

CQ Researcher

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Government Secrecy

Is too much information kept from the public?

President Bush says he believes in open government, but critics say his administration has gone to unusual lengths to control and limit access to information.

Government restrictions on information increased dramatically after the Sept. 11, 2001, terrorist attacks. The administration says homeland security concerns justify clamping down on public access to information, but open-government advocates say the policies dampen public debate, diminish government accountability and actually hamper efforts to protect the United States. Many of the secrecy disputes have spawned court fights, most of them won by the administration. Courts also have generally appeared uninterested in enforcing the federal Freedom of Information Act, prompting some in Congress to try to strengthen the 1966 law. Without it, they argue, such scandals as the abuse of detainees held by the United States at Baghdad's Abu Ghraib prison might never have come to light.



The remains of a soldier killed in Iraq arrive back in the United States. After resisting, the Defense Department finally released hundreds of photos of such ceremonies in April 2005 but obscured the faces and insignias of honor guards.

INSIDE THIS REPORT

THE ISSUES	1007
BACKGROUND	1013
CHRONOLOGY	1015
CURRENT SITUATION	1019
AT ISSUE	1021
OUTLOOK	1023
BIBLIOGRAPHY	1026
THE NEXT STEP	1027

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THE ISSUES

- 1007 • Should the government classify less information as secret?
 • Has the Bush administration misused government secrecy?
 • Should Congress make it easier to obtain government records?

BACKGROUND

- 1013 **Competing Imperatives**
 As officials sought more secrecy, the public expected more information.
- 1014 **Shifting Views**
 Despite open-government laws, access to information was often incomplete.

- 1018 **Increasing Secrecy**
 After the 9/11 terrorist attacks, government ramped up secrecy.

CURRENT SITUATION

- 1019 **Court Battles**
 Open-government advocates are challenging restrictive information policies.
- 1022 **Information Leaks**
 Secrecy is hampering the debate over U.S. treatment of detainees, critics say.

OUTLOOK

- 1023 **Culture of Openness?**
 The administration shows no signs of retreating from its restrictive policies.

SIDEBARS AND GRAPHICS

- 1008 **More 'Secret' Documents Are Being Created**
 The federal government created 15.6 million secret documents in 2004.

- 1009 **FOIA Requests Doubled**
 Public requests for information hit a new high in 2004.

- 1012 **Using the Freedom of Information Act**
 Nine types of information are exempt from disclosure.

- 1015 **Chronology**
 Key events since 1966.

- 1016 **The Outing of CIA Agent Valerie Plame**
 Critics say the administration uses leaks to punish political enemies.

- 1020 **Whistleblowers Silenced by State Secrets Doctrine**
 Federal employees fired after criticizing the government can run afoul of the little-known doctrine.

- 1021 **At Issue**
 Has the Bush administration misused government secrecy?

FOR FURTHER RESEARCH

- 1025 **For More Information**
 Organizations to contact.

- 1026 **Bibliography**
 Selected sources used.

- 1027 **The Next Step**
 Additional articles.

- 1027 **Citing *The CQ Researcher***
 Sample bibliography formats.

Cover: The remains of a soldier killed in Iraq arrive back in the United States. The Defense Department's 2003 decision to bar the press from photographing such ceremonies has been criticized as an effort to limit public focus on U.S. casualties in Iraq. Facing a lawsuit, the Pentagon finally released hundreds of photos of such ceremonies in April 2005 but obscured the faces and insignias of honor guards. (Department of Defense)

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Government Secrecy

BY KENNETH JOST

THE ISSUES

The rumors surfaced in 2003: Prisoners were being held incommunicado and shockingly abused at U.S. prisons in Iraq and Guantánamo Bay, Cuba.

Government secrecy kept the lid on the mistreatment at Abu Ghraib prison near Baghdad until April 2004, when CBS News' "60 Minutes II" broke the story — complete with dramatic photographs of snarling guard dogs, beatings and sexual humiliation.

But insiders had long been concerned about the treatment of detainees. Vice Admiral Lowell E. Jacoby, head of the Defense Intelligence Agency (DIA), for example, had complained that Department of Defense (DoD) investigators in Iraq had tried to silence DIA agents who questioned their interrogation techniques. And FBI e-mails showed that FBI experts had strongly objected to the harsh DoD techniques.

Pressured to investigate, the Army's inspector general in July 2004 blamed the Abu Ghraib abuses on individual servicemembers rather than any systemwide failure. Subsequent interviews, however, cast a more damning light on command responsibility for the abuses. "There was no specific training on treatment of detainees," a platoon leader told Army investigators. And an enlistee said that without training, interrogators ended up using techniques that "they literally remembered from movies."

The interviews and other documents — reluctantly released by the Pentagon to the American Civil Liberties Union (ACLU) — "establish beyond any doubt that the abuse of detainees held by the United States abroad was



Washington Post via Getty Images

An Iraqi detainee is hooded and handcuffed at Abu Ghraib prison in Baghdad. In addition to scores of photographs of abuses aired by CBS, the Pentagon reluctantly released interviews and other documents about interrogation abuses at the facility. The American Civil Liberties Union obtained the records after invoking the federal Freedom of Information Act.

systemic and widespread," says ACLU lawyer Amrit Singh. "They call into question the government's failure to hold accountable the senior officials responsible for these abuses."

Singh's organization obtained the documents only after a protracted legal battle with the Pentagon that began in October 2003, well before the Abu Ghraib scandal broke.¹ The ACLU lawyers had asked for Defense Department records pertaining to U.S. treatment of Iraqi detainees, invoking the federal Freedom of Information Act (FOIA).

The landmark 1966 law requires federal agencies to make records available to anyone upon request unless they fall within one of nine statutory exemptions. (See box, p. 1012.) Through the years, government documents released in re-

sponse to FOIA requests have become basic raw material for countless news stories and interest-group reports.

As in the current ACLU case, FOIA-released materials often provide ammunition for critics of government policies and actions. Perhaps partly because of the potential for such criticism, government agencies often drag their feet in responding to FOIA requests or take a broad view of the act's exemptions for withholding documents.

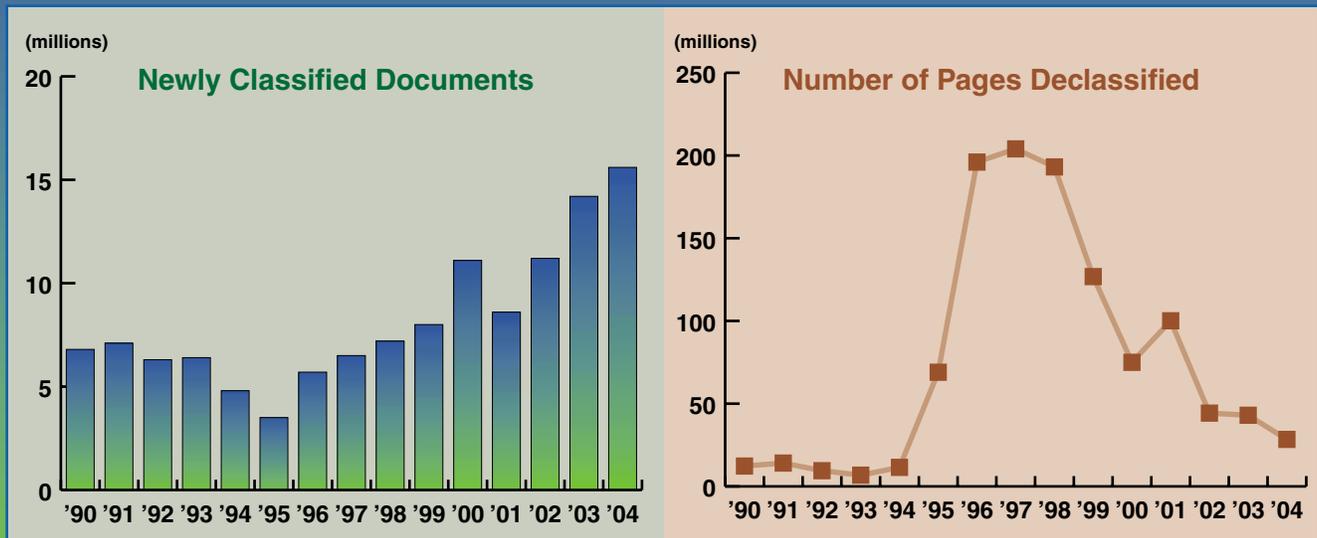
Bureaucratic resistance to the law dates from its earliest days, but journalists and watchdog groups say it has increased since President Bush took office in 2001. "This is not a good [time] for FOIA compliance," says David Burnham, a former *New York Times* reporter who heads Syracuse University's Transaction Records Action Clearinghouse (TRAC). The organization uses the law to compile and distribute detailed reports on federal law enforcement.²

In fact, open-government advocates say the Bush administration has adopted policies across the board that have made the past five years distinctively difficult in getting access to government information. "They have been more secretive and more controlling of information than probably most of the recent past administrations," says Pete Weitzel, a veteran journalist who now coordinates the Coalition of Journalists for Open Government. "All federal administrations tend to be somewhat closed and secretive, but this one has been more so."

The new administration displayed its penchant for secrecy almost immediately by putting a lid on information about an energy task force headed by Vice President Dick Cheney. After the Sept.

More 'Secret' Documents Are Being Created

The federal government created 15.6 million secret documents in 2004, or 81 percent more than in 2000, the year before the terrorist attacks on Sept. 11, 2001 (graph at left). Meanwhile, the number of pages declassified has declined steadily since 2001 after rising dramatically in the 1990s (graph at right).



Source: "Secrecy Report Card 2005," OpenTheGovernment.org

11, 2001, terrorist attacks, the administration imposed an array of restrictions on information about the government's response. Attorney General John Ashcroft followed in October 2001 by advising federal agencies to make broader use of the FOIA's exemptions to withhold materials requested under the law.

Information-policy disputes continued through Bush's first term and now into his second. The administration has cited homeland security to justify various restrictions on information that officials claimed terrorists could use to devise new attacks. Most recently, Bush has come under sharp attack from Democrats in Congress for allegedly misleading lawmakers about intelligence in the run-up to the Iraq war and blocking a Senate investigation of whether pre-war intelligence was manipulated by the administration. (See "At Issue," p. 1021.)

