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

Nos. 02-5254 & 02-5300

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

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
No. 01-cv-2500 (GK)

BRIEF FOR APPELLEES/CROSS-APPELLANTS

QUESTION PRESENTED

Whether the Freedom of Information Act, the First Amendment, and the common law require disclosure of the identities of individuals arrested and detained by the government, the identities of their attorneys and other basic information concerning arrests.

INTRODUCTION

In an unprecedented action, the United States government has during the past thirteen months secretly arrested and detained hundreds of individuals not even charged with criminal offenses. From colonial days to the present, arrests have always been public acts in this country. The district court correctly recognized that the Freedom of Information Act requires the disclosure of the identities of these detainees. So does the First Amendment and the common law, as we show below.

STATEMENT OF FACTS

Following the September 11, 2001, terrorist attacks, Attorney General Ashcroft announced on October 25, 2001, that the "anti-terrorism offensive has arrested or detained nearly 1,000 individuals as part of the September 11 investigation." Op. 4-5. As of November 5, 1,182 people had been detained.[1] But while trumpeting the numbers of arrests, the government refused to provide the most basic information about who had been arrested and on what basis. As the number of secret detentions increased, press reports began to appear raising serious questions as to whether the rights of the detainees were being violated.[2]

On October 29, numerous civil liberties and human rights groups requested the names of the individuals who had been arrested or detained and the charges against them, under the Freedom of Information Act, the common law and the First Amendment. Pl. Mot. Ex. 10, JA __. Many newspapers called for release of the names, as did Members of Congress, and the Senate Judiciary Committee scheduled an oversight hearing on this and other issues.[3] The day before that hearing, the Attorney General released a list of 93

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[1] Dan Eggen and Susan Schmidt, *Count of Released Detainees Is Hard to Pin Down*, Wash. Post, Nov. 6, 2001, at A10; Pl. Motion for Summary Judgment ("Pl. Mot.") Ex 7, JA __. However, the government now states that some of these 1,182 were questioned but not jailed. *See* Reynolds Decl. ¶¶ 3-4. On November 8, the Department of Justice announced that it would no longer disclose even the number of individuals detained in connection with the investigation. Amy Goldstein and Dan Eggen, *U.S. to Stop Issuing Detention Tallies*, Wash. Post, Nov. 9, 2001, Pl. Mot. Ex. 19, JA __.

[2] *See e.g*. Lois Romano and David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, Wash. Post, Oct. 15, 2001, at A1, Pl. Mot. Ex. 34; Richard A. Serrano, *Many Held in Terror Probe Report Rights Being Abused,* L.A. Times, Oct. 15, 2001, at A1, Pl. Mot. Ex. 35; Alison Leigh Cowen, *Detainees' Lawyers Complain of Unfair Treatment*, N.Y. Times, Oct. 21, 2001, at B1, Pl. Mot. Ex. 39.

[3] Op. 2; Pl. Mot. Exs. 11-18.

individuals who had been charged under federal criminal laws.[4] The government refused to release any other names and on December 5, plaintiffs filed this action.

The Government's Disclosures and Withholdings.

In response to this lawsuit, the government has provided a list of 108 named individuals who have been charged with federal criminal offenses, including the names and addresses of the attorneys representing these individuals.[5]

However, the government has refused to provide the names of individuals detained for immigration violations, on material witness warrants, or on state or local charges, or the names of attorneys representing them. It has disclosed only that it has detained 751 individuals on immigration violations, and for 718 of those un-named individuals it has stated the nationality, immigration charge, date of arrest and date of service of charging documents.[6]

The government has refused to disclose even the number of individuals detained on material witness warrants, the court orders allegedly sealing their cases, or the judicial districts where such orders have been entered. Its filings only account for a maximum of 860 detainees when, even as of November 5, 2001, it had stated that 1,182 people had been detained. It has thus failed to provide any accounting for at least 322 individuals.

The Detainees.

None of the four declarations upon which the government relies in this case claims that *any* of the detainees was involved in terrorism or even has any knowledge about terrorism.[7] Only one individual has been criminally charged in the attacks, and he

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[4] Attorney General Ashcroft, Press Briefing, Nov. 27, 2001, Pl. Mot. Ex. 22. *See* Def. Motion for Summary Judgment ("Def. Mot.") Ex 5.

[5] Reynolds Supp. Decl., JA __; Def. Mot. Ex. 5.

[6] Op. 7; Def. Mot. Ex. 6, JA __.

[7] Reynolds Decl. JA_; Reynolds Supp. Decl. JA_; Reynolds Second Supp. Decl. JA_; Watson Decl: JA_.

was detained before September 11.[8] To the contrary, the government admits that "many [of the detainees] have [been] or may be cleared of any wrongdoing." Def. Mem. in Support of Sum. Jud. 21. The government was unable to tell the district court the basis for apprehending these particular individuals. Op. 18. It does appear that virtually all of them are either Arabs or Muslims.[9]

Questions Raised about Government Misconduct.

There have been extensive and credible reports of government misconduct in connection with these secret detentions. Plaintiffs Amnesty International and Human Rights Watch have published reports detailing numerous serious violations of detainees' rights. [10] The Justice Department's own Inspector General has found the allegations sufficiently compelling that he has launched an investigation.[11] There has been congressional testimony, [12] and many press reports.[13] Four detainees have already filed

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[8] Reynolds Decl. ¶ 27. Since the District Court decision, three additional individuals named on the list of criminal defendants have been charged with terrorism-related offenses, although not in connection with the September 11 attacks. See Douglas Farah and Tom Jackman, *6 Accused of Conspiracy to Aid in Terror Attacks*, The Washington Post, August 29, 2002, at A1.

[9] All but twelve of the criminal defendants have Arabic names, see Reynolds Supp. Decl., Def. Mot. Ex. 5, and those twelve include the individuals charged with assisting the hijackers to obtain false documents, without knowing their plans. Nearly all of the INS detainees are identified as nationals of Arab or Muslim countries. See Def. Mot. Ex. 6, JA __.

[10] *See Amnesty International's Concerns regarding post September 11 detentions in the USA* (AI Report), available at http://www.amnesty-usa.org/usacrisis/9.11.detentions2.pdf. and *Human Rights Watch: Presumption of Guilt* (HRW Report), available at www.hrw.org/reports/2002/us911/USA0802.pdf

[11] Op. 26.

[12] Two lawyers testified before Congress that their clients had been held incommunicado and not permitted to speak to them. Testimony of Gerald H. Goldstein before the Committee on the Judiciary of the United States Senate, December 4, 2001, at 1-3, Pl. Mot. Ex. 56; Testimony of Michael Boyle before the Committee on the Judiciary of the United States Senate, December 4, 2001, pp.4-5; Pl. Mot. Ex. 32.

[13] Many press reports were filed with Plaintiffs' summary judgment memoranda. See JA __-__, __-__, __-__.

lawsuits outlining some of the abuses.[14] The specific examples are far too numerous to detail, but include detainees held for long periods without being charged, prevented from communicating with their lawyers, and held incommunicado in solitary confinement, [15] abusive treatment while in custody,[16] denial of the right to consular notification,[17] and unlawful use of material witness warrants.[18]

Government Disclosures Concerning the Terrorism Investigation.

The government's principal justification for withholding the information at issue is that disclosure would harm the terrorism investigation by providing terrorist groups a "roadmap" of the investigation. Gov. Br. 16-18. But that asserted justification is contradicted by the government's own extensive public disclosures which have revealed far more information regarding the scope and details of the investigation than disclosure of the information at issue could possibly reveal.

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[14] *See Turkmen v. Ashcroft*, 02-CV-02307-JG (E.D.N.Y. 2002) (filed April 17, 2002); *Omar v. Casterline, et. al.*, No. 02-CV-1933 (W.D. La. filed Sept. 9, 2002) (W.D. LA.). See also, C. Haughney, *Judge Orders Inquiry into Detainment of Egyptian,* Washington Post, Aug. 17, 2002, at A2 (federal judge orders inquiry as to FBI misconduct in the case of Abdallah Higazy). Cf. *United States v. Awadallah,* 202 F. Supp 2d 55, 61 (S.D.N.Y. Jan. 31, 2002).

[15] *See* HRW Report pp. 7, 33-45; AI Report pp. 16-18. Because many inmates were only allowed one phone call per week, it took several weeks to contact potential counsel. Laurie P. Cohen and Jess Bravin, *Denied Access to Attorneys: Some Detainees Are Jailed Without Charges on INS Offenses*, Wall St. J., Nov. 1, 2001, at A8, Pl. Mot. Ex. 37.

[16] *See* HRW Report pp. 67-87; AI Report pp. 28-38.

