[ORAL ARGUMENT TO BE HELD ON NOVEMBER 18, 2002]

Nos. 02-5254, 02-5300

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR NATIONAL SECURITY STUDIES, et al.,
Plaintiffs-Appellees/Cross-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT AND BRIEF FOR CROSS-APPELLEE

ROBERT D. McCALLUM, JR.
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

MARK B. STERN
(202) 514-5089
ROBERT M. LOEB
(202) 514-4332
ERIC D. MILLER
(202) 514-2754
Attorneys, Appellate Staff
Civil Division, Room 9131
U.S. Department of Justice
601 "D" Street, N.W.
Washington, D.C. 20530-0001

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INTRODUCTION

At issue in this case is whether the government must release a list of names and other information about hundreds of individuals questioned and then held in connection with its ongoing investigation of the terrorist attacks of September 11, 2001. As explained in our opening brief, the government properly invoked FOIA Exemption 7 to protect the integrity of this ongoing investigation, the privacy interests of individuals who would prefer that their connection with the investigation remain confidential, and the lives and safety of Americans threatened by possible future terrorist attacks.

In their brief, plaintiffs ask this Court to ignore the expert judgment of the senior career officials responsible for

the most important law-enforcement investigation in this Nation's history. In detailed and unrebutted affidavits, those officials have explained that the release of the information sought in this case would enable terrorist organizations to interfere in various ways with the government's investigation of the September 11 terrorist attacks, and thus endanger the national security by facilitating similar or worse attacks in the future. These affidavits plainly draw a rational link between disclosure and the harms the government has identified, which is sufficient to justify withholding. Indeed, the identities of persons interviewed in criminal investigations are routinely withheld under Exemption 7. Moreover, contrary to plaintiffs' contention, the views of the officials are entitled to considerable deference, and there is no proper basis for disregarding those views in this case.

Plaintiffs' principal argument for disregarding these expert assessment of law enforcement and national security harms is that the government, not surprisingly, has released some information about the ongoing terrorism investigation. But none of the information released comes close, either in comprehensiveness or specificity, to the full list of names and other information that plaintiffs seek here. And this Court has held that the government does not waive an exemption under FOIA simply by releasing other, similar information.

Finally, plaintiffs' alternative claims under the common law and the First Amendment should be rejected. The common law creates no rights of access to material that Congress has specifically decided to exempt from FOIA and, in any event, is displaced here by rules and regulations that specifically prohibit disclosure. And while the First Amendment has been held to confer a right of access to judicial proceedings, that right has never been extended to apply to investigative records held by the Executive Branch.

ARGUMENT

I. Information About Individuals Questioned And Held In Connection With The September 11 Investigation, And Their Attorneys, Is Protected From Disclosure By FOIA Exemption 7.

In our opening brief, we showed that FOIA Exemption 7 protects from disclosure the names and other information about persons interviewed, including those subsequently detained, by the government in connection with its September 11 investigation. In pertinent part, that provision exempts from disclosure

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, . . . or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7). The district court correctly held that the information sought by plaintiffs was "compiled for law enforcement purposes." And as we explained in our opening brief,

release of that information would jeopardize the government's ongoing terrorism investigation, invade the privacy interests of individuals who have chosen not to publicize their connection to it, and endanger the lives and safety of both the targets of the investigation and the public at large. Plaintiffs' principal responses are that the government's disclosure of other information about the terrorism investigation has somehow undermined its exemption claims, and that the government is guilty of widespread wrongdoing in its treatment of individuals who were detained. Neither of these claims has merit.

A. This Case Involves Records Compiled For Law Enforcement Purposes.

The district court correctly concluded that the records at issue were "compiled for law enforcement purposes" within the meaning of Exemption 7. As the court explained: "There is no question that the Government's affidavits establish that the information sought in this case was gathered expressly for the legitimate law enforcement purpose of investigating the September 11, 2001 terrorist attacks." Op. 14 n.8.