Statistics released by the Information Security Oversight Office (ISOO), an arm of the National Archives and Records

Administration, reflect the increased secrecy under Bush. The most recent ISOO annual report shows that the number of documents classified as secret or top secret reached an all-time high of 15.6 million in 2004. Meanwhile, the number of pages declassified each year has been falling continuously under Bush, following an increase under President Bill Clinton. (See graphs, above.)

"The data say explicitly that it's gotten worse" under Bush, says Thomas Blanton, executive director of the National Security Archive, a private reference center at The George Washington University in Washington. "There has been massive secrecy and massively unnecessary secrecy."

But the administration denies accusations of excessive secrecy whenever they arise. "The administration is proud of its record of openness," Frederick L. Jones II, a spokesman for the National Security Council, said after publication of the ISOO statistics.³

Bush himself defended the administration's information policies in remarks to the American Society of Newspaper Editors in April 2005. "I've always believed in open government," Bush told the editors, meeting in Washington. But he said there was also a "tension" between disclosure and "jeopardizing the war on terror."

"I wish I could report that, you know, all is well," Bush continued. "It's not. It's just not. It's going to take awhile." He added, "And so long as, you know, people can be endangered by leaks, we've just got to be real careful."⁴

Even as Bush was warning against leaks, however, a special federal prosecutor was zeroing in on top White House officials as possible sources for leaks in summer 2003, identifying the wife of a prominent critic of the administration's Iraq policies as an undercover Central Intelligence Agency (CIA) operative. The CIA leak investigation reached a critical stage in October 2005

with the indictment of I. Lewis “Scooter” Libby, Cheney’s chief of staff, on five counts of lying when he denied disclosing the name of Valerie Plame Wilson, a CIA expert on weapons of mass destruction. Karl Rove, deputy White House chief of staff and Bush’s key political adviser, was not indicted but was said to have discussed Plame — though not by name — with at least one reporter. (See story, p. 1016.)⁵

As the debate over government secrecy continues, here are some of the major questions being considered:

Should the government classify less information as secret?

Shortly after World War II, the FBI succeeded in cracking the code on cables between the Soviet Union and some 200 or so espionage agents inside the United States. Amazingly, however, information from the so-called Venona transcripts never reached President Harry S Truman. In fact, the CIA did not declassify the information and release it to the public until 1996.⁶

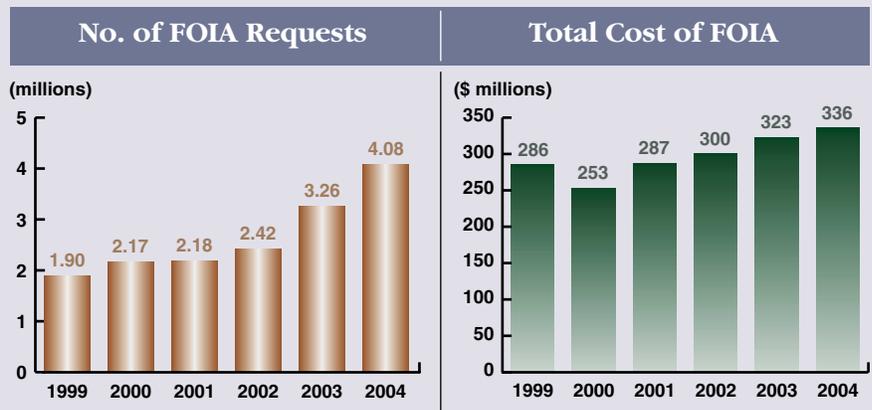
In examining the Sept. 11 terrorist attacks, congressional committees and the so-called 9/11 commission documented analogous failures of information-sharing within and among executive branch agencies before the attacks. CIA warnings about the al Qaeda terrorist group — dating from the mid-1990s on — received limited circulation and less attention. Meanwhile, the FBI either was not told or failed to follow up on information tracking two of the eventual hijackers from an al Qaeda meeting in Indonesia into the United States.⁷

The episodes more than 50 years apart demonstrate the all but universally acknowledged truth that the government classifies too much — way too much — information as secret. “It’s a problem that has persisted regardless of which party was in charge at the time,” says ISOO Director William Leonard.

Classification procedures derive from executive orders issued by successive

FOIA Requests Have Doubled

Public requests for information under the Freedom of Information Act (FOIA) have more than doubled over the past six years, hitting a new high in 2004 (graph at left). Federal resources devoted to training personnel and processing FOIA requests, however, rose only 17 percent over the same time period (graph at right).



Source: “Secrecy Report Card 2005,” Openthegovernment.org

presidents since Dwight D. Eisenhower. Traditionally, three levels of classification are used for national security-related information: classified (now rarely used), secret and top secret. A commission headed by the late Sen. Daniel P. Moynihan, a New York Democrat and longtime critic of excessive secrecy, found in 1997 that an executive order issued by President Bill Clinton designated 20 federal officials as authorized to classify materials as “top secret” but that the power eventually was expanded to more than 1,300 “original classifiers.”⁸

Without disputing the need to protect some diplomatic and military secrets, critics say overclassification inevitably results from “the iron law of bureaucracy,” as Blanton of the National Security Archive calls it. “Secrecy is the fundamental tool of a bureaucrat to protect turf, to protect power,” he explains.

John Pike, director of the Alexandria, Va., think tank GlobalSecurity.org, says bureaucrats also overclassify because “they’re more likely to get into trouble by underclassifying than by overclassifying.” In addition, he says, “It certainly

makes decision-making easier when no one knows what you’re doing.”

Despite bureaucrats’ inherent tendencies toward overclassification, many experts say the Bush administration has raised secrecy to new levels. The policy reflects the administration’s broad view of executive power along with a push to limit criticism or interference, these experts say critically. “It’s an attempt to return to the imperial presidency,” says Blanton.

Alane Kochems, a national security expert at the conservative Heritage Foundation in Washington, cites justifications for the increase in classified information under the Bush administration but stops short of a wholehearted defense. The government was justified in adopting new levels of secrecy immediately after 9/11, she says, because “we didn’t know what was going on with the terrorists.”

Kochems also says secrecy is more common because cooperation between the government and the news media has diminished. Still, Kochems says the issue of overclassification is “probably a legitimate question to ask.”

Beyond the traditional three-level classification system, the Bush administration has spawned an increasing array of ad hoc secrecy designations for unclassified materials — categories like “sensitive but unclassified” or “critical infrastructure information.” OpenTheGovernment.org lists some 50 such designations in its 2005 secrecy report card.

“Government control of unclassified information has grown by leaps and bounds,” says Steven Aftergood, director of the Federation of American Scientists’ Project on Government Secrecy. “It is turning into a bigger problem than overclassification.”

As in the case of 9/11, the risks of excessive secrecy include bad policy-making, according to Richard Gid Powers, a professor of political science at the College of Staten Island. “Overutilization of secret information is a hindrance to what makes good policy, which is free access to information,” he says.

Overclassification also makes it harder to protect “real secrets,” Powers says. “Before you can concentrate on keeping important things secret, you have to identify what is really secret.”

Despite the broad agreement on the problem, experts doubt their suggestions for reform will be adopted. Rick Blum, director of OpenTheGovernment.org, suggests reducing the number of people authorized to classify information as secret. “If you can stop it at the source, then all the costs of storing and building these secure facilities, all of the big system of secrecy that costs us billions and billions of dollars can also be cut down to size,” Blum says.

Athan Theoharis, a history professor at Marquette University in Wisconsin and author of several books on the FBI, suggests that Congress codify classification procedures and guidelines to regularize policy from one administration to another. But, he acknowledges, “Congress has been quite hesitant.”

For his part, Leonard says the solution lies with “strong and effective oversight at the agency-head level. More than

anyone else, it’s an agency head who sets the tone and tenor for how this particular agency approaches this subject.”

Pike bluntly dismisses all the suggestions. Is change likely? “Probably not,” Pike replies without hesitation. “It’s probably hopeless.”

Has the Bush administration misused government secrecy?

Within his first weeks in office, President Bush created a special task force of government officials to develop a proposed national energy policy. The task force, headed by Vice President Cheney, conducted meetings and deliberations behind closed doors until unveiling its proposal in May 2001.

Both the General Accounting Office (now called the Government Accountability Office) (GAO) and two outside interest groups went to court to obtain access to the task force’s records. But the legal fight — up to the Supreme Court and back down — ended in May 2005 with a ruling upholding the administration’s decision to keep the task force proceedings and records closed to public view.⁹

The task force case was the first of a seemingly continuous string of secrecy disputes generated by this administration — typically with unapologetic defense of the restrictions on release of information. “[They feel] they were given a mandate, that they’re carrying it out and that there isn’t a need for people to be scrutinizing how, what and why,” says Meredith Fuchs, the National Security Archive’s general counsel.¹⁰

Many of the disputes seem somewhat unexceptional — for example, the administration’s refusal to disclose the CIA’s 2004 National Intelligence Estimate for Iraq, which was requested under the FOIA by the National Security Archive. The CIA’s National Intelligence Council prepares the annual intelligence estimates, which are evaluations of world hot spots based on input from all U.S. intelligence agencies.

But other, more innovative restrictions were adopted in the immediate aftermath of 9/11. For instance, the administration refused to release the names of hundreds of mostly Muslim foreigners rounded up shortly after the attacks and closed their deportation hearings.

As in the case of the immigration crackdown, experts and interest groups called many of the administration’s invocations of national security to justify secrecy unnecessary, unhelpful or both. The Department of Health and Human Services, for example, warned against publication of a study on how the nation’s milk supply could be contaminated by the botulism toxin, but the National Academy of Sciences published it anyway in July 2005. The previous year, the Department of Homeland Security tried to require employees to sign agreements barring them from sharing even unclassified information with the public but backed down under pressure from unions representing department employees.