[17] The Canadian government reportedly protested the treatment of a Canadian citizen of Pakistani descent who "disappeared" on September 20 and whose detention in federal custody was not disclosed for nearly three months, despite his own request for consular help and despite inquiries by the Canadian authorities. See Crossette, *Diplomats Protest Lack of Information*, at B5, Pl. Mot. Ex. 36; John Donnelly and Wayne Washington, *Diplomats Fault Lack of US Notice on Many Detainees*, Boston Globe, Nov. 1, 2001, at A1, Pl. Mot. Ex. 55, JA __. See also HRW report pp. 8, 45-46; AI Report pp. 24-25.

[18] *See* HRW Report pp. 60-66.

The government has voluntarily released the identities and other extensive information about individuals it has detained and publicly identified as terrorists. For example, on June 10, 2002, Attorney General Ashcroft announced that the United States had in custody an al Qaeda operative named José Padilla, who had been arrested on May 8, 2002, as he arrived at Chicago O'Hare International Airport from Pakistan; that on "several occasions in 2001, he met with senior al-Qaida officials"; that he was exploring a plan to build and explode a . . . 'dirty bomb' in the United States"; and that there were "multiple independent and corroborating sources" for this information.[19] Other officials disclosed that Mr. Padilla had been held at the Metropolitan Corrections Center in downtown Manhattan from May 8 through June 9 on a material witness warrant and then transferred to the Brig at the Charleston Naval Weapons Station; that he had stayed at an al Qaeda safe house in Lahore, Pakistan, in late 2001 or early 2002; and that the information leading to his capture had come from a "top al Qaeda leader" named Abu Zubaydah.[20]

Previously the government had announced the capture of Abu Zubaydah in Pakistan. The government described him by name as the operations director for al Qaeda, announced that he would be questioned, and made public information from that questioning.[21]

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[19] Attorney General Ashcroft News Conference, June 10, 2002, available at http://www.usdoj.gov/ag/speeches/2002/ 061002agtranscripts.htm.

[20] James Risen and Philip Shenon, *U.S. Says it Halted Qaeda Plot to Use Radioactive Bomb,* The New York Times, June 11, 2002, at A1, Pl. Supplemental Memorandum ("Pl. Supp. Mem.") Ex. A.

[21] *See Secretary of Defense Donald Rumsfeld Interview on Fox News Channel*, Apr. 12, 2002, available at http://defenselink.mil/news/Apr2002/t04122002_t0412fox.html; Judith Miller and David Johnston, *F.B.I. Chief Says Al Qaeda Aide's Arrest Will Help Prevent Attacks by Terrorists*, N.Y. Times, Apr. 4, 2002, at A14, Pl. Reply in Support of their Motion for Summary Judgment ("Pl. Reply") Ex. 3; Judith Miller and Philip Shenon, *Qaeda Leader in U.S. Custody Provokes Alert*, N.Y. Times, Apr. 20, 2002, at A1, Pl. Reply Ex. 4.

Government officials also announced that they had arrested one Issaya Nombo on immigration charges after a letter congratulating him on obtaining his pilot's license was discovered in a cave in Afghanistan.[22]

Similarly, the government announced that it was holding Mohammad Mansur Jabarah on a material witness warrant after his arrest in connection with a terrorist plot in Singapore, and that he was providing valuable information regarding Al Qaeda's operations.[23]

In addition, the government has released the names of other persons detained by the INS in connection with the post 9/11 investigation, who it has not tied directly to terrorist activities. For example, on June 15, 2002, DOJ announced that Adham A. Hassoun had been arrested in Miami on June 12 and was being detained at Krome Detention Center. The Department also disclosed the nature of his link to the investigation (Mr. Hassoun and Jose Padilla "knew each other in the 90's and had attended a mosque together in Fort Lauderdale").[24]

On June 24 , 2002, DOJ announced the detention of Ramsi Al-Shannaq in connection with the post-9/11 investigation, arrested at his home in Baltimore on June 24 and charged with overstaying his visa. Other officials disclosed other details about his situation.[25]

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[22] Emery P. Dalesio, *Tanzanian Pilot Detained in N.C.*, The Associated Press, April 18, 2002, Pl. Reply Ex. 5; Philip Shenon, *African Held After Name is Left in Cave*, N.Y. Times, April 18, 2002, at A15, Pl. Reply Ex. 6.

[23] Op. n. 10, William Rashbaum, *Captured Qaeda Member Gives Details on Group's Operations*, The New York Times, July 27, 2002, at A8.

[24] See *Man Tied to Bomb Suspect is Arrested,* The New York Times, June 16, 2002 at A10, Pl. Notice of Filing Additional Exhibits Ex. B.

[25] *See FBI Detains Man With Hijackers Link,* New York Times on the Web, June 26, 2002, Pl. Second Notice of Filing Additional Exhibits Ex. A.

The government continues to this day to identify individuals arrested in connection with its terrorism investigation and detained on immigration charges and to provide details about those detentions.[26]

The government has outlined the scope of its investigation and even announced the results of the investigation to date. Its disclosures began within weeks of the September 11 attacks, and made clear that the detentions at issue here resulted from a focus on Arabs or Muslims attending flight schools and on those who had some contact, however minimal, with any of the hijackers.[27] On October 21, 2001, senior government officials stated that they had captured at least 10 members of Al Qaeda and that investigators had established connections between the hijackers and two dozen people in custody, but that they were only casual connections.[28] Government investigators identified Zacarias Moussaoui by name as a suspect in the hijackings, *when he was still being held on immigration charges or as a material witness*.[29] On October 31, the Attorney General announced the arrest of three named individuals "suspected of having knowledge of the September 11 attacks," and outlined the evidence supporting that suspicion, even though the public charges related only to possession of false documents.[30]

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26 See e.g., Foster Klug, *Bond denied for three immigrants: INS cites terror probe*, The Associated Press, September 23, 2002 (INS publicly identifies 5 Baltimore INS detainees, their date and place of arrest, and location of detention); *Sudanese Held on Visa Charge*, The Washington Post, September 21, 2002, at A9 (named Sudanese identified as pilot with suspected ties to Bin Laden arrested on immigration charges).

27 *See e.g.,* Pl. Mot. Exs. 4 & 29.

28 *See* Pl. Mot. Ex. 4.

29 Id. Moussaoui was indicted as the 20th hijacker on December 11, 2001. Transcript of News Conference regarding Zacarias Moussaoui, DOJ Conference Center, December 11, 2001, available at: http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks12_11.htm.

30 *See* Pl. Mot. Ex. 30.

More recently, FBI Director Mueller testified to Congress that, with the exception of Zacarias Moussaoui, "[a]s far as we know [the hijackers] contacted no known terrorist sympathizers in the United States. . . . To this day we have found no one in the United States except the actual hijackers who knew of the plot."[31] Director Mueller also disclosed that the FBI has identified a "substantial number" of people as supporters of al Qaeda, who cannot be detained for immigration or other violations, and who are therefore being monitored around the clock.[32] He also named an individual who is believed to have played a key role in planning the September 11 attacks.[33]

Finally, there have been extensive disclosures concerning individuals detained on material witness warrants.[34]

THE DISTRICT COURT'S DECISION

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31 FBI Director Robert S. Mueller III, Statement for the Record, Joint Intelligence Committee Inquiry, September 26, 2002. Available at: http://www.intelligence.senate.gov/0209hrg/020926/mueller.pdf.

32 *FBI Chief: 9/11 Surveillance Taxing Bureau,* Washington Post, June 6, 2002, at A1, Pl. Supp. Mem. Ex. D.

33 Walter Pincus, *Mueller Outlines Origin, Funding of Sept. 11 Plot*, Washington Post, June 6, 2002, at A1, Pl. Supp. Mem. Ex. E.

34 *See* note 23 *supra,* page 8 about Moussaoui; Ben Fox, *Three men held in San Diego as witnesses in terrorist attack*, Assoc. Press, Sept. 25, 2001, Pl. Mot. Ex. 11 (reporting that law enforcement official named three individuals as having been detained as material witnesses); Pl. Mot. Exs. 12, 13, Pl. Supp. Mem. Ex. H. The government's court's filings also disclose that Osama Awadallah, indicted October 31, 2001, had been held as a material witness, *see* Indictment, pars. 2-3, 7-10, *U.S. v. Awadallah*, (S.D.N.Y., No. 01 Crim. 1026) available at: http://news.findlaw.com/hdocs/docs/terrorism/usawdllh103101ind.pdf; and that Mohdar Abdoulah, also indicted, was held as a material witness, *see* Gov. Opp. To Mot. To Dismiss, p. 12, in *U.S. v. Abdoulah*, No. 01-cr-03240 (S.D. Cal. filed May 6, 2002, S.D. Cal.) available at: http://news.findlaw.com/hdocs/docs/terrorism/usabdoulah50602grsp.pdf.

The district court issued its decision on August 2. Mindful of the post-September 11 context of the case, Judge Kessler recognized that "[d]ifficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law." Op. 3. The court also recognized, however, that "the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship." Op. 3-4.

