

Severe threat to Freedom of Information

By Lucy Dalglish
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In the days immediately following September 11, the U.S. government embarked on a disturbing path of secrecy. The atmosphere of terror induced public officials to abandon this country's culture of openness and opt for secrecy as a way of ensuring safety and security.

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

Over the past three years, the administration of President George W. Bush has taken a variety of actions designed to restrict information from reaching the public, including:

1. 'The Ashcroft Memorandum'

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

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

...The increasing government push for secrecy is often curious. For instance, in July 2004, Forbes Magazine reported that the Department of Justice had denied a FOI Act request from a private party for copies of press releases issued by the agency concerning terrorism-related indictments. In January 2004, a Washington Post editorial decried the failure of the

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government to make Iraqi government records, seized during the invasion, available to Iraqi people or anyone else other than investigators seeking weapons of mass destruction.

Secrecy News reported in October 2003 that Patent and Trademark Office secrecy orders imposed upon inventors (even those who are not funded by government) to keep secret their discoveries that might be “detrimental to the national security” were issued 75 times in 2003, more by half than the 18 to 44 totals for each of the previous four years. In November 2003, The Post reported that the new Transportation Safety Administration had not made public test results on the new pilot program to test whether public or private airport screeners are more effective.

2. Secret Imprisonment, Arrests and Indictments

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

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

... Among the government’s best kept secrets in its war on terrorism are the identities of the hundreds of people it has locked up (and in many cases the reasons for their detention). Names, numbers and reasons are not only secret in Iraq, Afghanistan and Guantanamo Bay, they are secret in the United States. And an appeals court decision that the U.S. Supreme Court refused to review keeps them so. The court says the names can be secret for “national security” reasons. The government says they can also be secret because disclosure of the fact of incarceration could be stigmatizing, intruding upon the detainees’ personal privacy. ... Many of the people detained as part of terror investigations are never charged with crimes. Instead, the Bush administration appears to be using the federal material-witness statute as a kind of “preventive detention” for Arab or Muslim men whom authorities suspect of terrorist connections but lack evidence to charge. That approach is at odds with the purpose of the statute, which is to authorize the brief detention of witnesses

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to ensure that they appear to give testimony.

. . . In the relatively few cases where the government has seen fit to file criminal charges, rather than operate through the material — witness or enemy — combatant designations, federal prosecutors have aggressively sought to restrict public access to the proceedings. Frequently, judges have acceded to such requests, deferring to the government's claims that the secrecy is justified by post-Sept. 11 concerns about national security.

3. Erosion of the Reporter's Privilege

From the report: Leaks of sensitive information to the news media have angered government officials and sometimes the public, prompting a number of investigations. While it is difficult to tell exactly how prosecutors are handling the issuance of subpoenas to journalists, mainly due to the secrecy surrounding the grand jury process, they do appear to be following rules the attorney general's guidelines on subpoenaing the news media — which require that alternative sources of information must be exhausted before the government can subpoena a reporter.

. . . With national security concerns dominating American life, U.S. journalists face an increased likelihood since September 11 of being seen as government informants, with no constitutional right to keep sources confidential or to withhold unpublished materials from prosecutors. Crackdowns on government leaks also threaten the availability of confidential sources.

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

. . . The most alarming leak investigation, in which one reporter has been held in contempt and ordered to jail and several others are fighting subpoenas, involves the leak of undercover CIA officer Valerie Plame's identity. The investigation began after unidentified senior administration officials revealed Plame's identity to columnist Robert Novak, who published her name in a July 2003 column. Other Washington-area journalists were also reportedly given the information about Plame's identity.

. . . In May 2004, a Justice Department investigation sought to question several reporters at The Washington Post, the newspaper reported. In addition, The Los Angeles Times reported that reporters for Newsday were also being asked for interviews. On May 24, NBC's Tim Russert, host of "Meet the Press," and TIME magazine reporter Matthew Cooper were subpoenaed to appear before the federal grand jury. Explaining why the network was seeking to have the subpoenas quashed, NBC News president Neal Shapiro

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said in a statement that “sources will simply stop speaking to the press if they fear those conversations will become public.”

4. Newsgathering Under the USA PATRIOT Act

From the report: It is still unclear how or when the FBI’s expanded wiretapping and warrantless search powers will affect journalists, but the Justice Department has shown that it intends to use its powers aggressively, even making clear that a law barring newsroom searches is trumped by the USA PATRIOT Act when it comes to terrorism investigations.

The Act’s impact on newsgathering is still largely theoretical nearly three years after Congress rushed to enact the law. No newsrooms are known to have been searched and apparently no documents have been taken from reporters under the law — although those subject to such a search and seizure would be prohibited from talking about it.

Nevertheless, journalists should be concerned about certain provisions of the law, which grant broad new powers to government agents to investigate terrorism and make previous statutory protections for newsrooms almost irrelevant when it comes to terrorism investigations.

Congress enacted the law with little debate just six weeks after the terrorist attacks on the World Trade Center and the Pentagon. The awkwardly named law — the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 — expands the FBI’s ability to obtain records through secret court orders. The law also gives government investigators greater authority to track e-mail and telephone communications and to eavesdrop on those conversations.

Although aimed at trapping terrorists, those provisions of the law could ensnare journalists and compromise their ability to report on the war on terrorism.

Americans Can’t Fight a War Blind

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

Despite predictions from legal experts, appellate courts have been very reluctant to weigh in on actions — some of them extremely questionable — taken by federal agencies. So far, the executive branch has had free reign in determining how much citizens will know about the War on Terror. But American citizens and lawmakers seem to be slowly realizing they

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must speak up, or their ideal of a free and open society will be a thing of the past. American citizens seem less frightened, and some are more determined to maintain civil rights and liberties. Some citizens — but not enough — have started to object to the secret imprisonment of witnesses and immigrants. They are asking hard questions about airline security.

They want details about just how much the USA PATRIOT Act affects their civil liberties. They are questioning whether they were lied to when the Bush administration justified war with Iraq with claims about weapons of mass destruction.

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

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

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

— *Lucy Dalglish is the Executive Director of the Reporters Committee for Freedom of the Press. Their 2004 report, “Homefront Confidential” is now available at www.rcfp.org/homefrontconfidential/index.html For daily updates on threats to the public’s right to know, log on to the RCFP Weblog at www.rcfp.org/behindthehomefront <<http://www.rcfp.org/behindthehomefront>>.*

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