Other instances of secrecy have been viewed even more critically as overt news management. Most notably, the administration’s 2003 decision to bar media coverage of ceremonies for the returning remains of soldiers killed in the Iraq war — ostensibly to protect family members’ privacy — has been widely criticized as an effort to limit public focus on U.S. casualties in the conflict.¹¹

The administration even drew criticism with its largely unanticipated decision to allow and facilitate media coverage of the Iraq war by “embedding” journalists with individual military units. Pentagon officials said the policy — a contrast to the restrictions on coverage in the first Persian Gulf War in 1991 — was aimed at giving the public firsthand information about the war. Some journalists applauded the policy, but others saw it as likely to lead to more positive stories by tying reporters more closely to the servicemembers they were covering.¹² “Initially, there was a lot of debate,” the Heritage Foundation’s Kochems

remarks. "That seems to have quieted down."

Overall, many secrecy critics say the Bush administration has been particularly aggressive in restricting access to information, far more than previous administrations of either party. "Absolutely," says Philip Melanson, director of the policy studies program at the University of Massachusetts in Dartmouth. "The restrictive attitude began even before 9/11," he says, noting that Cheney's energy task force was "a domestic-policy initiative that had nothing to do with national security."

Other experts and advocates, however, caution against singling out the Bush administration for criticism. "It would be wrong to see this in partisan tones," says Blum of Openthegovernment.org. "The patterns of secrecy go far beyond any administration. The judicial branch plays a part in this by giving increased deference to the executive branch on secrecy. And Congress has to step up to the plate, too."

In fact, the administration has won almost all of the court battles over secrecy, including the dispute over the Cheney task force and the restrictions on the coverage of the post-9/11 immigration crackdown. On Capitol Hill, some members of Congress have criticized the administration's penchant for secrecy — Democrats most vocally but also some Republicans. But Aftergood of the Federation of American Scientists says Congress has generally failed to challenge the administration directly and forthrightly.



Anti-war activist Daniel Ellsberg, who leaked the Pentagon Papers to The New York Times during the Vietnam War, is arrested while protesting against a possible war with Iraq outside the U.S. Mission to the United Nations in New York City on Dec. 10, 2002.

Getty Images/Mario Tama

"If at least Congress changed, then we would have somebody in the government fighting for greater disclosure and in a position to compel such disclosure," Aftergood says. "Right now, we don't."

Should Congress make it easier to obtain government records under the Freedom of Information Act?

Reporter Christian Lowe got a hot tip in August 2004: Some of the body armor issued to Marines fighting in Iraq had critical, life-threatening defects, and the Marine Corps knew of the flaws before accepting the protective vests. But it took eight months — and a formal Freedom of Information Act request — before the story finally appeared in Lowe's

newspaper, the *Marine Corps Times*, in May 2005.

Lowe says he might have been able to write the story without the FOIA, but the documents — obtained not from the Marines but from the Army — helped lock it up. "It was undisputable," Lowe explains. "You had the evidence right there in print."¹³

A few days before the story was to appear, the Marine Corps recalled the shipment of some 5,200 protective vests. Ironically, however, Lowe says the Corps also responded to the story by deciding that specifications for body armor would be exempted from the FOIA law in the future — on national security grounds.

Lowe's experience illustrates both the benefits and the pitfalls of the landmark law. Since it took effect in 1967, countless reporters and others have used the FOIA to ferret out information ranging from historical gossip to damning evidence of government waste,

fraud or abuse. But FOIA requesters routinely find that use of the law is slow and cumbersome, compliance often incomplete and judicial review of agency decisions unhelpful.

FOIA advocates say the difficulties in using the law have increased under President Bush. They point to a controversial memorandum — issued by Attorney General Ashcroft a month after the 9/11 terror attacks — advising agencies to "carefully consider" possible exemptions before releasing documents under the act. The memo promised that the Justice Department would defend the withholding of documents unless the agencies' decisions had no "sound legal basis."¹⁴

Using the Freedom of Information Act

The Freedom of Information Act (FOIA), establishes a broad but qualified right of access to any “records” held by a federal agency. Similar laws are on the books in all the states.

Enacted in 1966, the FOIA allows anyone to request records without stating the reason. Agencies have a 20-day deadline for responding to a request, and requesters may sue in any federal court to challenge an agency’s decision to withhold materials. If successful, the requester can recover costs and attorneys’ fees.

The law exempts Congress, federal courts and the White House, as well as the military during wartime. In addition, the act identifies the following nine categories of materials that need not be made public:

- “Properly classified” in the interest of national defense or foreign policy.
- Related solely to the agency’s “internal personnel rules and practices.”
- Specifically exempted from disclosure by separate statute.
- “Trade secrets” or other confidential commercial or financial information.
- Inter- or intra-agency memorandums or letters not subject to discovery in court.
- Personnel, medical and similar files for which disclosure would constitute a “clearly unwarranted invasion of personal privacy.”
- Compiled for law enforcement purposes if disclosure could:
 - a) Interfere with law enforcement proceedings;
 - b) Deprive a person of a fair trial or adjudication;
 - c) Constitute an unwarranted invasion of personal privacy;
 - d) Disclose the identity of a confidential source;
 - e) Disclose law enforcement techniques, procedures or guidelines;
 - f) Endanger the life or physical safety of an individual.
- Reports prepared by or for use by agencies regulating financial institutions.
- Geological and geophysical information and data concerning wells, including maps.

Source: T. Barton Carter, Marc A. Franklin and Jay B. Wright, The First Amendment and the Fourth Estate: The Law of Mass Media (9th ed.), 2005.

Weitzel of the journalists’ coalition notes that Ashcroft’s successor, Alberto Gonzales, has kept the memorandum on the books. “Every sign, every memo that has come out in this area

is that they are trying to control information more than any administration since the start of the FOIA,” Weitzel says.

Ashcroft’s memorandum adds to

the inherent difficulties in getting agencies to comply with the law, says Rebecca Daugherty, director of the Freedom of Information Service Center at the Reporters Committee for Freedom of the Press. “We’ve never seen the respect for FOIA as a law that needs to be enforced,” she says. Sympathy for the law has continued to recede in recent years, she adds, both in the executive branch and in the courts.

An additional difficulty, Daugherty says, is lack of resources. FOIA offices in individual agencies are typically understaffed and underfunded while the volume of requests under the law has been growing. “Without those resources, it’s always easier not to give out information than to give it out,” she says.

Congress has revisited the law many times since it was enacted. In the first major revision in 1974, lawmakers made it easier to use. But since then, many of the changes have limited the scope of the law. Congress did give FOIA requesters one major benefit in 1996, however, by extending the law to electronic records and requiring electronic delivery of documents when possible.

Now, companion bills to make FOIA somewhat easier to use are pending in the House and the Senate, both sponsored by Republicans. “It’s a shame that conservatives aren’t involved in the fight for open government, because to me it’s the most conservative of principles,” says Sen. John Cornyn, R-Texas, who is cosponsoring the Senate bill with Democrat Patrick J. Leahy of Vermont.¹⁵

Cornyn advocated for open government while serving as Texas attorney general before his election to the Senate in 2002. Rep. Lamar Smith, a fellow Texas Republican and one-time newspaper reporter, is sponsoring the companion House bill.

The legislation would enforce the current, 20-day deadline for responding

to FOIA requests by requiring agencies to set up hotline tracking systems and allowing courts to overturn agencies' denials more easily if deadlines were not met. The bills would also make it somewhat easier to win attorneys' fees for going to court to enforce FOIA requests and would specifically entitle freelance journalists to a waiver from an agency's research and copying costs.

Leahy also has proposed a separate measure — not supported by Cornyn — that would repeal the part of the 2002 homeland security bill that allows companies to report security vulnerabilities as “critical infrastructure information” exempt from the law. Leahy calls that provision “the single greatest rollback in FOIA history.”

Daugherty says the legislation “would definitely make some improvements,” while Blum of OpenTheGovernment.org calls the measures “a good first step.” Bush himself told the newspaper editors in April that he wanted to work with Cornyn on the issue. Still, the prospects for passing the legislation in the current Congress are widely viewed as close to nil.

“History teaches us that it often takes more than a couple of years to get amendments to the Freedom of Information Act passed,” says Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press. “They are not viewed as being as urgent as other things Congress considers.” ■



Sgt. Charles Graner appears poised to punch an Iraqi detainee at Abu Gbraib prison as other prisoners lay bound and hooded. Photos showing mistreatment at the facility were first aired by CBS News' "60 Minutes II." Graner was sentenced to prison for his role in the abuses.

Washington Post via Getty Images

time” publish a journal of its proceedings (Art. I, sec. 5, cl. 3), except for “such parts as may in their judgment require secrecy.” That provision has been taken to imply that either chamber may meet and deliberate in secret session.¹⁷

In fact, both the Continental Congress and the Constitutional Convention met in secret. Though secret sessions are now rare, both chambers of Congress made extensive use of secrecy in their early years. The House met frequently in executive session through the end of the War of 1812 but only five times since then. The Senate used secret sessions for

all nominations and treaties until 1929; since then, it has met in secret 54 times, usually on national security matters or during impeachment proceedings.¹⁸

As early as the mid-19th century, the United States was professing a commitment to openness as an instrument of foreign policy. In his book *Secrecy: The American Experience*, the late Sen. Moynihan noted that the Department of State began in the 1870s to compile correspondence and documents in the annual volume *Foreign Relations of the United States*. At the end of World War I, President Woodrow Wilson famously articulated this U.S. theme in the first of his Fourteen Points: “Open covenants of peace, openly arrived at.”¹⁹

Yet, as Moynihan points out, by requesting and signing into law the Espionage Act of 1917 Wilson himself helped create the 20th-century culture of secrecy. The act, signed only three months after the U.S. entry into the war, made it a crime to obtain or to disclose national defense information to a foreign government “with the intent or

BACKGROUND

Competing Imperatives

Issues of government secrecy and openness produced few major conflicts in early U.S. history. In the 20th century, however, the emergence of the United States as a major world power helped create a new impetus for government secrecy just as the advent of instantaneous communication was creating a desire for and expectation of more information from and about government. The competing imperatives have fueled disputes that have raged nearly continuously since the 1960s.¹⁶

Two constitutional provisions require a measure of government openness. Congress is required to publish a “regular statement” of the government’s receipts and expenditures (Art. I, sec. 8, cl. 7). In addition, each house of Congress must keep and “from time to

reason to believe” that the information would be used to injure the United States. The act remains on the books today with several amendments, though the most controversial addition — the speech-restrictive Sedition Act of 1918 — was repealed in 1921.