Noting that "[t]he fundamental purpose of FOIA is to lift the veil of 'secrecy in government,' and that the "Government bears the burden of proving why information should not be disclosed," Op. 11-12 (quoting *United States v. Reporters Committee for Freedom of the Press*, 489 U.S. 748, 772-73 (1989), the district court found that the government's affidavits, when subjected to careful analysis, failed to meet its burden under Exemption 7(A) to show that disclosing the detainees' names could be reasonably likely to interfere with its terrorism investigation.

The court found the government's claim of harm unpersuasive because (i) it assumes, "implausibl[y,] that terrorist groups would not have figured out whether their members have been detained"; (ii) it assumes that "those detained actually had some pre-existing link to or knowledge of terrorist activity," while the government's declarations "utterly fail to demonstrate, the existence of this link"; and (iii) it is "contradicted by the [the government's] own extensive disclosures," which the government "does not explain." Op. 15-17. In addition, the prediction that disclosure of detainees' names will enable terrorists to "create false or misleading evidence" is unpersuasive because it is

supported by only a single conclusory sentence in one declaration, which fails to explain how the release of names "could possibly lead to evidence tampering." Op. 23-24.

The district court likewise ordered disclosure of the names of detainees' attorneys, finding that the government's proffered harms are "totally speculative, with no factual basis," and that lawyers are "a hearty brand of professionals" who have no "expectation of anonymity" in their representation of clients. Op. 34-36.

Turning to Exemptions 7C and 7F, the court found that given the "substantial" evidence of government misconduct, "the public's interest in learning the identities of those arrested and detained is essential to verifying whether the Government is operating within the bounds of the law." Op. 26. The court likewise concluded that Exemption 7F "do[es] not justify the Government's withholding of names." Op. 27. However, although the government's assertion that disclosure of names "could" subject detainees to physical danger was entirely speculative, the court fashioned an "opt out" procedure for detainees who wished to keep their names private. Op. 27. Plaintiffs have cross-appealed this portion of the decision, which both parties agree was unauthorized by FOIA.

Regarding detainees held as material witnesses, the court found the government's lengthy detentions "deeply troubling." Op. 27. The court held that their identities may not be withheld under grand jury secrecy rules and Exemption 3 because the government's affidavits simply "do not establish that those held as material witnesses are in fact grand jury witnesses." Indeed, it is known that some have been "released and *never* testified before a grand jury." Op. 29-30 (emphasis by the court). The court gave the government the opportunity to submit, *in camera,* the orders of other courts that the government claimed prohibited disclosure. Op. 32.

The court did not require disclosure of the "dates and locations of arrest, detention, and release," citing the government's claim that the dates and places of arrest could be useful information to terrorists and that disclosure of the location of detention could expose the facilities to attack. Op. 32-34. The court apparently was unaware that the dates of arrest *had already been disclosed* by the government,[35] and that the place of detention of most detainees was also public knowledge.[36] Nor did the court note that *nothing* in the government's affidavits attempted to explain how disclosure of release dates could cause any harm. Plaintiffs have cross-appealed this portion of the decision.

Finally, the court ordered the government to conduct a further search for certain documents. The government has not appealed that order.

SUMMARY OF ARGUMENT

This case seeks disclosure of the identities of hundreds of individuals who have been arrested and jailed in the wake of the September 11 terrorist attacks. Never before has our government arrested and confined hundreds of individuals in secret. The anti-terrorism investigation is obviously of the highest importance. But plaintiffs do not seek information about that investigation, which in any event has been described in great detail by government officials. Rather, plaintiffs seek the identity of hundreds of individuals who apparently have nothing to do with terrorism, but who apparently do share the ethnic background, religion or national origin of the September 11 hijackers and have accordingly landed in jail on a variety of mostly petty charges. The core purpose of the Freedom of Information Act—to inform the public about government activity and to prevent secrecy from shielding government misconduct—is at stake here. The Justice Department has acted by executive fiat, without citing any legislative authorization for

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[35] See Def. Mot. Ex 6, JA __.

[36] See note 56 *infra*.

secret arrests and without any court order finding that extraordinary circumstances exist to justify such an extraordinary act.

1. Nothing in the Freedom of Information Act authorizes the government to withhold records that, like arrest records, have *always* been public. The government's contrary reading turns the statute on its head.

2. Even if arrest records were subject to FOIA's Exemption 7, the government has failed to carry its burden of showing that disclosing the identities of the detainees or their attorneys or the other requested information could reasonably be expected to interfere with its ongoing terrorism investigation under 7A or threaten the physical safety of an individual under 7F. The government failed to establish a rational link between disclosure and the alleged harms because it failed to establish that there was any connection between the detainees and terrorism, or that disclosure would reveal anything of significance to terrorist groups, especially given its own extensive disclosures concerning the investigation.

3. The government similarly failed to demonstrate that the information may be withheld under Exemption 7C as an unwarranted invasion of privacy. No privacy interest has ever been recognized in the fact of being arrested, and whatever minimal privacy interest may exist is outweighed by the compelling public interest in knowing whom the government has arrested and in determining whether the government here has engaged in serious violations of individual rights.

4. The government also may not withhold the identities of individuals detained as material witnesses under Exemption 3 and grand jury secrecy rules. Grand jury rules do not require the withholding of these identities and the government's interpretation is inconsistent with its own public disclosures. Moreover, the government made no showing that these individuals were in fact grand jury witnesses, and there is evidence that a substantial number were not.

5. Finally, the common law and the First Amendment prohibit keeping basic arrest information secret. Since before the Revolution the common law has recognized that arrests are public acts, and all previous attempts to conceal them have been rejected by the legislatures or the courts. As an access-*enhancing* statute, FOIA supplements but does not preempt this enforceable common law right.

This unbroken history, plus the vital public purpose served by informing the American people about who their government is jailing, establish a First Amendment right of access to arrest records, just as the same "experience and logic" established a First Amendment right of access to court proceedings. *Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9 (1986).* Indeed, the government has conceded that the First Amendment requires disclosure of the identities of persons arrested on criminal charges; there is no basis for a constitutional distinction between those arrestees and these.

ARGUMENT

As Alexander Hamilton wrote in the Federalist Papers:

> To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and *therefore a more dangerous engine* of arbitrary government.

Federalist No. 84 (emphasis in original) (quoting 1 Blackstone, Commentaries on the Laws of England 335). This Court has expressed the same view, noting that "'secret arrests' [are] a concept odious to a democratic society." *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969). The unprecedented secret arrest and detention of more than 750 individuals—who have not even been accused of crimes—is a stark departure from the bedrock principle that the government must disclose the identity of

people whom it forcibly deprives of liberty. In the United States, arrest records have always been public.[37]

Perhaps reluctant to acknowledge how truly radical its action has been, the government asserts that this case is not about "secret detentions." Gov. Br. 13-14. But it does not, and cannot, dispute that

> [a]s of this moment, the public does not know how many persons the Government has arrested and detained as part of its September 11 investigation, nor does it know who most of them are, where they are, whether they are represented by counsel, and if so, who their counsel are.

Op. 11.[38] The government has taken extraordinary steps to keep this information secret from the American people. The INS has instituted special procedures so that the dockets of these cases will be secret and to preclude government employees from even acknowledging their existence.[39] And when a state court order enforcing a state statute requiring county jails to keep a public roster of inmates threatened to disclose the names of some INS detainees, the government issued a new regulation forbidding the state to release those identities.[40]

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[37] We understand that the amicus brief to be filed by the Washington Post, *et al*, will canvass this history in some detail.

[38] The arrests are no less secret, even if, as the government contends, the jailed individuals—who may well speak limited or no English and have no right to court-appointed counsel—are free to communicate outside the jail. And there is extensive evidence that, contrary to the government's unsupported assertion (Gov. Br. 14) many of these individuals were held incommunicado or virtually so. *See* notes 12, 15, 17 *supra*.

[39] Pl. Mot. Ex. 57, JA __; Watson Decl. ¶ 9, JA_. Cf. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (secret hearings unconstitutional); *North Jersey Media Group v. Ashcroft*, ___F.2d__2002, WL 31246589 (3rd Cir. Oct. 8, 2002) (secret hearings not unconstitutional).

[40] *ACLU of New Jersey, Inc. v. County of Hudson*, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002).

