov. Mike Easley (D) in June 2003, excludes vulnerability assessments and other documents that could jeopardize safety and security. The law also adds a ninth exemption to the state's open meetings law, allowing closure of a meeting to discuss plans to protect public safety relating to terrorist activities. *(Ch. SL 2003-180)*

North Dakota

• Critical infrastructure, security plans and certain public health information are exempt from disclosure under a law signed by Gov. John Hoeven (R) in March 2003. *(HB 1143)*

• A bill proposed in 2005 by Rep. John Nelson (R-Wolford) but not enacted would have exempted cattle feedlot permit application information from open records law for fear that terrorists might use the data to upset food supply. *(HB 1464)*

Ohio

• A law signed by Gov. Bob Taft on May 7, 2002, allows agencies to hold executive sessions when dealing with emergency response procedures under certain situations. It exempts from the definition of a public record all records that relate to security or infrastructure. *(SB 184)*

• A law was passed in 2004 that gives state public health officials the authority to keep some information secret during health investigations of the suspected origins of bioterrorism attacks. The law allows the health department to shield the identities of people or businesses under investigation until the case is completed. In cases that require lengthy investigations, preliminary details can be released every six months. Statistical and aggregate data are immediately available. *(HB 6)*

• State officials responsible for public records access changed the state's long-standing policy of making birth and death records readily available in 2004 after the Department of Homeland Security and the New Orleans Passport Agency told them that over-the-counter access to such records allowed terrorists and criminals to easily commit identity theft. The changes include requiring formal requests and hefty fee increases to see records.

• The city of Parma implemented, and then immediately dropped on June 7, 2004, a policy of recording the names and descriptions of open records requesters. The policy was adopted to help police identify people who might use public records to commit crimes. It was dropped after a Cleveland *Plain Dealer* reporter — the first person to be affected by the policy — complained.

Oklahoma

• Legislation signed by Gov. Brad Henry (D) in May 2003 exempts discussions of vulnerability assessments of government buildings and terror response plans from release. Terror investigations also would be kept confidential. *(SB 395)*

• A 2003 law allows a government body to hold an executive session or close records pertaining to the discussion of terrorist

plans or protection against terrorist attacks. *(SB 395)*

• Legislation adding print and electronic media to the state's Whistleblower Act was also signed into law in 2003. The provision prohibits disciplinary action against an employee who talks to the news media before first notifying a supervisor or someone in the employee's chain of command. *(HB 1058)*

• The Homeland Security Act was amended in 2004 to strip the state Homeland Security Department of its exemption from complying with the open meetings and records acts. *(HB 2280)*

• The governor on June 5, 2005 signed into law a significantly improved version of a bill which originally created an exemption for almost all state homeland security records. In its final form the law still weakens the state's open records law, allowing all records maintained or generated by the office that involve the federal Department of Homeland Security to be withheld. But the law declares that certain information is open, including records involving the expenditure of public funds and the office's fundamental administration. The bill also allows the Office of Homeland Security not to release records that include "confidential private business information or an individual's private records." *(SB 28)*

Oregon

• A bill signed into law by then-Gov. John Kitzhaber on July 1, 2002, expands security exemptions to Oregon's open records and meetings law. The previous law exempted only law enforcement plans that deal with threats to individual or public safety. The new law expands the security exemption to the records of all public bodies.

The law also exempts from the public record information about security programs for sources of energy, communications and dangerous substances. Under the law, discussions about security matters can take place during a closed executive session. Oregon journalists can attend the sessions closed to the public, but are not permitted to publish information learned there. The intent of this provision is to allow reporters to challenge in court any inappropriate use of the executive session exemption. *(HB 2425)*

Pennsylvania

• A House bill would have established a state Office of Homeland Security and would have given authority to the agency to develop criteria for certain records, maps or any other information the agency deems necessary to keep out of the public domain. The measure died in committee in 2002. *(HB 2483)*

• A bill that passed the House in 2005, but not the Senate, would have prevented agencies from releasing information that would indicate vulnerabilities to terrorists, but used extremely broad language. *(HB 854)* Another act would have shrouded all information about buildings mapped as part of a statewide first responder information system. *(HB 46)*

Rhode Island

• A Senate proposal would have exempted any plans, assessments or security measures related to publicly owned or publicly operated biological, nuclear, incendiary, chemical or explosive facility. The bill died shortly after it was introduced on Jan. 29, 2002. *(S 2324)*