Over time, a system for classifying national security information evolved, with periodic calls to tighten the rules to prevent unauthorized disclosures. But there were also complaints about overclassification, such as a 1956 report by a five-member Defense Department committee. In consolidating the classification system the next year, however, Defense Secretary Charles E. Wilson did nothing about the issue. In the same year, the congressionally established Commission on Government Security proposed making it a crime for someone outside or inside government to disclose classified information. The proposal died after journalists pointed out it was tantamount to press censorship.

Meanwhile, the growth of the modern regulatory state led to procedures and rules premised on a degree of openness. The Federal Register Act, passed by Congress in 1935, mandated daily publication of presidential proclamations, executive orders and agency regulations. A decade later, the Administrative Procedure Act (APA) of 1946 required that agencies allow the public to participate in the rule-making process. Two decades after that, Congress passed the FOIA, establishing the public’s right to see agency records unless they were exempted by the statute. Privately dubious, President Lyndon B. Johnson nonetheless signed the bill into law in 1966; it went into effect on July 4, 1967.

The civil rights and anti-war movements of the 1960s and early ’70s triggered major conflicts with two of the government’s most secretive agencies: the CIA and the FBI. Disclosures that the CIA had helped destabilize unfriendly governments and that both agencies had investigated domestic political groups

led to major congressional probes in the early 1970s. Lawmakers eventually recommended that the executive branch curtail some of the practices and that Congress should strengthen its oversight and public accountability. Despite the reforms, both agencies continued to resist journalists’ and watchdog groups’ efforts to use FOIA to examine their actions, both past and present.²⁰

A more focused confrontation produced a significant victory for government openness when the Supreme Court in 1971 rejected the Nixon administration’s efforts to block publication of the so-called Pentagon Papers, the once-secret Defense Department study of the Vietnam War. Daniel Ellsberg, a former Pentagon researcher turned anti-war activist, leaked the report to *The New York Times* and later to *The Washington Post* and other newspapers. Claiming a danger to national security, the Justice Department went to federal court to try to stop publication of articles about the report. But in a 6-3 decision the high court said the government had failed to meet the “heavy burden” required to justify press censorship. Years later, Erwin Griswold, the solicitor general who argued the case, commented, “In hindsight, it is clear to me that no harm was done by publication of the Pentagon Papers.”²¹

Shifting Views

Congress strengthened the statutory framework for access to government records in the 1970s and over the next two decades periodically faulted the executive branch for access restrictions and overclassification. Democratic presidents Jimmy Carter and Clinton professed somewhat greater support for open government than Republicans Ronald Reagan and George H. W. Bush. Overall, however, open-government advocates said access to information and records often continued to be slow, expensive and incomplete.

Almost from the start, the executive branch displayed marked recalcitrance in complying with the Freedom of Information Act. “By and large, the agencies resisted the law,” the University of Massachusetts’ Melanson writes.²²

By the early 1970s, discontent among lawmakers and open-government advocates had grown to the point that Congress began work on a major overhaul of the act. The 1974 amendments, enacted by a wide margin over President Gerald R. Ford’s veto, most significantly provided for judicial review of agency decisions to withhold requested records. It also narrowed the blanket law enforcement exemption to allow withholding documents only when disclosure would result in specific harms — such as interference with ongoing enforcement proceedings or disclosure of a confidential informant. The overhaul also established a 10-day deadline for agencies to respond to FOIA requests and limited copying costs that could be charged to requesters.²³

Also in 1974 Congress passed a law to take custody of President Nixon’s presidential papers and tape recordings after he resigned in the wake of the Watergate scandal. Lawmakers followed four years later with the broader Presidential Records Act, which established public ownership of all future presidential records beginning with the 1981 presidential term. Passed by a Democratic-controlled Congress and signed by Carter, the law provided that most presidential records were to become public property at the end of a president’s tenure. However, a former president could restrict access to materials in some categories — including national defense, foreign policy and presidential appointments — for up to 12 years.²⁴

During his two terms in the 1980s, Reagan was less friendly to open-access policies. He issued a new order on classified information in 1982 — Executive Order 12356 — which ended the

Continued on p. 1016

Chronology

1960s-1970s *Congress allows public access to government information.*

1966

President Lyndon B. Johnson signs Freedom of Information Act (FOIA); law takes effect in 1967.

1971

Supreme Court refuses to block publication of Pentagon Papers.

1974

Congress strengthens FOIA by setting deadlines for agencies to release information, providing for judicial review; also passes Privacy Act to give individuals right to see government information about themselves.

1978

Congress passes Presidential Records Act, providing that presidential papers be released to public 12 years after end of administrations; law takes effect in 1981.

1980s *Reagan administration limits information access.*

1982

President Ronald Reagan orders use of highest secrecy level for classifying information and eliminates requirement to declassify documents after 30 or 50 years.

1986

Congress passes and Reagan signs FOIA revision, somewhat broadening law enforcement exemption.

1989

Supreme Court says agencies can withhold records requested under FOIA if disclosure would not serve "central purpose" of law.

1990s *Clinton administration loosens restrictions on access to government information.*

1995

President Bill Clinton orders a 25-year limit on secrecy classification unless specific harm would result.

1996

Congress passes Electronic Freedom of Information Act, requiring agencies to make requested records electronically available whenever possible.

1997

Commission on Protecting and Reducing Government Secrecy, headed by Sen. Daniel P. Moynihan, D-N.Y., criticizes excessive secrecy, proposes various reforms; legislation fails to advance.

2000-Present

President George W. Bush greatly expands use of secrecy; sticks to policies despite widespread criticism.

January-May 2001

Energy task force headed by Vice President Dick Cheney meets in secret until its proposal is unveiled in May.

September-October 2001

After 9/11 terrorist attacks government imposes tight secrecy on roundup of Muslim immigrants and others. . . . Attorney General John Ashcroft tells agencies to use FOIA exemptions to withhold records if legally permitted. . . . Congress passes and Bush signs USA Patriot Act, which limits disclosure of anti-terror investigations.

November 2001

Bush signs executive order on Nov. 1 allowing White House or former presidents to veto release of presidential papers; historians, archivists file suit to invalidate.

December 2002

Federal judge rejects effort by General Accounting Office to obtain energy task force records.

2003

Supreme Court in May rejects news media challenge to closed post-9/11 immigration hearings; federal appeals court in June refuses efforts to obtain names of detainees under FOIA. . . . American Civil Liberties Union files FOIA suit in October seeking documents on treatment of detainees at Cuba's Guantánamo Bay Naval Base and Abu Ghraib prison in Iraq.

2004

Federal judge in March dismisses historians' challenge to Bush order on presidential records. . . . Bush in April affirms support for open government to newspaper editors but cites need to prevent leaks. . . . Supreme Court in June throws out appeals court ruling to allow interest groups to examine records of energy task force meetings with industry executives. . . . New York federal judge criticizes Pentagon for slow response on ACLU suit; documents released in December show FBI criticism of Defense Department's interrogation techniques.

2005

Federal judge in September rejects National Security Archive suit to obtain 2004 National Intelligence Estimate on Iraq. . . . ACLU wins ruling for release of more Abu Ghraib pictures, but government to appeal.

The Outing of Valerie Plame . . .

Amidst new fears about bioterrorism and germ warfare, Vice President Dick Cheney convened a meeting of top advisers in December 2002 to debate whether to resume widespread vaccination of Americans against smallpox.

The impetus for the meeting came in part from recently received intelligence — described a few days earlier in a story by *New York Times* reporter Judith Miller — that Iraq might have obtained “a particularly virulent form of smallpox” from a Russian lab. Miller attributed the information to “senior administration officials.”

Three years later, *Newsweek* magazine implied that Miller must have been helped on the story by none other than I. Lewis “Scooter” Libby, Cheney’s chief of staff and a determined hawk — both on Iraq and on germ-warfare issues.¹

Libby’s role as a behind-the-scenes source for the high-profile *Times* reporter embarrassingly came to light in 2005 in the politically charged investigation of a different leak: the identity of an undercover CIA operative married to a critic of the Bush administration’s Iraq policies. Miller spent 85 days in jail shielding Libby as a confidential source and later — with Libby’s waiver of confidentiality — gave federal grand jury testimony used to indict him on five felony counts of lying, perjury and obstruction of justice.²

Libby, who resigned immediately after the Oct. 28, 2005, indictment, was charged with lying to FBI agents and the grand jury when he denied having divulged to Miller and *Time* magazine’s Matt Cooper the identity of Valerie Plame Wilson, a CIA expert on weapons of mass destruction (WMD). Plame’s husband, former diplomat Joseph Wilson IV, had challenged the administration’s prewar claim that Iraq had an ongoing WMD program.

After Wilson went public, news stories quoted unnamed administration officials identifying Plame as an undercover agent, which can be illegal under a 1982 law prohibiting the disclosure

of undercover agents’ identities. Democratic lawmakers and others accused the administration of revealing Plame’s identity as political retaliation. After Attorney General John Ashcroft recused himself, Deputy Attorney General James Comey named U.S. Attorney Patrick Fitzgerald of Chicago as special counsel to investigate the leak.

Fitzgerald quickly subpoenaed prominent journalists to identify the administration officials quoted as identifying Plame. For reasons still unexplained as of November 2005, Fitzgerald did not subpoena syndicated columnist Robert Novak — the first to publish Plame’s identity in July 2003. A few days later Cooper named Plame in a short item on *Time*’s Web site.

Some of the subpoenaed journalists agreed to testify under some limitations, but Miller — who never wrote a story about Plame — and Cooper resisted testifying, claiming a First Amendment right to shield the identity of a confidential source. They appealed all the way to the Supreme Court. Cooper avoided going to jail for contempt of court by agreeing on July 6 to testify after receiving a waiver of confidentiality from his source — who turned out to be Karl Rove, deputy White House chief of staff and Bush’s closest political adviser.

Saying she had no similar waiver, Miller stood by her refusal to testify and was ordered jailed. She was released on Sept. 29 after obtaining a full and voluntary waiver of confidentiality from her source, whom she later identified as Libby.