The government concedes that the First and Sixth Amendments prohibit it from keeping secret the names of individuals arrested and jailed on federal criminal charges.[41] It has suggested no basis for distinguishing in this respect between criminal detainees and INS detainees. Nor is there any. While those jailed on immigration charges are not charged with a crime, they face equally serious deprivations of liberty. Most of the INS detainees were denied pretrial bail, and some were held for weeks or months before even being charged.[42] There is extensive evidence that many were transferred across the country, held in maximum security facilities, sometimes in solitary confinement, and prevented from telephoning anyone. They had no entitlement to a court-appointed lawyer and were tried in secret proceedings.[43] After imprisonment, they faced further loss of liberty through deportation. *See Bridges v. Wixon*, 326 U.S 135, 154 (1945) (in deportation proceedings "the liberty of an individual is at stake"). And the government's proffered law enforcement rationale for secrecy would apply with the same force to criminal arrests as to any other arrests.

The government has not identified any authority for secretly jailing those not charged with crimes because there is no such authority. Congress has never authorized secret arrests and detentions. To the contrary, it has prohibited them whenever the issue has arisen.[44]

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41 Def. Reply 19.

42 *See, e.g.*, Kareem Fahim, *INS Detainee Among Longest-Held Makes Plea for Release,* Village Voice, Mar. 6-12, 2002 Pl. Mot. Ex. 26 (reporting that Shakir Baloch has been in solitary confinement for five months); HRW Report, pp. 46-50; AI Report, pp. 10-11.

43 See notes 14-15 *supra*; Tamara Audi, *U.S. Held 600 for Secret Rulings*, The Detroit Free Press, July 18, 2002.

44 In 1954, Congress prohibited the District of Columbia from denying public access to arrest records. See 46 *infra*. Since September 11, 2001, Congress has

The information sought by plaintiffs is, therefore, information that has always been available to the press and public in order to investigate government wrongdoing. The government's perverse argument that FOIA authorizes secrecy would turn FOIA, whose core purpose is to inform the public and prevent secrecy from shielding government misconduct, on its head.

I. FOIA REQUIRES DISCLOSURE OF THE NAMES AND OTHER INFORMATION ABOUT ARRESTED INDIVIDUALS AND THEIR ATTORNEYS.

A. Arrest Records are Not Subject to Exemption 7.

"'[D]isclosure, not secrecy, is the dominant objective of [FOIA].'" *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)). The Act requires disclosure of all information unless it comes within a specific exemption, *Rose*, 425 U.S. at 360-361, and those exemptions must be narrowly construed, *Klamath Water Users*, 532 U.S. at 7. The basic purpose of FOIA is "to open agency action to the light of public scrutiny." *Rose,* 425 U.S. at 372. Thus, when an agency withholds documents, it has the burden of proving that the claimed exemption applies. 5 U.S.C. § 552(a)(4)(B); *Campbell v. Department of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).

FOIA's carefully structured exemptions were not meant to provide authority to withhold information about government operations that had traditionally been public. No

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considered the issue of detention and has expanded the authority of the Attorney General to detain non-citizens, subject to specific certification and reporting requirements. USA PATRIOT Act, Pub. L. No. 107-56, § 412, 115 Stat. 272 (Oct. 26, 2001). But the executive never even asked Congress to permit secret detentions, and has never used the procedures created at its own request in the USA PATRIOT Act, using instead the extra-legal, secret procedures challenged here.

authority sanctions the reading of FOIA as a new basis for non-disclosure.[45] To the contrary, FOIA was enacted to "permit access to official information long shielded unnecessarily from public view." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973).

In particular, nothing in FOIA creates some new rule allowing the government to keep secret the identities of those whom it arrests or jails. As Congress previously explained, arrests are public events, which must be recorded in public records, because

> It is felt that the keeping of such [arrest] records and their availability to the public should be matters of law and not of administrative discretion, both for the protection of the public against secret arrests and to guard against abuse in any way of the arrest power.

H.R. REP. NO. 83-2332 (July 25, 1954).[46]

Despite this understanding, the government claims that it may keep the detainees' identities secret under Exemption 7 because the information was "compiled for law enforcement purposes." But the inquiry into whether information was compiled for law enforcement purposes within the meaning of FOIA must focus on the nature of the information or particular document for which the exemption is claimed. *See Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 626 (1982); *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 229-230 (1978). Here, the information is contained in arrest warrants, INS charging documents (the equivalent of indictments) and jail records containing lists of inmates. The government's claim that it can withhold such records under Exemption 7 is no less extraordinary than a claim that it

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45 Cf. *Houston Chronicle Pub. Co. v. City of Houston*, 531 S.W.2d 177, 181 (Tex. Civ. App. 1975) ("[n]ot surprisingly, representatives of the news media were shocked to discover that legislation that was declared to be for the purpose of opening up to public scrutiny functions of government was being construed to deny access to reports previously available to the press.").

46 The congressional report accompanied a bill, later enacted, requiring arrest records in the District of Columbia to be public. Act of Aug. 20, 1954, 68 Stat. 775 (now codified at D.C. Official Code § 5-113.01 (2001)).

could withhold unsealed indictments under Exemption 7. If accepted, the government's argument would allow secret arrests and detentions whenever the government claimed harm to law enforcement interests, as the district court recognized. Op. 21 (would "turn 7A into an exemption dragnet").

Such an interpretation would raise the substantial constitutional question whether these secret arrests are a violation of the First or Fifth Amendments. *See* Part II *infra.* On that ground of constitutional avoidance alone, this Court should interpret FOIA to require disclosure. *See e.g., Harris v. United States*, 122 S.Ct. 2406, 2413 (2002) ("when 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter'" (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408 (1909)).

But even if these records were subject to Exemption 7, they must be disclosed in this case, because the government failed to meet its burden to show a *reasonable likelihood* of harm under the claimed exemptions. Exemptions 7A, 7C and 7F authorize withholding information when disclosure: (A) "could reasonably be expected to interfere with enforcement proceedings," or (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)(A), (C), (F). As shown below, the government has failed to establish that disclosing the requested information could reasonably be expected to result in any of these statutory harms.

B. The Government Failed To Establish That The Identities of the Detainees Are Exempt Under 7A or 7F.

The government has failed to meet its burden under Exemptions 7A and 7F because it has not established that disclosure of the detainees' names could reasonably be expected to interfere with enforcement proceedings or endanger the life or physical safety

of an individual. The government simply has not established the requisite link between disclosure and the harms it hypothesizes. Moreover, the government's argument proves far too much. If accepted, it would authorize secret jailing in connection with any serious criminal investigation.

1. The government has failed to show that disclosure can reasonably be expected to interfere with its ongoing investigation.

The government has the burden of establishing a connection between disclosure and the harms it alleges will ensue from such disclosure. Even a showing of a "direct relationship between an active investigation and withheld information" does not carry the government's burden, because it does not prove that disclosure can reasonably be expected to cause the alleged harms. *Campbell v. Dep't of Health and Human Services*, 682 F.2d 256, 263-264 (D.C. Cir. 1982). As the district court held, the government has not met its burden of establishing a "rational link" between the harms alleged and disclosure. Op. 17 (quoting *Crooker v. BATF,* 789 F.2d 64, 67 (D.C. Cir. 1986)).

Most of the government's arguments about harm make sense only if the detainees are involved in terrorism or have knowledge about terrorism. But the government's affidavits nowhere even assert, much less offer any evidence, that this is true of *any* of the hundreds of individuals whose names are being withheld. Op. 17-18. The government's declarations state only that the detainees

> were *originally questioned* because there were indications that they *might* have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals and organizations who perpetrated them. For example, they *may* have been questioned because they were identified as having interacted with the hijackers, or were believed to have information relating to other aspects of the investigation.

Reynolds Decl. ¶ 10 (emphasis added). The government never states that any of these original suspicions were confirmed about even one of the detainees. Instead, it states

only that "in the course of questioning [these individuals], law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws, and, *in some instances*, also determined that they had links to *other facets of the investigation."* Id. [47]

Nevertheless, even though the government's affidavits lack the necessary factual predicate, the government argued that revealing the names of detainees would be harmful because it could alert terrorist organizations that their associates had been detained. But as the district court pointed out, given the government's emphasis that the detainees "are entitled to inform whoever they want of their detention and the passage of months," "it is implausible that terrorist groups would not have figured out whether their members have been detained." Op. 16.[48]

The government now claims that disclosure would interfere with its investigation because it "would allow terrorist organizations to know which persons have and have not been questioned as part of the terrorism investigation and would offer them a roadmap by which to discern the scope and direction of the federal government's ongoing efforts." Gov. Br. 23. But disclosing the identities of those who have been jailed—most on technical visa violations—will not reveal anything about the identities of the thousands of other individuals who have been questioned or investigated in connection with September

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[47] The government's other allegation that some of "the INS detainees may have been questioned because of their association with an organization believed to be involved in providing material support to terrorism," Watson Decl. ¶ 8, describes only a hypothetical possibility at least two steps removed from involvement in terrorist activity.

[48] In addition, the names of many individuals detained as material witnesses are already known, because they have been publicly identified. See page 9, note 34 *supra*.