Plaintiffs respond that they merely seek individual "jail records" or "arrest warrants." Br. 18. That is incorrect. Despite their repeated citation to Morrow v. District of Columbia, 417 F.2d 728, 741 (D.C. Cir. 1969), plaintiffs do not seek anything remotely resembling the "arrest books" at issue there, which "encompass[ed] merely a chronological record of each

arrest" at individual facilities. Instead, plaintiffs seek information about individuals who are the subject of a particular law enforcement investigation. Specifically, plaintiffs seek a comprehensive listing of names and other information about "individuals 'arrested or detained' . . . in the wake of the September 11 attack." Hodes Decl. Exh. A (emphasis added). The names of these individuals, and other information about them, obviously became known to the government in the course of the terrorism investigation. See Reynolds Decl. ¶¶ 2-4. Likewise, the fact that these individuals are of interest to the investigation is also plainly information that was generated by the investigation. Indeed, the compilations at issue were created precisely to enable responsible government officials to monitor the terrorism investigation. Reynolds Dec. ¶ 4; cf. Def. Exh. 7 (redacted list of INS detainees for "Joint Terrorism Task Force Working Group"). Because the information sought was initially compiled for law enforcement purposes, it meets the threshold requirements of Exemption 7. See FBI v. Abramson, 456 U.S. 615 (1982).

B. Disclosure Of Information About Individuals Questioned In Connection With The September 11 Terrorism Investigation Would Undermine The Investigation, Violate Privacy Interests, And Threaten The Physical Safety Of Many Individuals.

1. In our opening brief, we explained that release of the identity of individuals questioned in connection with the ongoing

terrorism investigation and their attorneys would interfere with the investigation by, among other things, providing terrorists with a virtual roadmap of the investigation and discouraging individuals from cooperating with it. We further explained that, because the investigation is largely designed to prevent future acts of terrorism, any such interference would place at risk the lives and safety of the American public. In requiring disclosure, the district court failed to give appropriate deference to the considered judgments of the senior law enforcement officials responsible for the investigation. Plaintiffs repeat this error.

Although plaintiffs claim that there is no significant likelihood of harm from disclosure (Br. 19), the uncontradicted evidence indicates otherwise. As explained in detail in the declarations of James S. Reynolds, Director of the Terrorism and Violent Crime Section of the Department of Justice, and Dale Watson, the recently retired FBI Executive Assistant Director for Counterterrorism, release of the identities of the detainees would allow terrorist organizations to determine where the government is focusing its investigative efforts, enhancing their ability both to impede the pending investigation and to carry out successful terrorist attacks in the future. Reynolds Dec. ¶ 16; Watson Dec. ¶ 15. It also would impair the government's ability to obtain information or secure cooperation from the detainees by

creating a risk that they will be subject to intimidation or retaliation. Reynolds Dec. ¶¶ 14-15; Watson Dec. ¶ 18. And it would enable terrorist organizations to obstruct pending proceedings by creating false or misleading evidence. Reynolds Dec. ¶ 17. These declarations are more than sufficient to establish a "rational link," see Crooker v. ATF, 789 F.2d 64, 67 (D.C. Cir. 1986), between the records at issue and the harms from disclosure.

Plaintiffs fault the Watson and Reynolds declarations for lacking support in concrete "record evidence" of harm. Br. 26. This criticism is misplaced, because the FOIA exemptions at issue by their terms apply whenever disclosure "could reasonably be expected" to produce the anticipated injuries to law enforcement or public safety. The Reynolds and Watson declarations describe numerous harms "reasonably . . . expected" as a result of disclosure, including national security harms as to which courts owe particular deference to the predictive judgments of the responsible Executive Branch officials. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (noting that "terrorism or other special circumstances" warrant "heightened deference to the judgments of the political branches with respect to matters of national security"); Department of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and

national security affairs").

Applying these principles, other appellate courts, in rejecting claims similar to those raised here by plaintiffs, have credited the predictive judgments set forth in the Reynolds and Watson declarations. For example, in North Jersey Media Group, Inc. v. Ashcroft, ____ F.3d ____, 2002 WL 31246589 (3d Cir. Oct. 8, 2002), the Third Circuit recently rejected an alleged First Amendment right of access to administrative hearings involving the INS detainees at issue here. In concluding that such access would impair the public good, the court explained that, although "the representations of the Watson Declaration are to some degree speculative," courts must nonetheless be "quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise." Id. at *19; see also ibid ("To the extent that the Attorney General's national security concerns seem credible, we will not lightly second-guess them."). Similarly, in ACLU v. Hudson, 799 A.2d 629, 652 (N.J. Super.), cert. denied, 803 A.2d 1162 (N.J. 2002), a state appellate court recently held that the imminent disclosure of information substantially similar to that sought here by plaintiffs "created urgent conditions" sufficient to justify an emergency federal regulation promulgated without notice-and-comment rulemaking. After reviewing the Reynolds

declaration, the court "accept[ed] the government's characterization of the interests affected as important, i.e., facilitation of law enforcement operations, the protection of detainees, and promotion of national security." Id. Plaintiffs give no proper justification for disregarding the Reynolds and Watson declarations in this case.