With the immediate mystery solved, reporters, commentators and media-watchers worked overtime for the next few weeks analyzing the roles Libby and Rove played throughout the Bush administration as anonymous sources for news stories. Rove was well known as an adviser and occasional administration spokesman, and his role as a secret source was often obvious. Only after Libby’s indictment, however, did news stories clarify that the low-profile Libby had also met frequently with reporters.³

Continued from p. 1014

30- to-50-year limit on classification that Carter had established. Reagan’s order also directed officials to classify information at the highest secrecy level possible; Carter had specified use of the lowest level available.²⁵ Separately, Reagan began pushing in his first year in office for restrictive changes in the FOIA. One modest change approved in 1984 exempted some CIA files from the law. A broader measure stalled but gained passage two years later as a late-added amendment to a major anti-drug bill.

The Freedom of Information Reform Act of 1986, among other changes, broadened the law-enforcement exemption and made it more difficult for non-media requesters to obtain fee waivers for research and copying charges.²⁶

During his eight years in the White House in the 1990s Clinton rolled back some of Reagan’s restrictions. Clinton’s Executive Order 12958 in 1995 made older secrets more accessible by allowing declassification of documents after 25 years unless disclosure would “clearly and demonstrably damage na-

tional security,” assist in development of weapons of mass destruction or identify confidential informants. The order also established the Interagency Security Classification Appeals Panel (ISCAP) to hear appeals of agencies’ refusal to declassify requested documents. Over time, the panel has overruled agencies well over half the time.²⁷

Clinton also signed into law the milestone Electronic Freedom of Information Act Amendments of 1996, which required agencies to make records electronically available. The

. . . Leaking Secrets to Punish Political Foes?

The indictment charges that Libby went to some lengths within government channels in May and June 2003 to find out about Plame. He allegedly then discussed Plame in three conversations with Miller in June and July and with Cooper on July 12 — all before the Novak column appeared on July 14.

Libby, who pleaded not guilty at an arraignment on Nov. 3, allegedly told investigators and the grand jury that he had picked up information about Plame from other journalists — including Tim Russert, NBC's Washington bureau chief — and passed it along to others as Washington-insider gossip. After the indictment, Russert said he had denied Libby's version of their conversation to the grand jury.

One of Libby's lawyers, Joseph A. Tate, suggested that Libby may rely on a faulty-memory defense in the case. "Mr. Libby testified to the best of his recollection on all occasions," Tate said on the day of the indictment.⁴

Rove was not indicted but remains under investigation. White House Press Secretary Scott McClelland had declared earlier that Rove had not divulged Plame's identity. Fitzgerald subsequently empaneled a new grand jury for the case on Nov. 18, after the belated disclosure that another administration official had disclosed Plame's identity even earlier to *Washington Post* investigative reporter and author Bob Woodward.⁵



I. Lewis "Scooter" Libby

Karl Rove

Getty Images (both)

Whatever the final outcome of the so-called Plamegate scandal, a longtime open-government advocate says the case demonstrates the administration's inconsistent attitude toward secrecy.

"Most leak investigations are demanded by the White House," says Athan Theoharis, a professor of history at Marquette University in Wisconsin. "In this case, it's the White House that is leaking. For an administration that is so committed to secrecy, [it appears] secrecy is something that is fungible, and in some cases it's political."

¹ Evan Thomas, "Cheney's Cheney," *Newsweek*, Nov. 7, 2005. Thomas described the timing of Miller's story shortly before the Cheney meeting as "probably no coincidence." Miller's story — headlined "C.I.A. Hunts Iraq Tie to Soviet Smallpox" — appeared on p. A18 of the *Times*' print edition, Dec. 3, 2002.

² In addition to the *Newsweek* article, another comprehensive story that focuses on the media-related aspects of the case is Barton Gellman, "A Leak, Then a Deluge," *The Washington Post*, Oct. 30, 2005, p. A1. A good timeline of the case appears with the story.

³ See, for example, Glenn Kessler, "With Vice President, He Shaped Iraq Policy," *The Washington Post*, Oct. 29, 2005, p. A1.

⁴ Quoted in Jim VandeHei, "Libby May Rely on Faulty-Memory Defense," *The Washington Post*, Oct. 30, 2005, p. A14.

⁵ See Carol D. Leonnig and Jim VandeHei, "Another Grand Jury for Leak Case," *The Washington Post*, Nov. 19, 2005, p. A1; Jim VandeHeil and Carol D. Leonnig, "Woodward Was Told of Plame More Than Two Years Ago," *The Washington Post*, Nov. 16, 2005, p. A1. Woodward's source came forward to Fitzgerald and then released Woodward from a pledge of confidentiality to permit the reporter to testify before the grand jury but not to be publicly identified.

law also increased from 10 days to 20 the number of days within which an agency must respond to FOI requests — a change aimed at improving agencies' response time by easing a deadline that had proved unworkable.²⁸

Meanwhile, the Supreme Court proved less than generous in interpreting the FOIA. In various decisions in the 1980s, the court had blocked use of the act to obtain policy-related records held by outside contractors, materials turned over to the Library of Congress by outgoing Secretary of State Henry A. Kissinger and

files on individuals named in Nixon's infamous "enemies list."²⁹ In one of the most important rulings, the court in 1989 ruled that "rap sheets" held by the FBI were exempt under the act's privacy provision even though the information on an individual's arrests and convictions was typically public record at the local or state level. The ruling in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press* said rap sheets could be withheld because their disclosure would not further the act's "central purpose of exposing to public scrutiny official in-

formation that sheds light on an agency's performance of its statutory duties." In later decisions, the court invoked the same "central purpose" test to further circumscribe the law.³⁰

In the 1990s Congress re-entered the debate over government secrecy by creating a joint executive-congressional commission to study the issue. Sen. Moynihan, who had pushed for its creation, headed the 12-member Commission on Protecting and Reducing Government Secrecy. The Moynihan commission's report, issued in 1997,

included predictable criticism of excessive secrecy along with recommendations for a law to govern classification procedures and creation of a national declassification center.³¹ Open-government advocates called the recommendations useful but modest. In any event, only two senators attended a committee hearing on the report in May 1997, and a bill embodying the recommendations went nowhere.³²



Getty Images/Joe Raedle

Journalists who will be “embedded” in Marine units receive a briefing from Col. Ronald Bailey after arriving in Kuwait City in March 2003. More than 600 journalists were attached to military units to cover the expected possible war with Iraq.

downs and other enforcement actions initiated after the Sept. 11 terrorist attacks. The government detained hundreds of mostly Muslim foreigners for suspected immigration violations in the weeks after the attacks, refused to identify them and won an order from the chief immigration judge closing their deportation hearings.

News organizations challenged the secret immigration proceedings in separate cases — successfully in Michigan and unsuccessfully in New Jersey. But the Supreme Court’s refusal in May 2003

to hear the media’s appeal in the New Jersey case effectively ended the battle with the secrecy policy upheld.³⁵

Meanwhile, the federal appeals court in Washington in June 2003 similarly rejected an effort by the Center for National Security Studies to use the FOIA to obtain a list of the names of the detainees. The court agreed with the administration’s argument that releasing the names could give terrorists “a virtual road map” to the government’s investigation.³⁶

The administration also included secrecy provisions in its major post-9/11 legislative proposal — the USA Patriot Act — approved by Congress in October 2001 barely a month after the terrorist attacks. Among other things, the act gave the FBI authority to obtain subpoenas for personal records from the secret Foreign Intelligence Surveillance Act court in any terrorism-related investigation; the section also prohibited “any person” from disclosing any information about the FBI’s use of the subpoenas, known as “national security letters.”³⁷

The ACLU challenged that provision and others in a still pending suit filed in federal court in Michigan in July 2003.

Increasing Secrecy

From the earliest days of his first term in 2001, President Bush set a tone of secrecy and allowed Justice Department and other officials to impose ramped-up secrecy after the 9/11 terrorist attacks later that year. Four years later, the administration’s policies continue to reflect what open-government advocates and a range of outside observers describe as unprecedented levels of secrecy. Administration officials generally dispute the accusations and — with several legal victories under their belt — show no signs of changed attitudes at the White House or elsewhere in the executive branch.

The administration won two legal battles defending the secrecy of the Cheney energy task force against the backdrop of accusations of undue influence by energy industry representatives in shaping its recommendations. Administration officials said confidentiality was both legal and necessary to ensure candid advice for the president and noted the similar secrecy adopted by a health care task force headed by then-first lady Hillary Rodham Clinton.

In the first fight, a federal judge in Washington in December 2002 rejected on separation-of-powers grounds a bid by the GAO to obtain access to task force records.³³

In the second fight, the Sierra Club, the liberal environmental organization, and Judicial Watch, a conservative watchdog group, argued for access to information under the Federal Advisory Committee Act, which requires open meetings by government policymaking committees with outside members. The federal appeals court in Washington initially allowed the groups’ limited discovery to try to show that industry representatives served as de facto members of the task force. But the Supreme Court in June 2004 ordered the appeals court to reconsider the decision. And in May 2005 the appeals court dismissed the groups’ suit. “The president must be free to seek confidential information from many sources, both inside the government and outside,” Judge A. Raymond Randolph wrote for the unanimous three-judge panel.³⁴

The administration proved similarly successful in defending its restrictions on information about immigration crack-

In addition, the ACLU won lower-court rulings that struck down the national security letter provision in a New York case and lifted the ban on disclosure of the receipt of a national security letter in a Connecticut case. The government's appeal of those decisions was argued before the Second U.S. Circuit Court of Appeals on Nov. 2, 2005.³⁸

With the post-9/11 policies dominating the news, Attorney General Ashcroft's 2001 memorandum advising agencies to be more cautious in granting FOIA requests received little attention and remains on the books, despite subsequent criticisms from open-government advocates.³⁹ A September 2003 GAO study of federal FOIA compliance officers cast some doubt on the impact of the directive. Nearly half of those responding — 48 percent — said Ashcroft's policy had had no effect on their agencies' likelihood of making discretionary disclosures under the act. But 31 percent said they had become less likely to make discretionary disclosures, and the vast majority of those — three out of four — cited Ashcroft's directive as a major reason.⁴⁰