11, but not jailed. Thus, it reveals nothing about who "ha[s] and ha[s] not been questioned." The government's claim is illogical on its face.[49]

Moreover, the government has made extensive public disclosures about the scope of and details of the terrorism investigation and about individuals it has identified as actual terrorists. While the government's brief repeatedly warns of the danger of alerting terrorist groups as to whom the government has questioned, it is silent about the Justice Department's own repeated press announcements of its highly visible program to question thousands of non-citizen males from countries with an al Qaeda presence.[50] The government has even announced the results of the investigation to date. "[With the exception of Zacarias Moussaoui] [a]s far as we know [the September 11 hijackers] contacted no known terrorist sympathizers in the United States. . . . To this day we have found no one in the United States except the actual hijackers who knew of the plot."[51] It has provided many other details concerning its investigation, from which, for example, one can see that the detentions at issue in this case resulted from its focus on Arabs or

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[49] The government's repeated misrepresentation underscores how weakly its theory is supported by the facts. *See* Gov. Br. 14 ("The issue here is . . . whether the government is required to provide a composite list of *all* persons whom it has *questioned* in connection with its September 11 investigation") (emphasis added); 15; 22; 24; 32 ("What plaintiffs seek here is . . . the list that establishes *precisely* who has and who has not been questioned in connection with the September 11 investigation") (emphasis added); 36.

[50] Department of Justice "5000 Interviews Status Report" Dec. 21, 2001, www.usdoj.gov/opa/pr/2001/December/01_ag_663.htm. Not only did the Department announce who would be questioned, it published the questions and guidelines for the interviews *and the results of the interviews.* Memorandum from the Attorney General re: Interviews Regarding International Terrorism, Nov. 9, 2001, www.usdoj.gov/ag/readingroom/terrorism1.htm; Memorandum from the Deputy Attorney General re: Guidelines for the Interviews Regarding International Terrorism, Nov. 9, 2001, www.usdoj.gov/04foia/readingrooms/terrorism2.htm; Memorandum from Kenneth L. Wainstein, Director, Executive Office for United States Attorneys, re Interview Report, March 19, 2002.

Muslims attending flight schools and on those who had some contact, however minimal, with any of the hijackers. [52]

Likewise, while the government argues that disclosing a compilation of names will be terribly harmful, it has already volunteered just such a list of individuals detained in connection with its terrorism investigation. On November 27, 2001, the Attorney General released a list of 93 individuals detained in connection with the September 11 investigation, who had been charged with various federal crimes not connected to terrorism.[53] The government has not explained why it compiled and released a list of detainees of just the type it now claims would imperil its investigation.

Not only has the government already released a list of detainees that is analytically indistinguishable from the list at issue here, it has also voluntarily released *more* information about individuals it has detained and publicly identified as terrorists than is being sought here. It has disclosed the very information about those detainees that it claims in this lawsuit could cause terrible harm if disclosed—their names, the date and place of their arrest, and their place of confinement. It even disclosed the very information that it fears terrorists "might" be able to deduce from the limited information being sought by plaintiffs, such as the government's source for information about an individual or the fact of a detainee's cooperation. And it has done this in the case of detainees who *are* believed to be terrorists, unlike the detainees whose identities are the subject of this lawsuit. *See* Op. 16, and notes 19-26 *supra*.

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[51] See note 31 *supra*.

[52] See note 28 *supra*.

[53] Pl. Mot. Ex. 22.

Thus, the government's predictions of harm are belied by its own disclosures of the very kind of information it is now withholding. In light of those extensive voluntary disclosures there is no basis to find that identifying the detainees could reasonably be expected to harm the investigation, as the district court correctly concluded. Op. 16-17. The *evidence* provided by the government's actual conduct plainly outweighs its speculative assertions. *See Lederman v. United States,* 291 F.3d 36, 45 (D.C. Cir. 2002) (rejecting government's professed security concerns about persons engaged in First Amendment activity on Capitol Hill in light of government's demonstrated lack of security concerns about tourists and other pedestrians in the same area).

The government's claim that disclosure of the identities of detainees could deter their future cooperation also fails for the same reasons. There is no allegation that *any*, much less all, of the detainees have useful information or connections. Even if some detainees had connections to al Qaeda, the government's claim depends upon al Qaeda not already knowing of their detention, when it must. Finally, as the district court points out, the government's argument would expand Exemption 7A to a rule that would permit the withholding of the names of jailed individuals "simply because of the possibility, however remote, that the detainees . . . have information that might, at a later date" be useful. Op. 19 n.12.[54]

The government's argument also fails because it simply proves too much. It would allow the secret arrest and detention of anyone on the mere allegation that he was "linked" to a "facet" of a terrorism investigation or an investigation of drug dealing or perhaps abortion clinic or animal-rights "terrorism." Under the government's analysis,

not even any showing of information reasonably indicating that the person was part of or had material knowledge about a criminal conspiracy would be necessary, just as there has been no such showing here. The government's claim is a frightening proposition that is antithetical to the American system of justice and for which there is no basis in the law.

2. The district court correctly held that the government's affidavits did not establish, even under a "mosaic" theory, the requisite probability of harm.

Having failed to demonstrate that disclosure can reasonably be expected to harm its investigation, the government asks the Court simply to defer to its judgment. But the government cites no authority that a court may simply accept its "predictive judgments," because there is none. To the contrary, as the government acknowledges, the law directs the courts to review the government's claims of exemption *de novo,* 5 U.S.C. § 552(a)(4)(B), and agency affidavits are not entitled to any special deference. *Alyeska Pipeline Service Co. v. EPA,* 856 F.2d 309, 315 & n.51 (D.C. Cir. 1988). No authority permits the court to employ in an Exemption 7 case the "substantial deference" standard appropriate in reviewing Exemption 1 national security claims.

Nor does the reasoning behind the "substantial deference" rule in Exemption 1 cases apply here. Exemption 1 claims involve classified information and frequently intelligence sources and methods, a world where most information is secret and the government is careful to keep it secret. Here, by contrast, while the terrorism investigation is obviously extremely important, the information at issue is not classified and has been provided to the detainees themselves (and any lawyers representing them) who have been free to disclose it as they wish. This case is thus unlike cases involving classified national security information, in which the government, mindful of the "mosaic" concept, takes great care not to disclose any piece of relevant information and

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54 The government did not claim that any of the detainees' identities were exempt as confidential informants under Exemption 7(D).

the courts presume that substantial deference is appropriate because of such heightened and necessary secrecy.

The district court was therefore quite correct in rejecting the government's argument— that deference should substitute for its inability to explain how disclosure can reasonably be expected to result in the alleged harms—as "contrary to well-settled Exemption 7 case law." Op. 21.

Moreover, under any standard, the government's invocation of the mosaic theory does not satisfy its burden. The government complains that the district court did not adequately consider the mosaic theory, because it did not consider what disclosure of the list of detainees would tell terrorist groups. Gov. Br. 32. But this is precisely what the district court did do. Applying common sense, as the government urges, it found that the government's "predictive judgments" about disclosure of the list are not only unsupported by its own affidavits, but illogical and contradicted by record evidence. For all the reasons outlined above, disclosing a list of detainees, while necessary for the American people to know what its government is up to, has not been shown to be reasonably likely to inform terrorists groups of anything of significance to their planning.

C. The District Court Erred in Ruling that Dates and Locations of Arrest, Places of Detention and Dates of Release May Be Withheld.

The district court held that the dates and locations of arrest could be withheld because they would reveal "patterns in the Government's investigation and strategy." Op. 33. But the government's claim is again fatally undercut by its own disclosures. Indeed, the district court apparently overlooked the fact that the dates of arrest of all the INS detainees have already been released. Def. Mot. Ex 6, JA __. The government has also provided arrest location information for persons arrested *as terrorists*.[55] Given these disclosures, the government has not met its burden to show that release of the locations of

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55 See note 19 *supra*; Eric Lichtblau, *4 in U.S. in Post-9/11 Plan to Join Al Qaeda*, The New York Times, October 5, 2002, at A1.

arrest can reasonably be expected to harm the investigation, especially as nearly a year has passed since most of the arrests.

The district court also accepted the government's argument that the locations of detention facilities could be withheld because it would make them "vulnerable to retaliatory attacks." Op. 34. But the government's assertion was always speculative in the extreme and again contradicted by the evidence. The Justice Department Inspector General announced himself where many detainees were being held,[56] and no attacks occurred. Here, too, the government's conduct speaks louder than its words, as it has routinely disclosed the place of detention of those who are believed to be actual al Qaeda operatives, whereas the INS detainees are simply "linked" to "facets" of the investigation and presumably of much less interest to al Qaeda.[57]

Finally, the district court gave no reason for exempting detainees' dates of release from disclosure, and none is apparent. Those dates plainly provide no "roadmap" to anything.