Plaintiffs similarly err in contending (Br. at 25-26) that deference is appropriate only in the context of Exemption 1. To be sure, deference is highly appropriate in Exemption 1 cases, which necessarily present issues of national security. But there is no reason why deference should be so limited. To the extent that national security issues are relevant, courts afford broad deference to the predictive judgments of responsible executive branch officials, in contexts ranging from statutory construction, see CIA v. Sims, 471 U.S. 159, 179 (1985) ("The decisions of the [CIA] Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake"); to privilege assertions, see Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1979) ("Courts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets."); to the First Amendment, see North Jersey Media, 2002 WL 31246589 at *19; McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983)

("judicial review of CIA classification decisions, by reasonable necessity, cannot second-guess CIA judgments on matters in which the judiciary lacks the requisite expertise"). Plaintiffs provide no good reason for creating an exception to these settled principles in the context of Exemption 7.

Finally, plaintiffs err in their brief suggestion (Br. 20) that the harms documented by the Reynolds and Watson declarations would be generically present in "any serious law enforcement investigation." That assertion blinks reality. The scope and importance of this investigation are unprecedented. Reynolds Dec. ¶¶ 2-4; Watson Dec. ¶ 2-7; Hodes Dec. ¶ 5-6. Unlike more routine law-enforcement investigations, it involves national security, defense, intelligence, and law-enforcement matters of highest sensitivity. It involves an international investigation of a massive coordinated attack against this country planned, funded, and directed from abroad by dozens or hundreds of co-conspirators. And it involves sophisticated terrorist organizations whose fanatical commitment to killing Americans and attacking American interests makes them an ongoing threat. The declarations more than demonstrate that, in this context, the disclosure sought would threaten uniquely grave harms to the ongoing investigation and the public safety.

2. The disclosure of the identities sought by appellees would also "constitute an unwarranted invasion of personal

privacy." § 553(b)(7)(C). As this Court has recognized, "individuals have an obvious privacy interest cognizable under Exemption 7(C) in keeping secret the fact that they were subjects of a law enforcement investigation." Nation Magazine v. Customs Serv., 71 F.3d 885, 894 (D.C. Cir. 1995). Contrary to plaintiffs' suggestion, the government has not artificially created the privacy interests at issue by identifying the detainees as individuals questioned in connection with the terrorism investigation. Rather, the association between the detainees and the investigation is inherent in the terms of plaintiffs' FOIA request, which seeks information about those detainees held in connection with the investigation. Hodes Dec. Exh. A. And as the Supreme Court noted in Department of Justice v. Reporters Committee for Freedom of the Press, "the compilation of otherwise hard-to-obtain information" can significantly "alte[r] the privacy interest implicated by disclosure of that information." 489 U.S. 749, 764 (1989).

Plaintiffs make several allegations of governmental wrongdoing, which they claim demonstrate that the public interest in disclosure outweighs any privacy concerns under Exemption 7(C). This argument is both factually and legally flawed.

First, plaintiffs' allegations do not come close to satisfying the high evidentiary standard of Exemption 7(C). "[U]nless there is compelling evidence that the agency denying