Bush received more attention and more criticism with his unanticipated decision on Nov. 1, 2001, to allow either the White House or former presidents to block release of their presidential papers.⁴¹ Bush issued the new executive order shortly before former President Reagan's papers were to become subject to the Presidential Records Act — 12 years after he left office. Then-White House counselor Gonzales said the order — rescinding one Reagan had issued — would allow “an orderly process” to implement the act. Former President Clinton called the new order unnecessary, however, and the National Security Archive and the American Historical Association filed suit in federal court in Washington to try to invalidate it. In late March 2004, however, U.S. District Judge Colleen

Kollar-Kotelly dismissed the suit as moot, saying Reagan's records had already been released.⁴²

The access-restrictive policies adopted in Bush's first year set the tone for similar disputes through the rest of Bush's first term and into his second. In one of the most significant moves, Bush in March 2003 issued a revised directive on classification procedures — Executive Order 13292 — that extended until 2006 the scheduled declassification of documents under Clinton's order. Bush's order also eliminated Clinton's stipulation to classify documents at the lowest appropriate level and mandated secrecy for all information furnished in confidence by foreign governments.⁴³

Throughout, White House spokespersons disputed accusations of excessive secrecy. “We have been forthcoming at every turn, and we have always valued the right and the need of the public to have information about their government,” White House spokeswoman Anne Womack told *The Boston Globe* in February 2002.⁴⁴

Three years later, White House Deputy Press Secretary Dana Perino similarly defended the administration's policies. “We have done our best within the confines of the law to strike the right balance between transparency of government activity and the protection of information when disclosure would be harmful,” Perino said.⁴⁵ ■

CURRENT SITUATION

Court Battles

Open-government advocates are contesting restrictive Bush administration information policies in

court on several fronts, but with only limited success. The ACLU is using the Freedom of Information Act to obtain thousands of pages of documents on U.S. treatment of detainees overseas. The National Security Archive, however, hit a brick wall in trying to get an edited version of the 2004 National Intelligence Estimate on Iraq. But the archive hopes in a separate case that a federal judge in Washington will reconsider her decision upholding Bush's executive order limiting release of papers of former presidents.

The ACLU suit has generated a continuous stream of interim reports and accompanying news stories since October 2004 — one year after the group's first FOIA request and four months after the court action was filed.* In an initial ruling in September 2004, U.S. District Judge Alvin Hellerstein said the Pentagon had been “inattentive for many months” to the ACLU's requests.

Among the most important of the early disclosures, documents released in December 2004 showed that a special task force in Iraq tried to silence Defense Intelligence Agency personnel who observed abusive interrogations. The documents also showed that the FBI had objected unsuccessfully to some of the questionable techniques used by military interrogators on detainees held at the Guantánamo Bay Naval Base in Cuba. More recently, the ACLU in October 2005 issued an analysis of detainee autopsy reports showing that at least eight captives had died as a result of abusive interrogation techniques.

The ACLU suit came before the damning photographs of mistreatment of Iraqi captives at the Abu Ghraib prison were obtained and broadcast by “60 Minutes II” on April 28, 2004. The airing of the photographs — taken by

* Co-plaintiffs in the case are the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense and Veterans for Peace. The New York Civil Liberties Union is co-counsel in the case.

Whistleblowers Silenced by State Secrets Doctrine

In six months as a contract translator for the FBI, Sibel Edmonds came across what she thought were serious breaches of security procedures related to counterintelligence cases. But when she reported her suspicions through proper FBI channels, she was fired.

She then filed a wrongful-termination lawsuit, but the government got the case thrown out of court by invoking a weapon that can be especially powerful when used against whistleblowers: the state secret privilege.

Edmonds is one of several whistleblowers who have recently borne the brunt of tough actions by the Bush administration to silence or sideline internal critics. For instance, Frank Terreri, head of the air marshals unit of the Federal Law Enforcement Officers Association, was suspended in 2004 for criticizing the head of the Federal Air Marshal Service. Terreri has filed suit in federal court in Los Angeles contesting Department of Homeland Security rules limiting air marshals' rights to criticize agency procedures.¹

In Edmonds' case, the government's use of the little known state secret privilege could deny her any opportunity to contest her firing, which the Justice Department's own inspector general says resulted primarily from Edmonds' unsuccessful efforts to pursue allegations of security breaches.

The state secret privilege is a little known legal weapon the government can raise largely on its own say-so to prevent potentially harmful disclosures in courts. The government says the privilege is rarely invoked, but critics count at least 50 instances since the first clear judicial recognition of the privilege in 1953.² In that case, the government invoked the state secret privilege to block a suit by widows of airmen killed in the crash of a military aircraft, claiming the suit would reveal information about secret military equipment. More than 50 years later, however, it was revealed in 2004 that the accident reports included no military secrets but attributed the accident to faulty maintenance.

Edmonds, a Turkish-born naturalized U.S. citizen, said she was moved by love of her adopted country after the Sept. 11, 2001, terrorist attacks on the United States to put her multilingual knowledge to use as a contract translator for the FBI.³ Her work, according to a detailed account of the case in *Vanity Fair* magazine, entailed translating portions of wiretapped conversations involving Turkish officials who she says were targets of counterintelligence investigations.

Edmonds told *Vanity Fair* Contributing Editor David Rose that her troubles began soon after she started working for the FBI, when she received a surprise visit from a fellow translator and

the colleague's husband, an Air Force major and a former U.S. military attaché in the Turkish capital of Ankara. According to Edmonds, the visit appeared aimed at getting her to join Turkish-American lobbying groups and to befriend Turkish officials who were subjects of FBI scrutiny.

Edmonds suspected that the colleague might have improperly divulged information about the investigations. (The colleague denies any wrongdoing.) Edmonds reported her suspicions through channels but was fired for her trouble in March 2002. Three years later, the Justice Department inspector general's office concluded that the FBI had inadequately investigated Edmonds' allegations, but that the allegations were "the most significant factor in the FBI's decision to terminate her services."

By then, Edmonds had gone to court, claiming the FBI had violated her rights by firing her in retaliation for her accusations. Instead of answering the suit, Attorney General John Ashcroft invoked the state secret privilege to seek dismissal of the case. In a mostly classified declaration, the government argued that Edmonds' suit would necessarily reveal state secrets whose disclosure would be harmful to U.S. national interests and that the secrets could not be disentangled so as to allow the case to proceed with some testimony classified.

U.S. District Judge Reggie Walton agreed with the government's arguments and dismissed the suit in July 2004. Following a hearing closed to the public and news media, the U.S. Court of Appeals for the District of Columbia Circuit upheld Walton's ruling on May 6, 2005. American Civil Liberties Union (ACLU) lawyers representing Edmonds asked the Supreme Court to review the decision, but the justices declined on Nov. 28 to hear the case.

Ann Beeson, associate legal director of the national ACLU, says Edmonds' case is one of many instances of retaliatory action against whistleblowers who claim to have found embarrassing flaws in national or homeland security policies.

"From firing whistleblowers to using special privileges to cover up mistakes, the government is taking extreme steps to shield itself from political embarrassment while gambling with our safety," she says.

¹ Jerry Seper, "ACLU aims to lift gag rule on air marshals," *The Washington Times*, Nov. 10, 2005, p. A12. For background see Charles S. Clark, "Whistleblowers," *CQ Researcher*, Dec. 5, 1997, pp. 1057-1080.

² William Fisher, "Govt Puts 'Security' Defense to Frequent Use," *Inter-Press Service*, Aug. 15, 2005.

³ Background drawn in part from David Rose, "An Inconvenient Patriot?" *Vanity Fair*, September 2005, p. 264. See also Rebecca Carr, "FBI Whistleblower Appeals to Supreme Court," *Cox News Service*, Aug. 5, 2005.

servicemembers and showing Iraqi detainees in various degrading or sexually humiliating positions — touched off worldwide criticism. President Bush voiced "disgust" at the practices depicted, while members of Congress demanded a thorough investigation.⁴⁶

Despite the publication of the photographs, the Pentagon has strongly resisted the ACLU's FOIA requests to release all still or video images in its possession depicting treatment of Abu Ghraib detainees. In arguments before Hellerstein, government lawyers claimed

the photographs could be withheld under the FOIA's privacy exemption. But Hellerstein said the photos could be "redacted" as the ACLU lawyers had suggested so detainees could not be individually identified.

Continued on p. 1022

At Issue:

Has the Bush administration misused government secrecy?

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WRITTEN FOR THE *CQ RESEARCHER*, NOVEMBER, 2005

this administration has emboldened officials throughout the government to expand secrecy, undermining both the public's trust and its ability to hold our government accountable for decisions made in the name of all Americans.

The recent expansion of secrecy is well documented, although abusing secrecy by those in power is nothing new. The Clinton administration, for example, claimed executive privilege in an attempt to hide scandal and unsuccessfully tried to craft a health-care plan in secret.

But actions by top Bush administration officials have encouraged federal agencies to expand secrecy. Even before coming into office, the administration met behind closed doors with industry leaders to craft an energy policy and has been fighting public scrutiny of those meetings ever since. Attorney General John Ashcroft instructed federal agencies in 2001 to withhold information when in doubt, reversing the previous administration's directive to release information whenever possible.

In other matters, the administration has used the cover of secrecy to avoid controversy and maintain public support for U.S. actions. It fought the release of photographs documenting shocking prisoner abuses at Baghdad's Abu Ghraib prison as well as the return of flag-draped coffins of U.S. soldiers killed in Afghanistan and Iraq. And the administration is more concerned that information about the existence of controversial, secret U.S. prison camps in Eastern Europe was leaked to *The Washington Post* than it is about reports actually documenting abusive U.S. treatment of detainees or the government's refusal to abide by international agreements on torture. More recently, U.S. officials proposed halving industry disclosures on releases of toxic chemicals.

But focusing attention on the executive branch lets other branches of government off the hook too easily. The courts have been exceedingly deferential to executive-branch claims that protecting national security requires court cases to be kept secret. A court in Florida even ordered the case of a man detained in a terrorism-related investigation to be kept completely off the public docket.

And Congress manipulates openness to avoid scrutiny. In this age of the Internet, only well-connected lobbyists can read the text of bills as congressional committees vote on them. And the public is allowed to inspect reports on gifts from lobbyists to senators and their staffs only by visiting computer terminals in Senate offices.

To reverse this trend, we need to strengthen policies that give the public more democracy and less secrecy in government.