• The House passed a bill in 2003 prohibiting the disclosure of vulnerability assessments for particular locations and records containing security system designs for public water supplies, building air-handling systems, and food establishments. It is much narrower than the original measure. Initially, the measure established public records exemptions for "information developed and/or adopted as security measures and response procedures and capabilities designed to protect public health, welfare and safety of citizens against terrorism." That bill had the potential of closing down many public records in the state. Changes were made after members of the Rhode Island Press Association testified before the general assembly. The bill was referred to a Senate committee. *(HB 5862A)*

• In 2004, Gov. Don Carcieri (R) withdrew a Homeland Security Plan bill that was widely criticized by civil libertarians, including the ACLU, as a threat to free speech. The bill would have made it illegal to speak or print any language in "defiance or disregard" of the state and federal constitutions. The bill would have expanded a law on the books since World War I that makes it illegal to "teach or advocate anarchy or the overthrow by force or violence" of the state and federal governments.

Carcieri's proposal would have revised the law to include the term "terrorism," defined in the bill as anyone who advocates destroying government property. The withdrawn bill would have also allowed business owners to withhold from public view records that show whether they have "fire protection equipment, [and] mandatory building emergency equipment" required under the state's Fire Safety Code. Additionally, the bill would have required school committees to develop annual "school safety audits" for every public school. The committees could then withhold portions of the audit unless a catastrophic event necessitates release of the complete audit.

South Carolina

• The "Omnibus Terrorism Protection and Homeland Defense Act of 2002" criminalizes aid to a terrorist or terrorist organizations, increases penalties for various terrorist activity (including contamination of agricultural crops and livestock through biological or chemical agents), and increases the government's power to conduct roving wiretaps. It was signed by then-Gov. James Hodges (D) on July 2, 2002. *(H 4416; 2002 S.C. Acts 339)*

South Dakota

• A law signed by then-Gov. William Janklow (R) on Feb. 25, 2002, clarifies the crimes included in "terrorist acts" and increases the penalties for crimes that are committed with terrorist intent. *(HB 1305; 2002 S.D. Laws 103)*

• The South Dakota Newspaper Association and other groups successfully reduced the scope of a bill restricting public access to vital records in an effort to address concerns about identity theft and homeland security before it was signed into law by Gov. Mike Rounds (R) in February 2005.

Tennessee

• Two bills, one in each house, would have criminalized any distribution or delivery of biological warfare agents, chemical warfare agents, nuclear or radiological agents as an act of terrorism or as a hoax. Neither measure passed in 2002. *(SB 2492; HB 2585)*

• Two bills, one in each house, proposed to make confidential any plans made by law enforcement agencies in response to, or to prevent, any act of violence at a business or school. Both bills died in early February 2002. *(SB 2811; HB 2661)*

• The "Terrorism Prevention and Response Act of 2002" was enacted after several proposals were introduced to expand the crimes of terrorism to include possession or manufacture of a biological or chemical warfare agent, and increase the penalties

for the crime of terrorism. *HB 3232* was signed by then-Gov. Donald Sundquist (R) on July 9, 2002. *(SB 2574, HB 2545; SB 3192, HB 3232, 2002 Tenn. Pub. Acts 849)*

• Tennessee's General Assembly amended 2002 anti-terrorist legislation that exempted from the state public records law any public utility documents that would identify areas of vulnerability or would permit disruption or interference with utilities. The 2003 amendment states that the exemption should not limit government access to the records or prevent government agencies from allowing public access to the records during the course of an official function. *(Pub. Ch. 295)*

Texas

• Records collected for the purposes of emergency management or disaster planning would have been exempt from disclosure if the person in possession of the information believes that disclosure would interfere with implementation of the emergency management or disaster plan. This bill was sent to a House committee in 2003, but no further action was taken. *(HB 437)*

• A bill would have permitted boards of hospitals to meet secretly to discuss details of emergency response plans for terror attacks and natural or man-made disasters. This bill was sent to a Senate committee in January 2003, but no further action was taken. *(SB 152)*

• An expansive homeland security bill was signed into law by Gov. Rick Perry (R) in June 2003. It makes emergency response providers' staffing requirements, tactical plans and compilations of telephone numbers and risk vulnerability assessments confidential. Information about how to make weapons and their location; materials and any unpublished information about a potential vaccine or device to detect biological weapons; information about the security of communications systems; and documents that identify details or vulnerabilities of critical infrastructure — broadly defined to include all public and private assets vital to security, governance, public health, economy or the state or nation's morale — is also now classified.