But all this information is important to the public – so that organizations may be able to offer legal or humanitarian assistance to those still in custody and to obtain further information about possible government misconduct, including for example, how long someone was jailed awaiting trial on often very minor charges.

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[56] "We selected MDC (Metropolitan Detention Center in Brooklyn, New York) and Passaic (Passiac County Jail, Patterson, NJ) for this review because they housed a significant percentage of the post-September 11 detainee population." Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act, at p. 8; available at: http://www.usdoj.gov/oig/special/patriot_act/pdf/full_report.pdf.

[57] Department of Justice Press Conference, Washington, DC, June 10, 2002; Susan Schulman, *Five Area Men Held as Al Qaeda Suspects*, The Buffalo News, September 14, at A1; Robert Schlesinger, *Six Indicted in Terror Investigation*, The Boston Globe, October 5, 2002, at A1.

D. None of the Requested Information is Exempt From Disclosure Under 7(C).

"Exemption 7(C), by its terms, permits an agency to withhold a document only when revelation 'could reasonably be expected to constitute an *unwarranted* invasion of personal privacy.'" *Reporters Committee,* 489 U.S. at 771 (1989) (emphasis by the Court). It follows, as the Court explained, that whether disclosure "is *warranted* must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny." *Id.* at 772 (emphasis added; internal quotation marks omitted). Indeed, as explained above, application of a balancing test permitting the government to withhold particular arrests on privacy grounds would be an extraordinary departure from historical tradition and constitutional understanding.

But even applying such a test, there is no basis to withhold this information. Here, the compelling public interest in disclosure of the secret arrests outweighs any privacy interest at stake. The requested documents are not private papers that have come into the government's possession or records that would only shed light on an individual. Rather, they are *official arrest records* and *charging papers*—documents that have been traditionally public since long before FOIA, and in which there is no recognized privacy interest *at all.*[58] Disclosure will directly serve the core purpose of FOIA to protect "the citizens' right to be informed about what their government is up to. Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." *Reporters Committee*, 489 U.S. at 773 (internal quotation and citations omitted).

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[58] *Newspapers, Inc. v. Breier,* 279 N.W.2d 179, 186 (Wis. 1979); *Williams v. KCMO Broadcasting Division Meredith Corp.,* 472 S.W.2d 1, 4 (Mo.Ct. App. 1971) (news report concerning an arrest could not be the basis for a cause of action for invasion of privacy).

Moreover, compelling evidence suggests that the government has engaged in unlawful—indeed, unconstitutional—conduct, and the information being withheld is "necessary in order to confirm or refute" that evidence. *SafeCard Serv., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). By contrast, any privacy interest in the fact of being arrested and detained for alleged illegal conduct is minimal, as the government recognizes by routinely making that information public in thousands of cases every year.

Thus the district court's decision that Exemption 7(C) does not justify the government's withholding of names except in those instances where a detainee submits a statement to the government requesting that his name be kept confidential (Op. 27), should be affirmed in part and reversed in part. There is no legal basis to withhold any of the names.

1. There is an overwhelming public interest in disclosure.

The power of the government to detain individuals is its most awesome and potentially dangerous power, and the consequences of governmental mistakes or abuse are particularly pernicious. There is perhaps no government conduct that needs public scrutiny more than arrests. Thus, the public interest would be compelling if all we knew was that the government had jailed more than 1000 individuals in secret.

But the events of September 11 make the requested information even more important, as reflected in the massive media coverage of this dispute and the widespread public and congressional calls for release of the names and condemnation of the secrecy.[59] The information is necessary so the public can assess the effectiveness of the

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[59] See notes 1-3, 12, 13 *supra*. The district court's decision was reported on the front page of virtually every major U.S. newspaper. See, e.g., Eunice Moscoso, *Detainees Must be ID'd: Court Rules Against Feds on 9/11 Suspects*, The Atlanta Journal-Constitution, August 3, 2002, A1; Anne Gearan, *Judge: Release Names of Detainees*, The Bloomington Herald-Times, August 3, 2002, A1; Frank James, *Judge Orders U.S. to Name Detainees: Secrecy Called 'Odious;' Government Says it's Vital*, The Chicago Tribune, August 3, 2002, A1.

government's anti-terrorism efforts and whether these detentions, in contrast to the more recent arrests of identified terrorists, reflect a vast internal terrorist threat or resulted from a Justice Department dragnet based mainly upon religion or ethnicity. The public needs the names to determine whether the government has engaged in serious and repeated violations of individual rights.

The government's response that "bare allegations of government misconduct" are not enough is beside the point. Here, there is already extensive evidence of such violations as to the relatively few individuals whose identities are known.[60] As the district court found, there has been extensive first hand testimony to Congress, human rights groups, the media and in lawsuits documenting abuses, as well as numerous reports. Op. 26 n. 17; *see* notes 10, 12, 14 *supra.* The Justice Department's Inspector General also has initiated an investigation into the government's treatment of the detainees.[61] Releasing the identity of the detainees is the only way for the American people to find out "what their government is up to" here. *See Rosenfeld v. Dep't of Justice*, 57 F.3d 803, 812 (9th Cir. 1995), (rejecting Exemption 7(C) claim where the

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Major newspapers and the American Bar Association called for release of the names and condemned the secrecy. See, e.g., *A Fine Balance*, The Fort Worth Star-Telegram, August 12, 2002; *Names Please: a Judge Orders Identification of Detainees*, The Pittsburgh Post-Gazette, August 7, 2002; *Secret Detentions Violate American Values*, The Seattle Times, August 7, 2002; see also, The Baltimore Sun and The Boston Globe, August 9, 2002; The New York Times, August 6, 2002; The Milwaukee Journal Sentinel, August 14, 2002; and The Washington Post, August 10, 2002. American Bar Association Resolution 115B, approved by the ABA House of Delegates at the 2002 Annual Meeting.

[60] The government's reliance upon Department of State v. Ray, 502 U.S. 164 (1991) to argue that the names would not be of any incremental value, given the disclosures already made, Gov. Br. At 44, is misplaced. In *Ray*, the government had already released the information provided by the repatriated refugees about their treatment. Here, the government has released no information about the treatment of the detainees, other than its unsupported assertion that they have been treated properly.

[61] Defendant's argument that its own investigation could somehow obviate the public's interest in obtaining the information necessary to make its own determination, Gov. Br. 46 n.7, is without support.

"public interest in … knowing whether and to what extent the FBI investigated individuals for participating in political protests" would "not be served without disclosing the names of the investigation subjects").

Accordingly, the record here includes "compelling evidence of misconduct," the most stringent standard for requiring disclosure of the names of suspects, witnesses, investigators or informants in law enforcement files. But plaintiffs note that this Court has not applied this standard in any case concerning the disclosure of the name of someone who has been arrested. *See e.g., SafeCard Serv., Inc., v. SEC*, 926 F.2d 1197, 1206 (D.C.Cir. 1991).

2. Any privacy interests are outweighed by the substantial public interest in disclosure.

a. INS detainees.

The government points to no authority holding that individuals have a recognized privacy interest in the fact that they have been arrested and jailed.[62] The only court to consider the matter under FOIA confirmed that disclosing "information about persons arrested or indicted for federal criminal offenses does not involve substantial privacy concerns." *Tennessean Newspaper, Inc. v. Levi*, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975).

In trumpeting concern about the privacy of the detainees, the government argues that they have an interest in not being associated with the September 11 attacks. But it is the government that jailed these individuals on unrelated immigration charges and then announced to the world that they had been detained in connection with the September 11 attacks. The government may not create a privacy interest where there was none by

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[62] *Reporters Committee* is not such authority, as it dealt with "rap sheets" rather than "police blotter" records. As the Supreme Court recognized, the "compilation of otherwise hard-to-obtain information" about an individual into a "computerized summary located in a single clearinghouse" significantly "alters the privacy interest implicated by disclosure of that information." 489 U.S. at 764.

publicly linking individuals to the terrorism investigation and then claiming solicitude for their privacy.

Once again, the government's own actions contradict its claim. If the government's privacy argument were correct, its voluntary release of a list of criminal defendants "detained in connection with the September 11 investigation," when those individuals had not been charged with crimes in connection with those attacks would have been an unjustified violation of those defendants' privacy. See Pl. Mot. Ex 22.

Here, it is the government that continues to associate the detainees with terrorism and it is the government that claims it "cannot rule out" links to terrorism, even while admitting that it has no evidence to that effect. Any concern about protecting the detainees from being stigmatized could be met with an announcement that none or only a few of them have actually been linked to terrorism.

Even if there were a legally cognizable privacy interest in the fact of being arrested, it is far outweighed by the substantial public interest in determining whether the government has violated the rights of those whose privacy it now invokes.[63] And as the government correctly notes, the district court's decision that the names of individuals who provide a sworn statement seeking to "opt out" from public disclosure may be withheld has no basis in the statute (Gov. Br. 16) and is "legally unsound and practically unworkable." Gov. Br. 47. Accordingly, the government's Exemption 7C claim must be rejected. See *Stern v. Federal Bureau of Investigation*, 737 F.2d 84, 93-94 (D.C. Cir. 1984) (ordering disclosure of name of senior FBI agent censured for misconduct because privacy interest outweighed by public interest in disclosure).