the FOIA request is engaged in illegal activity," the "incremental public interest" in disclosure of "the names of private individuals appearing in the agency's law enforcement files" is not enough to overcome an Exemption 7(C) claim. SafeCard Servs. v. SEC, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991) (emphasis added); see also Davis v. Department of Justice, 968 F.2d 1276, 1282 (D.C. Cir. 1992); Accuracy in Media, Inc. v. National Park Serv., 194 F.3d 120, 124 (D.C. Cir. 1999). Far from offering "compelling evidence" of "serious and repeated violations of individual rights" (Br. 30), plaintiffs rely on items such as newspaper articles (which are of course inadmissible and unreliable hearsay); untested allegations made in four lawsuits (which confirm that the detainees questioned and held in connection with the September 11 investigation, like all other federal detainees, have access to the courts to challenge the fact or conditions of their confinement); congressional testimony by two attorneys (who did, in fact, successfully represent clients temporarily questioned and detained in connection with the terrorism investigation); the mere pendency of an Inspector General investigation (which was required by statute even absent any initial determination of probable misconduct, see Opening Br. at 46 n.7); and the government's use, in combatting the grave and ongoing terrorist threat, of tactics that courts have held to be lawful, see, e.g., North Jersey

Media, 2002 WL 31246589 (closed immigration hearings); ACLU v. Hudson, 799 A.2d 629 (preemption of state disclosure laws); In re Application of the United States for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D.N.Y. 2002) (use of material witness warrants for grand jury testimony). These items pale in comparison to the sworn affidavits of high government officials that plaintiffs would have this Court disregard. In any event, they hardly constitute "compelling evidence" of misconduct, particularly when considered against the backdrop of what is the "'largest, most comprehensive criminal investigation in world history.'" Hodes Decl. ¶ 5. The ability of the detainees to speak to the public or the press underscores the insufficiency of this alleged evidence even more; that few of them have chosen to do so casts considerable doubt on plaintiffs' claims of widespread abuse.

Finally, despite plaintiffs' repeated suggestion of unchecked executive discretion, the detainees questioned and held in connection with the September 11 investigation enjoy the full panoply of constitutional, statutory, and regulatory protections to which all other federal detainees are entitled. As Chief Judge Becker has recently explained, all INS detainees, including those questioned and held in connection with the terrorism investigation, enjoy "a heavy measure of due process," including the right to challenge their detention through habeas corpus.

See North Jersey Media, 2002 WL 31246589 at *21. All criminally-charged detainees, including those questioned and held in connection with the terrorism investigation, enjoy the "extensive safeguards" set forth in the Bail Reform Act of 1984, which requires a judicial finding, prior to any detention, that the detainee poses a threat to public safety. United States v. Salerno, 481 U.S. 739, 751-52 (1987); see 18 U.S.C. § 3142(e); see also id. § 3145(c) (providing expedited appellate review). And all individuals held as material witnesses, including those questioned and held in connection with the terrorism investigation, enjoy parallel protections under the Bail Reform Act. See 18 U.S.C. § 3144 (detention must be authorized by "judicial officer"); id. § 3145(c) (providing expedited appellate review).

Second, plaintiffs have not shown a legally sufficient connection between the misconduct they allege and the disclosures they seek. The "only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties." Department of Defense v. FLRA, 510 U.S. 487, 497 (1994), quoting Reporters Committee, 489 U.S. at 773. Here, plaintiffs have failed to explain how knowing the names of individuals who prefer that their connection to the terrorism investigation remain confidential would help the public

to determine how the government is performing its duties, or whether those individuals are being treated appropriately. After all, the public interest in the release of information must be evaluated in light of the information that is already available to the public. See Department of State v. Ray, 502 U.S. 164, 178 (1991). And any individuals who wish to speak publicly about their treatment were and are free to do so.

Plaintiffs suggest that knowing the names of all the interviewees who were detained would enable them to identify patterns, thus revealing whether the detentions "reflect a vast internal terrorist threat" or simply a "dragnet based upon religion or ethnicity." Op. 31. This claim contradicts plaintiffs' argument that terrorist organizations will be unable to identify any patterns in the investigation simply from learning the names of interviewees who were detained. In any case, the government has already disclosed the country of origin of all of the individuals questioned in connection with the terrorism investigation, and then held on immigration charges. Reynolds Dec. ¶ 7. Plaintiffs have not shown that, for their purposes, there would be significant incremental value in also knowing their names as well.