A governmental body also may now close any meeting to discuss the information made confidential under the act, but the body must make a tape recording of any closed session. The law allows "bona fide local news media" to monitor emergency communications of public interest, and ensures that certain information remains public, including how much a government entity spends for a security system and the location of security cameras at state agencies. Finally, at any time during a disaster the head of a governmental entity may voluntarily disclose otherwise confidential information to another person or entity if a legitimate need for the information exists. *(HB 9)*

• Several other 2003 laws threaten access to government. A far-reaching exception to the open meetings law allows a governmental body to close meetings to discuss proposed contracts if an open meeting would harm the governmental body's negotiations with a third person. However, closed sessions must be tape recorded. *(HB 2004)*

• On June 25, 2004, Assistant Attorney General Jane Harden of the Open Records Division ruled that utility, drainage and engineering plans of a Citigroup data processing center must be withheld from disclosure under the Public Information Act. The center, which provides electronic backup for billions of commercial transactions, was ruled "critical infrastructure." Plans must therefore be withheld because they would identify technical details of particular vulnerabilities to terrorists, Harden said. However, she also ruled that the center's exterior elevations, landscape plans and tree survey could not be withheld because they did not reveal details about vulnerabilities.

• In late January 2004, a University of Texas student was questioned by FBI and Secret Service agents after he requested under the state Public Information Act information about a system of utility tunnels under the university. The student filed the request after a university physical plant employee told him is was secret because of the Sept. 11 terrorist attacks.

• The University of Texas' student newspaper, *The Daily Texan*, was denied by university officials a copy of a Centers for Disease Control report that detailed 11 toxins — including anthrax, ebola and ricin — being studied and kept at the university because the document exposed a vulnerability to terrorist attacks. The paper sued. The CDC then changed the number of toxins the university was required to report from 11 to two. The university released the report on March 25, 2004, and the suit was dropped.

Utah

• A law signed by then-Gov. Michael Leavitt (R) in March 2002 classifies records containing information about explosives. *(SB 61; 2002 Utah Sess. Laws 78)*

• The House attempted to pass a bill in 2002 that would have exempted government agency records regarding security measures, including security plans, procedures and building work designs. The bill also would have enacted new definitions and penalties for criminal offenses, including prohibiting terrorism through weapons of mass destruction and hoaxes threatening the use of those weapons. A highly revised bill was later passed. *(HB 283; HB 283S; 2002 Utah Sess. Laws 166)*

• Information regarding National Guard operations in support of the National Guard's federal mission is exempt from public release under a bill signed into law by Leavitt in March 2003. *(SB 112)*

Vermont

• The Vermont Capital Construction Act of 2003 adds exemptions to Vermont's public records act for security purposes. Under the act, building plans, vulnerability assessments, operation and security manuals, and other information about publicly owned, managed or leased structures are not considered public records if disclosure would pose a safety or security risk. The records may be disclosed to government entities or others if necessary to perform their duties. A court can also order disclosure of the records. *(Act No. 63)*

• Legislation requiring hospitals to comply with the state's open meetings and public records act was read in the House but remained in committee for the rest of the 2003 session. *(H. 55)*

Virginia

• A 2002 law exempts from disclosure plans to prevent or respond to terrorist activity, such as specific security or emergency procedures. It also exempts any engineering and architectural drawings and training manuals if the disclosure would harm the security of government buildings or people. A provision also allows meetings to be closed when discussing actions taken in response to a threat to public safety and requires requesters to provide records custodians with their name and legal address. *(HB 700; SB 134; 2002 ch. 715)*

• New exemptions to Virginia's open meetings and records laws took effect on July 1, 2003. Several exemptions restrict information for "security purposes," such as building permit

records that threaten the safety or security of any building or its occupants if released. *(HB 1727)*

• A 2003 law exempts information the governor receives that is related to protecting the nation's critical infrastructure located in Virginia. *(HB 2210)*

• Another 2003 law that applies to all public and private buildings exempts from disclosure engineering and architectural drawings, records relating to critical infrastructure and vulnerability assessments. Meetings that discuss the closed records are also closed to the public. *(HB 2211)*

• A 2003 law creating a coordination program within Virginia's Department of Emergency Management also limits disclosure of information by the department and the agency that provided the information to the department. *(HB 2816)*

• Several bills were referred to the Virginia Freedom of Information Advisory Council for study in 2003. One bill expands the closed meeting exemption for discussions relating to terrorist activity to include other types of threats to the public safety. *(HB 2665)*

• Exemptions from the state Freedom of Information Act's open meetings and open records requirements were enacted in 2004 for records of the Commission on Military Bases that contain information relating to vulnerabilities of military bases and strategies to prevent closures of federal military bases located in Virginia. The exemptions expire on July 1, 2006. *(HB 1396)*