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WRITTEN FOR THE *CQ RESEARCHER*, NOVEMBER, 2005

it never ceases to amaze me when critics lambaste President Bush for being too zealous about keeping information out of the hands of terrorists like Osama bin Laden — information that might be useful to those wanting to kill Americans.

The critics complain: "There is too much secrecy in government. Bush is classifying too much. The public's right to know is being violated every day. The White House is encouraging a culture of secrecy in government. Civil liberties are no longer safe in America." Etc., etc., etc.

There is truth to these criticisms, though less than extreme critics claim. But I must respectfully ask the critics: You expected something different from Big Government?

Bush's critics forget that with Big Government always comes Big Secrecy. Sooner or later, those who seek less secrecy, less over-cautious classification and fewer intrusions on civil liberties must decide if those goals are more important than maintaining the sprawling, intrusive, ever-growing monstrosity we know as the federal government.

Liberty and Big Government cannot both exist for long among a people who mean to remain free. One or the other will ultimately be the dominant fact of our political life.

Critics also forget that America is at war. It is a cliché to say 9/11 "changed everything," but it's true. Our enemies are determined to kill millions of us and impose upon the survivors an Islamo-fascist dictatorship that would surely extinguish individual liberty for centuries.

Considering the porosity of our borders, the impossibility of protecting all potential targets against every possible attack and the insane willingness of legions of our enemies to blow themselves up to slay many of us, it is amazing Bush has not sought far more restrictive access to public buildings and events.

There is also considerable pressure within the law enforcement and intelligence communities for measures like a national identity card or a domestic passport. Thankfully, Bush has resisted such pressure. Similarly, there is support for an American Official Secrets Act to make it easier for government to keep a tighter lid on what can and cannot be published. Given Bush's evident antipathy for the media, how long before he proposes such a measure?

What is certain is that Bush's successor will someday demand like measures and more. And Big Government will be all too ready to oblige.

Continued from p. 1020

After the hearing, the government added another argument: that release of the photographs could incite violence against U.S. servicemembers in Afghanistan and Iraq. Hellerstein also rejected that argument. “Our nation does not surrender to blackmail,” he wrote near the end of a 50-page opinion, filed on Sept. 29, 2005. The government is now appealing the ruling.

“We believe the public has the right to know the full truth about who is responsible for the abuse,” ACLU attorney Singh says of the suit. “And so far, the government has not provided the full truth.”

Meanwhile, the National Security Archive is conceding defeat in its suit filed in October 2004 aimed at forcing the CIA to release portions of the National Intelligence Council’s downbeat July 2003 assessment of the Iraq situation.⁴⁷

In filing the suit, the archive’s lawyers acknowledged that the so-called National Intelligence Estimate included information properly classified and exempted from the FOIA. But the suit also noted that several officials — including President Bush on Sept. 19, 2004 — had referred generally to the assessment and contended that some parts of the document could be “segregated” and released.

U.S. District Judge Rosemary Collyer flatly rejected the suit in a 16-page ruling on Sept. 30, 2005. Refusing to examine the document herself, Collyer said she agreed with the CIA’s information-review officer that there were “no segregable portions that might sensibly be released.”

In a second suit, the archive has persuaded Judge Kollar-Kotelly to reopen its legal challenge to Bush’s November 2001 executive order on presidential papers. In dismissing the action in March 2004, Kollar-Kotelly said the release of former President Reagan’s papers had rendered the archive’s main complaint moot while its fear of delays in release of presidential papers in the future was too speculative. The judge agreed to reopen the

case after lawyers for the archive pointed out that they were attacking Bush’s decision as contrary to the provision in the Presidential Records Act that barred former presidents from invoking executive privilege to withhold materials.

Information Leaks

Long-sought information about the government’s role in detaining top terrorist suspects in secret prisons overseas is finally emerging — not through official releases or congressional investigations but through investigative stories by a *Washington Post* reporter. Some lawmakers want the Justice Department to investigate the leaks, but a leading secrecy critic says the episode illustrates the effect of overclassification in limiting public debate on critical policy issues.

Post reporter Dana Priest wrote that the CIA had been “hiding and interrogating some of its most important al Qaeda captives at a Soviet-era compound in Eastern Europe.” The story described the secret facility as one of a number of so-called “black sites” used by the agency since the 9/11 terrorist attacks to house and interrogate suspected terrorists away from public view, congressional oversight or judicial intervention.⁴⁸

The story — attributed to “U.S. and foreign officials familiar with the arrangement” — identified Afghanistan and Thailand as two countries where such secret facilities had been maintained in the past. The newspaper acceded to an administration request, however, not to name the Eastern European countries involved. But Human Rights Watch said the next day that it had used flight logs to track CIA-chartered aircraft in 2003 to airstrips in two Eastern European countries: Poland and Romania. Officials in both countries denied any role in the secret prisons.

The week after the story appeared, top congressional GOP leaders called for a joint House-Senate investigation into what they called an “egregious disclosure” of classified information. In a

letter to leaders of the House and Senate Intelligence committees, Senate Majority Leader Bill Frist, R-Tenn., and House Speaker J. Dennis Hastert, R-Ill., said the leak would “imperil our efforts to protect the American people and our homeland from terrorist attacks.”⁴⁹

The next day, however, Senate Intelligence Committee Chairman Pat Roberts, R-Kan., put a damper on the call for a congressional probe, suggesting that Congress should defer to the Justice Department. In their letter, Frist and Hastert had also asked for a Justice Department referral. The *Post* said the CIA had already reported the disclosure to the Justice Department, which was depicted as a routine procedure after publication of classified information.

The story appeared in the midst of a pitched fight between the administration and senators in both parties over a proposal by Sen. John McCain, R-Ariz., to bar “cruel” or “inhumane” treatment of detainees by U.S. personnel, including CIA operatives. The Senate approved the prohibition by a vote of 90-9 on Oct. 9 as an amendment to the Defense Department appropriations bill and attached a similar provision to a Defense authorization bill on Nov. 4.

The Bush administration says such legislation is neither necessary nor advisable. The “United States doesn’t do torture,” Bush has declared. Nevertheless, Vice President Cheney was lobbying lawmakers hard to exempt the CIA from coverage under the amendment, and the White House has threatened to veto any bill containing the measure.⁵⁰

The House-passed Defense spending and authorization bills did not include such a provision, leaving it up to House-Senate conferees to hash out the issue. However, Rep. John P. Murtha of Pennsylvania, ranking Democrat on the House Defense Appropriations Subcommittee, has vowed to call for a “motion to instruct” conferees to include the Senate provision in the final bill — a vote he said he would win hands down — when the House names

its conferees. "It's pretty hard to vote for torture," Murtha said.⁵¹

Whatever the legislative outcome, Aftergood of the Federation of American Scientists says the debate over U.S. treatment of detainees overseas has been hampered by the secrecy surrounding the practices. "There are all sorts of public-policy issues that are not being adequately debated because of restrictions on information," Aftergood says.

"Is torture permitted under any circumstances? If not, why is the administration opposing the amendment to prohibit torture by the CIA?" Aftergood asks. "We cannot get straight answers to these questions. Instead, we have to rely on big newspaper exposés like the *Post's* story."

Only two weeks after the CIA prison story, the *Post* got another leak that provided a late postscript to the protracted fight to get information about the energy task force that Cheney had headed in early 2001. Quoting from a "White House document . . . obtained this week," the newspaper reported on Nov. 16 that executives from four major oil companies — Exxon Mobil, Conoco, Shell Oil and BP America — had met with task force aides in the White House complex in 2001.

The meetings between energy executives and the task force had long been suspected but had been denied by industry officials as recently as the previous week, when they testified before a joint House-Senate committee hearing on gasoline price hikes.⁵²

Tom Fitton, president of the conservative watchdog group Judicial Watch, says the belated disclosure vindicates the organization's unsuccessful court fight to try to get information about the task force's meetings and procedures. "The courts told us we had to take at face value the government's assertion that the task force had no non-governmental members," Fitton says. The *Post's* story "would indicate that there was a higher level of participation by these insiders than they admitted to." ■

OUTLOOK

Culture of Openness?

With the American Colonies fighting for independence, the Continental Congress considered secrecy so important that members faced expulsion for divulging any information about the proceedings. A century-and-a-half later, the need for wartime secrecy was famously captured in the World War II warning, "Loose lips sink ships."

The Bush administration has waged the so-called war on terrorism with secrecy foremost in officials' minds. The administration has also gone to great lengths to control information about domestic-policy debates. Open-government advocates say the policies dampen public debate, diminish governmental accountability and — all the worse — hamper the country's efforts to strengthen homeland security.

"Prior to 9/11, people tended to focus on the fact that unauthorized disclosures of information could be detrimental and could result in Americans' losing their lives," says ISOO Director Leonard. "One of the great lessons of 9/11 is that the inappropriate hoarding of information could likewise be detrimental and result in Americans losing their lives."

The administration shows no signs of retreating from its policy of restricting much homeland security-related information, claiming the need to avoid giving terrorists a "roadmap" for future attacks. But National Security Archive Director Blanton says the lack of information increases the vulnerability to terrorist attacks. "The public has to be able to protect itself and be able to offer fixes," Blanton says. "That's the only way we're going to be more secure."

With classification of government documents at an all-time high, a top Pentagon official for information policy says the Pentagon recognizes the need to re-

duce unnecessary secrecy. The Pentagon has taken "positive steps" to try to train and educate classifiers to apply secrecy criteria with more care, Deputy Under Secretary of Defense for Counterintelligence and Security Robert Rogalski told an ISOO-sponsored symposium in mid-October. "We are trying to change [the] culture."

However, critics see little evidence of any reduction in overclassification. And Leonard agrees with critics who say the proliferation of new secrecy categories adds to the problems in getting government information. "The classification system has long-established rules, built-in mechanisms to challenge decisions and built-in limits to duration," he explains. "None of those things exist with respect to these widespread 'sensitive but unclassified' regimes that seem to be cropping up left and right."

Declassification, meanwhile, is understandably a low priority in the military or other national security agencies straining to meet the demands of the war on terror and the continuing conflicts in Iraq and Afghanistan. But, as Aftergood of the Federation of American Scientists emphasizes, continuing overclassification simply adds to the backlog of materials to be considered for declassifying at some later date.