3. The district court correctly concluded that the dates and locations of the arrest of the individuals questioned and then held in connection with the terrorism investigation, as well

as the locations of their detention and the dates of their release, were exempt from disclosure under Exemptions 7(A) and 7(F). As the court explained, information about the dates and locations of arrests could reveal patterns in the investigation. See Op. 33. For example, knowing that many people had been questioned and then detained in one city, while few people had been questioned and then detained in another city, could allow terrorists to determine where the investigation has been focused. This would permit them to shift their activities to evade detection, and thereby facilitate future terrorist attacks. See Reynolds Decl. ¶ 16; Watson Decl. ¶ 15. Likewise, disclosure of the locations of detention would endanger the investigation and the public safety "because it would make detention facilities vulnerable to retaliatory attacks." Op. 34. It also might facilitate contact between detainees and terrorist organizations. Reynolds Decl. ¶ 17. Although the district court did not separately address the dates of release, that information also could reveal the progress of the investigation, because it might give clues as to exactly when investigators determined that a particular individual was no longer of interest. Also, knowledge of the date an individual was released might make it easier for terrorist organizations to locate, and thereby retaliate against, that individual.

Plaintiffs argue that these concerns are speculative, see

Br. 27, but again they simply ignore the detailed and uncontradicted declarations of the senior law enforcement officials responsible for the government's terrorism investigation. As we have shown, the views of those officials are entitled to considerable deference. Also, plaintiffs claim that disclosures already made by the government undermine its interest in protecting the information. Specifically, they note that the Inspector General has identified the facilities at which some individuals questioned in connection with the terrorism investigation have been held on immigration charges. See Br. 27. But this general statement – which did not identify any particular individuals – hardly shows that the government lacks an interest in protecting specific information about the entire list of indivduals questioned in connection with the terrorism investigation and then detained.

C. The Interests Protected By Exemption 7 Are Not Undermined By The Government's Disclosures Of Other Information.

Plaintiffs argue that the government already "has made extensive public disclosures about the scope and details of the terrorism investigation." Br. 22. From this they reason that "the government's predictions of harm are belied by its own disclosures," Br. 24, and that the government should therefore be compelled to disclose the information sought in this case. This conclusion is flawed, for three reasons.

First, there are significant differences between the kinds of disclosures that have been made already and those that are sought by plaintiffs. Many of the government's prior statements about the terrorism investigation have not identified specific individuals. For example, plaintiffs note that the government publicly stated that it planned to interview a large number of aliens on a voluntary basis. Br. 22. But this information – which would have been unlikely to have remained secret anyway – does not reveal anything about whom the government interviewed, where and when those individuals were questioned, or even the exact number of individuals who were questioned.

Other prior disclosures have identified specific individuals in a manner unlikely, in the view of the law enforcement experts, to impede the progress of the investigation. For example, the government has identified individuals who have been charged with federal crimes. And, as plaintiffs point out, the government identified Zacarias Moussaoui as a suspect before he was indicted. Br. 8. Unlike the release of information sought by plaintiffs, these disclosures merely accelerated the publication of information – i.e., the names of criminal defendants – that soon would have become public anyway. More importantly, investigators often have legitimate reasons for identifying certain individuals who have attracted the attention of the investigation. They may, for example, wish to solicit tips from

the public about those individuals. But that does not mean that the investigation would not be harmed by the wholesale identification of hundreds of other individuals interviewed in the course of the investigation.[1]

Second, although plaintiffs do not describe their position in terms of waiver, their argument amounts to a claim that the government has waived the applicable FOIA exemptions through its prior disclosures. This Court has rejected the proposition that the government can waive FOIA exemptions based on national security or personal privacy simply by releasing other similar information. To establish a claim of waiver, "FOIA plaintiffs cannot simply show that similar information has been released, but must establish that a specific fact already has been placed in the public domain." Public Citizen v. Department of State, 11 F.3d 198, 201 (D.C. Cir. 1993); see also Fitzgibbon v. CIA, 911 F.2d 755, 765-66 (D.C. Cir. 1990). Thus, an agency does not waive an exemption "by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure." Public Citizen, 11 F.3d at 201; see also Reporters Committee, 489 U.S. at 762-65 (upholding claim of exemption for

[1] As we noted in our opening brief, and as both the district court and plaintiffs appear to have overlooked, not all of the individuals interviewed and then detained in connection with the terrorism investigation are suspected of being terrorists themselves; some of them are not suspected of terrorism but may nevertheless have valuable information about terrorist activities.