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63 The INS' own rules recognize that any privacy interest of non-citizens in their immigration status must give way where "disclosure would reflect agency performance." Third Party Requests for INS File Information, Memorandum for the Attorney General from Richard L. Huff and Daniel J. Metcalfe, May 10, 1996 (Pl. Mot. Ex. 54).

b. Individuals detained on material witness warrants.

This case differs materially from those cases cited by the government in which courts have found that witnesses in an investigation have a significant interest in keeping their involvement secret. *See* Gov. Br. 53. Usually witnesses interviewed during an investigation are not detained, and therefore they can keep their involvement from becoming public. In this case, however, the individuals involved have been arrested and taken away from their homes and their jobs. Their families, neighbors, and employers all know they are gone. Their arrest is not a secret to the people that really matter, and thus the repercussions that the government argues could result from revealing their identities— embarrassment and humiliation (Gov. Br. 40) — already exist. Accordingly, these detainees have less privacy interest in disclosure of their names than the usual witness.

But even if they had substantial privacy interests at stake, under the law of this Circuit the identities of witnesses in an investigation are not exempt from disclosure if access to those names "is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." *SafeCard Services*, 926 F.2d at 1206. As explained above, there is compelling evidence of government misconduct, including with respect to individuals held on material witness warrants, and disclosure is needed to determine whether this is in fact the case. *See* p. 5 n. 18 *supra*. Accordingly, the public interest in disclosure of the identities of these individuals far outweighs any attenuated privacy interests they may have.

E. The Names of the Detainees are Not Exempt under Exemption 7(F).

The government's claim that disclosing the names of the detainees is reasonably likely to cause harm to the public safety depends upon the same unproven assumptions that its 7(A) claim of harm to its ongoing investigation depends upon and fails for the same reasons. Similarly its claim that disclosing the names of the detainees is reasonably

likely to cause physical harm to the detainees themselves is mere speculation. There is already evidence that the detainees have suffered physical abuse in detention and have been threatened when deported. See notes 14-16 *supra*. Those who might threaten harm to such individuals are reasonably likely to already know of their detention, publicity will make them more, not less safe.

F. The Names of the Attorneys Are Not Exempt under Exemptions 7 (A) (C) or (F).

All the reasons outlined above as to why the identities of the detainees must be disclosed apply equally to disclosure of the names of their attorneys. But in addition, even if the identities of the detained individuals could be withheld, there is no basis for withholding the identity of their lawyers. The names of the attorneys are even more removed from disclosing any information of significance about the government's investigation. Nor is there any basis to claim a privacy interest on their behalf. The public interest in disclosure is substantial because the attorneys can provide important information about government misconduct. The claim of physical threat is pure speculation, belied by the experience of multiple lawyers publicly identified as lawyers for charged and convicted actual terrorists.

G. The Government Cannot Rely on Exemption 3 and Grand Jury Secrecy to Withhold the Identities of Individuals Detained as Material Witnesses.

The district court cogently explained why the government cannot rely on Exemption 3 and the federal laws mandating grand jury secrecy to withhold the identities of material witnesses. Fed. R. Crim. P. 6(e) prohibits disclosure of "matters occurring before the grand jury." But plaintiffs have not asked for the identities of grand jury witnesses; they have asked for the identities of individuals detained as material witnesses. Such material witnesses are not necessarily grand jury witnesses, and the government's affidavits do not establish that those held as material witnesses here are in fact grand jury

witnesses. Indeed, it is already known that at least eight material witnesses were eventually released and never testified before the grand jury. Op. 27-30. See Pl. Mot. Ex. 45. Finally, the government's interpretation of Rule (6)(e) as barring disclosure conflicts with its own public identifications of individuals held as material witnesses. See note 34, *supra*.

The government has failed to undercut the district court's reasoning. First, the government has not even addressed the fact that it has disclosed the names of numerous material witnesses. Gov. Br. 52-55. Yet this fact goes to the heart of plaintiffs' concern in this case: that the government is imposing secrecy in order to control the public's knowledge of and response to its activities rather than to protect legitimate law enforcement or security interests. The government's selective dissemination of information is inconsistent with its protestations of the need for secrecy. Moreover, the case law makes clear that public disclosure undercuts the arguments for secrecy. *In re Petition of Craig*, 131 F.3d 99, 107 (2d Cir. 1997); *In re Sealed Case*, 192 F.3d 995 (D.C. Cir. 1999).

Second, the government does not adduce any evidence that all (or even some) of the material witnesses were actually grand jury witnesses. It simply cites a statement in a declaration that all of the warrants in this case "were issued to procure a witness's testimony before a grand jury." Gov. Br. 54. This is insufficient to demonstrate a substantial overlap between individuals who are material witnesses and any actual grand jury witnesses. The hole in the government's evidence is demonstrated by its statement that an individual held as a material witness "must therefore be a grand jury witness." *Id*. The "therefore" makes no sense: the government may detain material witnesses for purposes of trial rather than grand jury proceedings. Furthermore, the government may improperly detain material witnesses for preventive detention purposes without any thought of trial or grand jury proceedings. Disclosure of the names of those detained as material witnesses helps protect against this danger.

II. THE COMMON LAW AND FIRST AMENDMENT PROHIBIT KEEPING BASIC ARREST INFORMATION SECRET.

A. Arrest Records are Covered by the Common Law Right of Access.

The government has not disputed the basic proposition that there is a federal common-law right of access to the documents at issue in this litigation. Def. Reply 40-43. And the district court "'assum[ed] this information can be considered [a] 'public record.'" Op. 43. But the court then failed to decide whether the common law provided a right of access to the identities of the detainees, because it had already ordered their names released under FOIA. Op. 43-44. The court did, however, reject plaintiffs' common law claim for access to "the dates and location of arrest and detention" on the ground that "[t]he harms the Government forecasts are significant" and that "[p]laintiffs have not indicated how the public interest would be furthered by the additional disclosures of dates and locations of arrest and detention." Op. 44.

The detainees' names, as well as the other information, must be disclosed pursuant to the common law right. We have shown above the reasons why disclosure of all of this information is in the public interest, and why the government's hypothesized harms from its release are not substantial. *Supra* at part I sections B- F**.** We show below that the district court's assumption that the common law right of access to public documents applied to these records was correct, because there is an enforceable right of access under the common law to basic information about individuals who are arrested and taken into custody by the government.

The Supreme Court recognized in *Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978), that "the courts of this country recognize a general right to inspect and copy public records and documents." *Id.* at 597. While that right has been most extensively litigated in the context of judicial records, it applies as well to other public records that, like court records, have been traditionally available to the public. With respect to such materials,

this common law right gives rise to a "presumption . . . in favor of public access" that is enforceable in the courts. *Id.* at 602.

This Court has recognized the deep roots and the importance of keeping basic arrest information public. Referring to an Act of Congress requiring the D.C. Metropolitan Police Department to maintain public arrest books, first enacted in the 19th century,[64] the Court noted that "[t]he requirement that arrest books be open to the public is to prevent any 'secret arrests,' a concept odious to a democratic society." *Morrow v. District of Columbia,* 417 F.2d 728, 741-42 (D.C. Cir. 1969).

Other courts across the nation have recognized this common law right. For example, in *Newspapers, Inc. v. Breier,* 279 N.W.2d 179 (Wis. 1979), the court ordered the police chief of Milwaukee to resume providing full arrest information when he had stopped providing certain details, relying on the state public records statute, which incorporated the common law. The court noted that the police chief was "not contending that the fact of an arrest may be kept secret or that the names of persons arrested should not be revealed. Accordingly, the serious constitutional due-process question which would be posed by secret arrests does not arise in this case." Id. at 184. Likewise, in *Houston Chronicle Pub. Co. v. City of Houston,* 531 S.W.2d 177 (Tex. Civ. App. 1975) the court construed the state Open Records Act to guarantee access to arrest records, which had been open "[f]or as long as veteran newspaper editors and reporters could recall." Id. at 180.

Similarly, attempts to abandon the historic practice of keeping a public "police blotter" led promptly to legislation codifying the common law right in Connecticut and California. See *Gifford v. Freedom of Information Com'n,* 631 A.2d 252, 262 (Conn. 1993) (reciting Connecticut events); *County of Los Angeles v. Superior Court,* 22 Cal.Rptr.2d 409, 415 (Cal. App. 1993) (reciting California events, and noting that the purpose of the corrective

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64 R.S.D.C. § 386, 20 Stat. 107, ch. 180, § 6 (June 11, 1878); now codified at D.C. Official Code § 5-113.01 (2001).

legislation was "to continue the common law tradition of contemporaneous disclosure of individualized arrest information in order to prevent secret arrests").