• The House and Senate unanimously passed, and Gov. Mark Warner (D) signed, a 2004 bill that exempts from the open records law records of the State Health Commissioner relating to the health of persons under quarantine. The exemption does not apply to statistical or aggregate information. *(HB 1483; SB 685)*

• A bill was enacted in 2004 that exempts from disclosure by the state Department of Emergency Management and local governing bodies the name, address, e-mail, telephone, pager number and operating schedule of individual participants in local citizen emergency response teams. *(HB 347)*

• A Virginia bill created an open records exemption for documents held by the Department of Agriculture that reveal the identities of the purchasers of certain potentially explosive fertilizers. *(HB 1547)*

Washington

• 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 are exempted from public access. The bill was signed into law by Gov. Gary Locke (D) on April 3, 2002. *(HB 2411; SB 6439; 2002 Wash. Laws 335)*

• Two bills proposed to restrict access to site plans, information in emergency preparedness plans and technical information. Both bills died in January 2002. *(HB 2646; SB 6676)*

• A 2004 bill would have created new exemptions to the state public records law for domestic security purposes. It would have exempted information regarding the internal layout, structural elements, infrastructure or security of any building or structure — whether publicly or privately owned — if the disclosure of such information would have a reasonable likelihood of threatening public safety. The bill died in committee. (*HB 2953*)

West Virginia

• The most significant bill of the 2003 legislative session added anti-terrorist homeland security measures to the state's open records laws. Gov. Bob Wise (D) signed the bill into law in March. Although the state's press association succeeded getting the bill amended, some provisions are still quite broad.

The law exempts "records assembled, prepared or maintained to prevent, mitigate or respond to terrorist acts or the threat of terrorist acts" from public records rules. Additional exemptions are allowed for telecommunications and network security information, including maps and plans showing the location or layout of telecommunication facilities; security or disaster recovery plans; and investigative records dealing with terrorist acts. *(Ch. 108, Acts, 2003)*

• A similar bill exempting meetings where state security issues are discussed from the Open Governmental Proceedings Act did not pass in 2003. *(HB 3010)*

• The state amended its open records law to include a broad anti-terrorism exemption. The amendment exempts "records assembled, prepared or maintained to prevent, mitigate or respond to terrorist acts or the threat of terrorist acts, the public disclosure of which threaten the public safety or the public health." *(Chapter 29B, Exemption 9)*

Wisconsin

• A Senate proposal would have closed access to security plans for public utilities filed with the state Public Service Commission. The proposal also would have prohibited municipalities from releasing the records as well. The measure failed in the Assembly on March 26, 2002. *(SB 394)*

• A bill that passed the Senate but remained in an Assembly committee in 2003 would have exempted utilities' security information from public inspection. *(SB 8)*

• Gov. Jim Doyle (D) vetoed legislation in April 2004 that would have exempted utilities' security information from public inspection. In a message to the legislature, Doyle said the open records law's existing balancing test weighing the interest in disclosure against the interest in secrecy adequately protected sensitive security information. The legislation would have made the security information off-limits under any circumstance. *(SB 8)*

Wyoming

• A Senate bill addressed how the state would deal with a terrorist attack, providing for the quarantine and vaccination of its citizens and providing compensation for any personal property that was taken or used. It also addressed attacks on crops and resources. The measure was introduced in the House in March 2002, but died. *(SF 67)*

• Gov. Dave Freudenthal (D) signed a bill into law in 2003 restricting the release of information if a records custodian believes it would make a public infrastructure vulnerable to terrorist attacks. *(SF 10)*

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H.R. 3323, 109th Cong., 1st Sess. ("Free Flow of Information Act of 2005")

S. 340, 109th Cong., 1st Sess. ("Free Flow of Information Act of 2005")

S. 369, 109th Cong., 1st Sess. ("Free Speech Protection Act of 2005")

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S.394 (109th Congress) (Openness Promotes Effectiveness in our National Government Act)

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Homeland Security Act, Public Law No: 107-296

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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

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

Three civil libertarian groups — OMB Watch, the Electronic Frontier Foundation and the National Coalition Against Censorship — keep a running tally on government efforts to shut down Web sites and restrict expression after September 11.

OMB Watch's page monitoring government sites can be found at: http://www.ombwatch.org/article/archive/104/

EFF's anti-terrorism page can be found at: http://www.eff.org/Privacy/Surveillance/Terrorism_militias/antiterrorism_chill.html

The National Coalition Against Censorship's site on free expression after September 11 can be found at: http://www.ncac.org/issues/freeex911.html