"rap sheets" that compiled publicly available arrest records); Mobil Oil Corp. v. EPA, 879 F.2d 698, 701 (9th Cir. 1989) ("[R]elease of certain documents waives FOIA exemptions only for those documents released"); cf. Halkin, 598 F.2d at 9 ("The government is not estopped from concluding in one case that disclosure is permissible while in another case it is not"). To be sure, the Court in Public Citizen and Fitzgibbon considered the issue of waiver in the specific context of Exemption 1, not Exemption 7. But nothing in the Court's reasoning indicates that its holding should be limited to Exemption 1. On the contrary, the Court noted that its analysis would also apply to Exemption 3, which, like Exemption 1, seeks "to preserve the Executive's freedom to refuse to disclose information that might compromise national security." Public Citizen, 11 F.3d at 202 n.4. It should similarly apply to Exemptions 7(A) and 7(F), particularly where (as here) the law enforcement and public safety issues are sufficiently grave to implicate the national security. In all of these contexts, the selective release of information can significantly advance legitimate government interests in effective law enforcement and in protecting the public safety and the national security. Accordingly, under the logic of this Court's precedents, the government has not waived its claims under Exemptions 7(A) and 7(F) simply by choosing to reveal some information about its investigation.

The same is true of plaintiffs' claim that the government has waived Exemption 7(C). The FOIA privacy exemptions protect a privacy interest that "belongs to the individual, not the agency holding the information." Sherman v. Department of the Army, 244 F.3d 357, 363 (5th Cir. 2001). The exemptions therefore may be waived only by the individuals concerned. See ibid; see also Computer Prof'ls for Social Responsibility v. Secret Service, 72 F.3d 897, 904 (D.C. Cir. 1996); Halpern v. FBI, 181 F.3d 279, 297 (2d Cir. 1999). Certainly, no authority supports the proposition that the privacy rights of some individuals can be waived by the disclosure of information about others.

Third, the rule plaintiffs urge would have the perverse effect of penalizing the government for its decision to permit some degree of openness. In effect, plaintiffs contend that because the government has disclosed some information about its terrorism investigation, it should be required to disclose all information about that investigation. The logical implication of such an approach is that the government should never release any information, lest it lose its ability to protect law enforcement investigations, the public safety, and the national security by maintaining the confidentiality of other information. Even if it were not constrained by precedent, this Court should not adopt a rule that would encourage the government to release as little information as possible.

II. The Identities Of The Persons Held As Material Witnesses Are Also Protected By FOIA Exemption 3.

In addition to being protected by FOIA Exemption 7, the identities of those individuals being held on material witness warrants are also protected from disclosure by FOIA Exemption 3, which covers matters that are "specifically exempted from disclosure by statute." Here, the applicable statute is Fed. R. Crim. P. 6(e), which prohibits the government from disclosing "matters occurring before the grand jury."

Rule 6(e) prohibits disclosure of the identities of potential, as well as actual, grand jury witnesses. See In re Sealed Case, 192 F.3d 995, 1002-03 (D.C. Cir. 1999) ("[W]e have read Rule 6(e) to cover matters 'likely to occur'" before the grand jury); see also In re Application of the United States for a Material Witness Warrant, 213 F. Supp. 2d 287, 288 n.1 (S.D.N.Y. 2002). Thus, plaintiffs' observation that some of the material witnesses were released before they testified, see Br. 35, is beside the point, because the Reynolds declaration makes clear that all of the material witness warrants in this case were "issued to procure a witness's testimony before a grand jury." Reynolds Second Supp. Dec. ¶ 4. Although plaintiffs suggest that "the government may improperly detain material witnesses," Br. 35, they offer no evidence for this allegation. And of course, each of the material witness warrants at issue here was issued by a United States district judge under 18 U.S.C. § 3144, not by the

Executive Branch acting alone.

As with Exemption 7, plaintiffs rely primarily on the government's alleged disclosures of other grand jury material. See Br. 36. They do not claim that the government has actually disclosed any of the specific information they are seeking – if it had, their FOIA request would be unnecessary. Instead, they argue that because the government allegedly disclosed other information about material witnesses, Rule 6(e) should not apply to the information at issue in this case. To support this point, plaintiffs cite only a newspaper article and court filings from an unrelated case, see Br. 9 n. 34. From the evidence plaintiffs present, it is impossible to determine whether grand jury material was in fact disclosed, and if so, whether it might have been authorized by one of the exceptions to Rule 6(e). But in any event, plaintiffs' legal premise is incorrect. It is true that at a certain point, "information is sufficiently widely known that it has lost its character as Rule 6(e) material. . . . Information widely known is not secret." In re North, 16 F.3d 1234, 1245 (D.C. Cir. 1994); see also In re Craig, 131 F.3d 99, 107 (2d Cir. 1997) (suggesting that "even partial previous disclosure often undercuts many of the reasons for secrecy"). But no authority supports the proposition that disclosure of grand jury material in one case means that the government must disclose grand jury material in other cases.