B. The Common Law Right of Access Should be Enforced Here.

The government argued below that the common law right of access should not be enforced here on grounds of sovereign immunity, preemption and balancing. Def. Reply 40-43. However none of those obstacles defeats plaintiffs' claim.

1. Sovereign immunity has been waived.

The government invoked sovereign immunity, but the Administrative Procedure Act, 5 U.S.C. § 702, is a waiver of sovereign immunity for actions against federal agencies seeking non-monetary relief. *Id.* at 41. This case is such an action and sovereign immunity is therefore not a bar. This Court has already rejected a sovereign immunity defense to a lawsuit seeking to enforce a common-law right of access to public documents. *Washington Legal Foundation v. United States Sentencing Commission,* 89 F.3d 897, 901-02 (D.C. Cir. 1996).

2. FOIA has not displaced the common law right of access.

The government's second objection below was that the enactment of FOIA preempted the common law right of access to public documents. Def. Reply 41-43. But no case has so held. To the contrary, this Court and the Supreme Court have all continued to recognize, develop and apply the common-law right of access subsequent to the enactment of FOIA in 1966.

Indeed, it was 1974—eight years after the enactment of FOIA—when Judge Gesell began the modern development of this right when he ruled that the media had a common-law right of access to "White House tapes" in the custody of the Clerk of Court. *United States v. Mitchell,* 386 F. Supp. 639, 641 (D.D.C. 1974). This Court agreed. 551 F.2d 1252 (D.C. Cir. 1976). The Supreme Court denied access to those tapes, *Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978), but not on the ground that FOIA had displaced the common law.

To the contrary, the Court acknowledged the vitality of the common-law right of access, which all parties conceded, *see id.* at 597, and denied access because a special law directed specifically at the tapes at issue (the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526, 88 Stat. 1695 (1974)) mandated denial. *Id.* at 603.

While the Presidential Recordings and Materials Preservation Act drew a unique and preemptive line, there is no reason to believe, and no court has held, that in enacting FOIA Congress intended to eliminate existing legal rights of access. Indeed, this Court has made clear that FOIA "is not to be interpreted in any way as a restriction on government disclosure." *Charles River Park A, Inc. v. Department of Housing and Urban Development,* 519 F.2d 935, 941 (D.C. Cir. 1975), *overruled, in part, on other grounds by Sears, Roebuck & Co. v. GSA,* 553 F.2d 1378, 1381 n.6 (D.C. Cir. 1977).

Consistent with that admonition, the courts have continued to consider common-law access claims as not precluded by FOIA. *See, e.g., Washington Legal Foundation v. United States Sentencing Commission,* 89 F.3d 897 (D.C. Cir. 1996) (adjudicating common-law claim on the merits).[65] This case should proceed the same way.

3. The public interest in obtaining this information outweighs the government's interest in withholding it.

The government's final defense to the common law right of access was that the harms from release outweighed the public interest in disclosure. Def. Reply 43. We have already explained why the opposite is true. *Supra* at part I, sections B-F**.**

Courts dealing with the common law right of access to arrest records have recognized as much. For example, in elaborating upon this Court's understanding that "'secret arrests,'

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65 See also *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995); *Mayo v. Government Printing Office*, 9 F.3d 1450 (9th Cir. 1993); *Smith v. United States District Court*, 956 F.2d 647 (7th Cir. 1992); *Wilson v. American Motors Corp*., 759 F.2d 1568 (11th Cir. 1985); *United States v. Myers (In re Application of National Broadcasting Co*.), 635 F.2d 945 (2d Cir. 1980).

[are] a concept odious to a democratic society," Justice Corrigan of the Ohio Supreme Court explained:

> If there is no official arrest record at the jail, except the private log of the jailer, how is it to be determined if there was unnecessary delay in according the person arrested his rights? How is his family or a friend going to learn of his arrest if, on inquiry, they are advised there is no official record? The constitutional foundation underlying these rights is the respect a state or city must accord to the dignity and worth of its citizens. It is an integral part of constitutional due process that a public record of such arrests be maintained.

Dayton Newspapers, Inc. v. City of Dayton, 341 N.E.2d 576, 579 (Ohio 1976) (Corrigan, J., concurring). And quoting Thomas Jefferson, the Wisconsin Supreme Court observed that

> "The functionaries of every government have propensities to command at will the liberty and property of their constituents. There is no safe deposit for these but with the people themselves, nor can they be safe with them without information."

Newspapers, Inc. v. Breier, 279 N.W.2d at 187 (quoting THE POLITICAL WRITINGS OF THOMAS JEFFERSON 93 (E. Dumbauld ed. 1955)).

Jefferson's concerns translate directly into the Supreme Court's teaching that a person need not have any special interest in particular information in order to assert a common law right of access. Rather, "[t]he interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies." *Nixon v. Warner Communications,* 435 U.S. at 597-98. That is, of course, precisely plaintiffs' interest here.

The circumstances giving rise to this case demonstrate that Jefferson's concerns were not hypothetical. In a dramatic break with our traditions, the government has incarcerated hundreds of men—all, or nearly all, belonging to a minority ethnic or religious group—and has refused, for more than a year, to release even basic information about their identity or the circumstances of their arrests. Moreover, the government has admitted that the real reason for most of these detentions is simply preventive: these individuals are not accused or even suspected of having committed any crime. In these circumstances, plaintiffs' "desire to keep

a watchful eye" on the government is compelling, and the common law right of access should be enforced.

C. The First Amendment Prohibits Keeping Arrest Records Secret.

The common law history also supports a First Amendment right. The First Amendment prohibits the government from denying access to information about the government's operations where two tests are satisfied. First, that the matter has historically been public, *see Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 505-08 (1984); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 605 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 569-70 (1980); and second, that the right of access plays a positive role in the context in which it is sought, *see Press-Enterprise,* 464 U.S. at 508-09; *Globe Newspaper,* 457 U.S. at 606; *Richmond Newspapers,* 448 U.S. at 569-73. These tests have sometimes been referred to as the tests of "experience and logic." *Press-Enterprise Co. v. Superior Court (Press-Enterprise II),* 478 U.S. 1, 9 (1986).

These tests do not create a general First Amendment right of access to government information. *See, e.g., Houchins v. KQED, Inc.,* 438 U.S. 1, 14 (1978) (no "First Amendment right to government information regarding the conditions of jails and their inmates"). But the material at issue in this case easily satisfies both tests. There is an unbroken history of public access to arrest records and charging documents, from colonial days to September 12, 2001. [66] As noted above, the right was recognized by Blackstone and the Federalist, it is embodied in the common law, it has been acknowledged by Congress and state legislatures, and enforced by the courts.

Even at the height of the Cold War, Congress understood that a failure to maintain open arrest records would leave the public defenseless "against secret arrests and against the abuse in any way of the arrest power." H.R. Rep. No. 2332, 83d Cong., 2d Sess., at 1.

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66 We understand that the amicus brief to be filed by the Washington Post *et al*. will canvass this history.

These fears have been borne out by the government's treatment of the very arrestees whose records are at issue in this case. *See* pp. 4-5 *supra*.[67]

Because arrest records satisfy both parts of the constitutional test, it follows that "the State's justification in denying access must be a weighty one," and that where, "as in the present case, the [government] attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. *Globe Newspaper*, 457 U.S. at 606-07.

The government's own conduct in releasing a plethora of information about its investigation, and in allowing detainees to self-disclose all of the information sought here, demonstrates that its categorical refusal to release the information to the American people serves no compelling interest, much less in a narrowly-tailored way. It follows that the First Amendment right should also be enforced.

CONCLUSION

For the reasons given above, the district court's decision that the names of the detainees and their attorneys must be disclosed should be affirmed; its decisions setting up an opt-out procedure and that the government may withhold the locations of arrest and detention and the dates of release should be reversed.

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[67] The government conceded below that the First Amendment "mandates it to disclose the identities of persons who were arrested in connection with the September 11 investigation and charged with a criminal offense." Def. Reply at 19-20. We agree with that concession. We also agree with its necessary implication that the *dicta* in *Los Angeles Police Dep't v. United Reporting Pub. Corp.,* 528 U.S. 32, 40 (1999)("California could decide not to give out arrestee information at all without violating the First Amendment") is not controlling here. The plaintiffs in LAPD were seeking the home addresses of arrestees, which have never been sought in this case, and which raise entirely different privacy interests. We disagree, however, with the government's view that the First Amendment requires it to release the names of anyone it charges with a criminal offense but permits it to detain anyone else in secret, including people it chooses not even to charge or try. That result makes no sense, either as a matter of experience or logic.

Respectfully submitted,

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