At the same time, the main legal tool to combat government secrecy, the Freedom of Information Act, appears less and less effective in providing access, say journalists and others. Bureaucratically, FOIA matters are unglamorous, low-priority work in most agencies. "No one ever grows up wanting to be an FOI officer," Daugherty, of the Freedom of Information Service Center, says. She notes that after Michael Brown was forced to resign as director of the Federal Emergency Management Agency (FEMA) due to the government's bungled response to Hurricane Katrina, he was put to work as a temporary consultant handling FOI matters.⁵³

Courts also appear to be losing interest in enforcing the law, Daugherty

says. “Judges are tired of FOI requests,” Daugherty says. “They aren’t ruling in favor of requesters the way they used to.”

Critics say Congress could take some steps to bring government secrecy under control. Aftergood suggests a law stipulating that materials be classified only if disclosure would cause identifiable damage to national security. Blanton of the National Security Archive wants Congress to give greater authority to ISCAP, the panel that hears appeals of declassification refusals. Daugherty wants Congress to revise the Freedom of Information Act to overturn some of the restrictive court rulings and would like for courts to narrow the use of the privacy exemption to justify withholding information.

Above all, Aftergood says open-government advocates need to organize and advocate more forcefully for measures to reduce secrecy. “There is political opposition to reducing secrecy,” Aftergood told the ISOO symposium. “There are people who are very satisfied with the status quo. It is necessary for people worried about the issue to take sides.” ■

Notes

¹ See <http://action.aclu.org/torturefoia/>.

² See <http://trac.syr.edu>.

³ Quoted in Scott Shane, “Since 2001, Sharp Increase in the Number of Documents Classified by the Government,” *The New York Times*, July 3, 2005, sec. 1, p. 14.

⁴ Quoted in David Westphal, “Bush Proclaims Belief in Open Government,” *The Sacramento Bee*, April 15, 2005, p. A10.

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⁶ See Daniel Patrick Moynihan, *Secrecy: The American Experience* (1998), pp. 60-71. For a full account, see Robert Louis Benson and Michael Warner, *Venona: Soviet Espionage and the American Response* (1996).

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¹⁰ Quoted in David Nather, “A Rise in ‘State Secrets,’” *CQ Weekly*, July 18, 2005, p. 1958. Nather’s story catalogs other examples cited in this section.

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¹³ See Christian Lowe, “The Marines’ Flawed Body Armor,” *Marine Corps Times*, May 9, 2005 (www.marinetimes.com). Informed of the imminent publication of the story, the Marine Corps recalled the shipment of body vests in question.

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¹⁵ Quoted in David Nather, “GOP Champions for Releasing Information,” *CQ Weekly*, July 18, 2005, p. 1962. Some other information also drawn from the story. For a com-

plete summary of the bills, see Congressional Research Service, “Freedom of Information Act (FOIA) Amendments (109th Congress)” (updated June 28, 2005).

¹⁶ For general background, see Moynihan, *op. cit.*, and Philip H. Melanson, *Secrecy Wars: National Security, Privacy, and the Public’s Right to Know* (2001).

¹⁷ See Mildred Amer, “Secret Sessions of Congress: A Brief Historical Overview,” Congressional Research Service, updated October 2004. Some additional background also drawn from the report.

¹⁸ *Ibid.* The CRS report does not include the Senate’s most recent secret session, held on Nov. 1, 2005. See Charles Babington and Dafna Linzer, “Senate Democrats Force Closed Meeting,” *The Washington Post*, Nov. 2, 2005, p. A1.

¹⁹ Moynihan, *op. cit.*, p. 83. Wilson outlined his 14 points for a post-World War I settlement in an address to a joint session of Congress on Jan. 8, 1918.

²⁰ For background, see Athan G. Theoharis, “The Freedom of Information Act Versus the FBI,” and James X. Dempsey, “The CIA and Secrecy,” both in Theoharis (ed.), *A Culture of Secrecy: The Government Versus the People’s Right to Know* (1998).

²¹ The case is *New York Times Co. v. United States*, 403 U.S. 713 (1971). Griswold’s comment quoted in Tony Mauro, *Illustrated Great Decisions of the Supreme Court* (2000).

²² Melanson, *op. cit.*, p. 16. Some other background drawn in part from Melanson’s account.

²³ See *1974 Congressional Quarterly Almanac*, pp. 805-806.

²⁴ See *1978 Congressional Quarterly Almanac*, pp. 799-800.

²⁵ For a summary of Reagan’s executive order, see *FOIA Update*, Vol. III, No. 3 (1982), www.usdoj.gov/oip/foia_updates/Vol_III_3/page6.htm.

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²⁷ For the text, see *FOIA Update*, Vol. XVI, No. 2 (1995), www.usdoj.gov/oip/foia_updates/Vol_XVI_2/page5.htm.

²⁸ See *1996 Congressional Quarterly Almanac*, pp. 5-33 to 5-34; “Congress Enacts FOIA Amendments,” *FOIA Update*, Vol. XVII, No. 4 (1996), www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page1.htm.

²⁹ The decisions are *Forsham v. Harris*, 445 U.S. 169 (1980); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *FBI v. Abramson*, 456 U.S. 615 (1982).

³⁰ The citation is 489 U.S. 749 (1989).



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³⁴ The decision is *In re Cheney*.

³⁵ The decision in the New Jersey case is *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (CA3 2002). The Supreme Court refused to hear the case on May 27, 2003; the government declined to appeal the ruling in the Michigan case, saying that the need for the closed hearings had ended.

³⁶ The decision is *Center for National Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003). The Supreme Court refused in January 2004 to hear the case.

³⁷ For background, see Kenneth Jost, "Civil Liberties Debates," *CQ Researcher*, Oct. 24, 2003, pp. 871-894.

³⁸ The Michigan case is *Muslim Community Association of Ann Arbor v. Ashcroft*. The New York and Connecticut cases, with their appeals court docket numbers, are *Doe v. Ashcroft*, 04 Civ. 2614, and *Doe v. Gonzales*, 05 Civ. 1256. See Mark Hamblett, "2d Cir. Faults National Security Letters," *National Law Journal*, Nov. 7, 2005, p. 15.

³⁹ See Gina Holland, "Ashcroft Urges Caution With FOIA Requests," *The Associated Press*, Oct. 16, 2001.

⁴⁰ U.S. General Accounting Office, "Freedom of Information Act: Agency Views on Changes Resulting from New Administration Policy," September 2003.

⁴¹ Presidential Records Act Executive Order, Nov. 1, 2001, www.whitehouse.gov/news/releases/2001/11/20011101-12.html. For coverage, see Mike Allen and George Lardner Jr., "A Veto Over Presidential Papers," *The Washington Post*, Nov. 2, 2001, p. A1.

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FOR MORE INFORMATION

American Civil Liberties Union, 125 Broad St., 18th floor; New York, NY 10004-2400; (212) 549-2500; 122 Maryland Ave., N.E., Washington, DC 20002; (202) 544-1681; www.aclu.org. Uses the Freedom of Information Act (FOIA) to obtain documents on U.S. treatment of detainees overseas.

Brechner Center for Freedom of Information, P.O. Box 118400, 3208 Weimer Hall, University of Florida, Gainesville, FL 32611-8400; (352) 392-2273; <http://brechner.org>. Provides resources on media law topics and links to a variety of FOI organizations.

Coalition of Journalists for Open Government, 1815 North Ft. Myer Drive, Suite 900, Arlington, VA 22209; (703) 807-2100; www.cjog.org. Helps coordinate open-government and FOIA activities by more than 30 member journalism organizations.

Federation of American Scientists, 1717 K St., N.W., Suite 209, Washington, DC 20036; (202) 546-3300; www.fas.org. Publishes *Secrecy News*, a newsletter detailing the release and withholding of information by the government and armed forces.

Heritage Foundation, 214 Massachusetts Ave., N.E., Washington, DC 20002-4999; (202) 546-4400; www.heritage.org. Conservative think tank that maintains the Center for Media and Public Policy, which examines the public's right to know.

Information Security Oversight Office, National Archives and Records Administration, 700 Pennsylvania Ave., N.W., Room 500, Washington, DC 20408; (202) 219-5250; www.archives.gov/isoo/. Publishes statistics on government secrecy.

National Security Archive, The George Washington University, Gelman Library, Suite 701, 2130 H St., N.W., Washington, DC 20037; (202) 994-7000; www.gwu.edu/~nsarchiv/. Private reference center publishes declassified materials obtained through the FOIA.

OpenTheGovernment.org, 1742 Connecticut Ave., NW, Washington, DC 20009; (202) 234-8494; www.openthegovernment.org. Coalition of journalism, consumer and good-government organizations works to promote open-government policies.

Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209; (703) 807-2100; www.rcfp.org. Supplies information on public access houses the Freedom of Information Service Center.

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⁴⁴ Quoted in Anne E. Komblut, "Bush's Stance on Secrecy Draws a Number of Critics," *The Boston Globe*, Feb. 11, 2002, p. A3.

⁴⁵ Quoted in Nather, "A Rise in 'State Secrets,'" *op. cit.*

⁴⁶ For Bush's statement and other early reaction, see Thom Shanker and Jacques Steinberg, "Bush Voices 'Disgust' at Abuse of Iraqi Prisoners," *The New York Times*, May 1, 2004, p. A1.

⁴⁷ Documents in the suit are posted on the archive's Web site: www.gwu.edu/~nsarchive.

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The Next Step:

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Whistleblowers

Burns, Robert, “Contract Officer’s Demotion Appears Political, Dems Say,” *The Houston Chronicle*, Aug. 30, 2005, p. A5.

Congressional Democrats have asked Defense Secretary Donald H. Rumsfeld to investigate the removal of an Army Corps of Engineers’ top procurement official who criticized the awarding of a no-bid contract to Halliburton Co. — Vice President Dick Cheney’s former company — for work in Iraq.

Solomon, John, “Whistleblower Fights Ruling,” *The Houston Chronicle*, Dec. 25, 2004, p. A7.

An administrative judge of the U.S. Merit Systems Protection Board ruled that federal employees who are highly paid research and medical experts are not protected by the Whistleblower Act, which protects federal workers who raise allegations of federal wrongdoing.

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