III. The Information Plaintiffs Seek Is Not Subject To Disclosure Under the Common Law Or The First Amendment.

Plaintiffs assert that even if the information they seek is exempt from disclosure under FOIA, its disclosure is nevertheless required by the common law or by the First Amendment. Neither of these theories has merit. Any common-law right of access is displaced by FOIA and, more specifically, is abrogated by regulations prohibiting disclosure in this context. In addition, the common-law disclosure doctrine requires a balancing of interests, which favors the government in this case. And although the First Amendment protects a right of access to certain judicial proceedings, it has never been held to confer a right to access investigatory information held by the Executive Branch.

1. It is doubtful whether there was ever a common-law right of access to the information sought here by plaintiffs. Consistent with the longstanding tradition of access to the courts, the Supreme Court has recognized a common-law right of access to judicial records, see Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978), and this Court has extended that right to certain records of other entities (such as the Sentencing Commission) "within the judicial branch," see Washington Legal Found. v. United States Sentencing Comm'n, 89 F.3d 897, 903 (D.C. Cir. 1996). In contrast, there is no general tradition of access to the Executive Branch, see North Jersey

Media, 2002 WL 31246589 at *__ (slip op. at 23-27), and certainly no general tradition of access to "investigatory information" held by the Executive Branch, see Detroit Free Press v. Ashcroft, 303 F.3d 681, 699 (6th Cir. 2002), petition for reh'g pending.

Plaintiffs nonetheless invoke a narrower alleged tradition of access to "arrest books." Br. 37-38. As explained above, however, the records sought here by plaintiffs -- comprehensive compilations of names and other information about hundreds of individuals associated with a particular law enforcement investigation -- bear no relationship to the kind of "arrest books" discussed by plaintiffs. Whatever the alleged tradition of access to arrest books "encompassing merely a chronological record of each arrest" at an individual facility (Morrow, 417 F.2d at 741), there is no tradition of access to the very different kind of sensitive investigatory materials sought here by plaintiffs.

Moreover, any common-law right of access that might otherwise exist would be displaced by the FOIA. In Nixon v. Warner Communications, the Supreme Court recognized a common-law right of access to the judicial records at issue, but held that the right was displaced by the access provisions of the Presidential Records Act. See 435 U.S. at 606 ("The presence of an alternative [statutory] means of public access tips the scales in favor of denying release," because "[t]he Executive and

Legislative Branches . . . possess superior resources for assessing the proper implementation of public access"). Similarly, although this Court has formally reserved the question whether "coverage by a federal disclosure statute precludes the application of the federal common law right of access altogether," it has stated that the applicability of FOIA "would likely tip the scales . . . against requiring disclosure of the document under the common law." Washington Legal Found., 89 F.3d at 903 n.*. That statement is surely correct. The FOIA applies broadly to all records held by each agency of the Executive Branch (5 U.S.C. § 552(a)(3); provides for disclosure subject to a series of detailed and precisely calibrated exemptions (5 U.S.C. § 552(b)); and imposes various procedural requirements ranging from specific deadlines (id. § 552(a)(6)) to fee schedules (id. § 552(a)(4)). It would be inappropriate for courts to invoke the common law to circumvent these detailed statutory provisions, see Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."), particularly because, in contrast to the FOIA, "the federal courts have had very limited experience with the common law right of access." Washington Legal Found., 89 F.3d at 905.

Moreover, as plaintiffs themselves concede (Br. 39), an alleged common-law right of access cannot prevail in the face of statutes or regulations directly prohibiting disclosure. In this case, release of information about individuals held on immigration charges is specifically prohibited by 8 C.F.R. § 236.6. That regulation makes clear that disclosure obligations must arise, if at all, under positive law such as the FOIA:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the [Immigration and Naturalization] Service . . . shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. (emphasis added).

Likewise, as noted above, Fed. R. Crim. P. 6(e) prohibits the disclosure of information about individuals held on material witness warrants. Together, these provisions displace any common-law access rights that might otherwise exist.

Finally, even if a common-law right of access were implicated here, the right is not absolute. Rather, court must "balance the government's interest in keeping the document secret against the public's interest in disclosure," Washington Legal Found., 89 F.3d at 902, a standard more than flexible enough to permit consideration the law enforcement, privacy, and public safety interests specifically protected by Exemption 7. As

explained above, release of the information at issue in this case would threaten severe harm to the integrity of the government's terrorism investigation, to the privacy interests of individuals who have chosen not to publicize their connection to the investigation, and to the safety of the American public. These interests greatly outweigh any public interest in disclosure.

2. The First Amendment does not compel the government to disclose any of the records sought by the plaintiffs in this case. As a general matter, the First Amendment does not "mandat[e] a right of access to government information or sources of information within the government's control." Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978). "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." Id. at 14. Thus, the Court in Houchins held that the press does not have a First Amendment right to inspect prisons. And more recently, the Supreme Court stated that the government "could decide not to give out arrestee information at all without violating the First Amendment." Los Angeles Police Dep't v. United Reporting Publ'g Co., 528 U.S. 32, 40 (1999).

To be sure, the Supreme Court has held that there is a First Amendment right of access to criminal proceedings in court. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). But it based this conclusion on a 1,000-year "unbroken, uncontradicted history" of public access and a tradition in which

public access was thought to "inher[e] in the very nature of a criminal trial." Id. at 564, 573; see also Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (elaborating on the "right of access to criminal proceedings"). This rationale does not apply to the activities of the Executive Branch. In general, the Constitution leaves the question of public access to the political branches and the democratic process.

Although one court has recognized a First Amendment right of access to administrative deportation proceedings, it did so only after emphasizing what it perceived to be the similarity of those proceedings to judicial proceedings. Detroit Free Press v. Ashcroft, 303 F.3d at 699; but see North Jersey Media Group, Inc. v. Ashcroft, ___ F.3d ___, 2002 WL 31246589 at *2 (3d Cir. Oct. 8, 2002) ("In our view the tradition of openness of deportation proceedings does not meet the standard required by Richmond Newspapers"). At the same time, it sharply distinguished between "purported rights of access to, or disclosure of, government-held investigatory information" and "access to information relating to a governmental adjudicative process." Detroit Free Press, 303 F.3d at 699. There is no authority for the proposition that the First Amendment provides a right of access to investigatory information held by the Executive Branch. For this reason, plaintiffs' First Amendment claim should be rejected.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in our opening brief, the judgment of the district court compelling disclosure of information should be reversed. In all other respects, the judgment of the district court should be affirmed.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

MARK B. STERN
(202) 514-5089
ROBERT M. LOEB
(202) 514-4332
ERIC D. MILLER
(202) 514-2754
Attorneys, Appellate Staff
Civil Division, Room 9131
U.S. Department of Justice
601 "D" Street, N.W.
Washington, D.C. 20530-0001

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a)(2), that the foregoing brief uses a "courier new" non-proportional 12-point font and contains no more than 6,859 words, according to the count of Corel WordPerfect 9.

_____
Eric D. Miller

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2002, I filed and served the foregoing brief by causing seven copies to be sent by hand-delivery to the Clerk of the Court, and by causing two copies to be sent by messenger or Federal Express to:

Arthur B. Spitzer, Esq.
American Civil Liberties Union
of the National Capital Area
1400 20th Street, N.W. #119
Washington, D.C. 20036

Steven R. Shapiro, Esq.
Lucan Guttentag, Esq.
American Civil Liberties Union Foundation
125 Broad Street
New York, N.Y. 10004

Kate Martin, Esq.
Marcia Maack, Esq.
Center for National Security Studies
1120 19th St. NW
Washington, D.C. 20037

Elliot M. Mincberg, Esq.
People for the American Way Foundation
2000 M Street, N.W., Suite 400
Washington, D.C. 20036

David L. Sobel, Esq.
Electronic Privacy Information Center
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009

_____
Eric D. Miller