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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 02-5254 & 02-5300

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,
Civ. Action No. 01-2500 (GK)

BRIEF FOR *AMICUS CURIAE* THE WASHINGTON POST COMPANY; ABC, INC.; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CBS BROADCASTING INC.; CABLE NEWS NETWORK LP, LLLP; THE COPLEY PRESS, INC.; MAGAZINE PUBLISHERS OF AMERICA, INC.; NATIONAL BROADCASTING COMPANY, INC.; NATIONAL PRESS CLUB; THE NEW YORK TIMES COMPANY; NEWSPAPER ASSOCIATION OF AMERICA; PHILADELPHIA NEWSPAPERS, INC.; SOCIETY OF PROFESSIONAL JOURNALISTS; TIME INC.; and TRIBUNE COMPANY IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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CERTIFICATE

Except for ABC, Inc., CBS Broadcasting Inc., Cable News Network LP, LLLP, The Copley Press, Inc., Magazine Publishers of America, Inc., Newspaper Association of America, Philadelphia Newspapers, Inc., Society of Professional Journalists, Time Inc., and Tribune Company, which are all signatories on this *amici* brief, all parties, intervenors or *amici* appearing before the district court and this court are listed in the Brief for Appellees/Cross-Appellants.

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Tribune Company is a publicly traded company and has no parents, subsidiaries or affiliates that are publicly owned. No publicly held company owns more than 10% of its stock.

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INTRODUCTION AND INTEREST OF *AMICI*[2]

Amici, which include this country's leading news organizations, are committed to scrutinizing and reporting the Government's methods of law enforcement. (A description of the identity of each individual *amicus* is set forth in Addendum A hereto.) *Amici* are now attempting to track the fate of over one thousand people whom our Government has detained in the wake of the September 11, 2001 terrorist attacks. Here is a sample of what *Amici* have been able to uncover with only a handful of names:

Tony Oulai, a West African pilot, was arrested on September 14, 2001 and has been jailed ever since – first as a suspected terrorist and now as a material witness. Although cleared of any links to terrorists, he was charged six months after first detained for a false statement about his immigration status on the day of his arrest. Amy Goldstein, *No Longer a Suspect, But Still a Detainee*, Wash. Post, May 27, 2002, at A1.

Nabil Almarabh, a former Boston cab driver, was taken into custody on September 18, 2001 as a terrorism suspect and material witness. He did not appear before a judge until arraigned in May 2002. Steve Fainaru, *Suspect Held 8 Months Without Seeing Judge*, Wash. Post, June 12, 2002, at A1. On September 3, 2002, after eleven months in custody, the Government conceded it had no evidence linking Almarabh to terrorism. Steve Fainaru, *Sept. 11 Detainee Is Ordered Deported,* Wash. Post, Sept. 4, 2002, at A10.

Hady Hassan Omar, an Arkansas resident, was arrested on September 12, 2001, and detained for seventy-three days because he bought a one-way airline

[2] All parties have consented to this filing; a Notice of Intent to Participate was filed on October 11, 2002.

ticket on the same Kinko's computer as a hijacker. Dan Eggen, *9/11 Detainee Files Lawsuit,* Wash. Post, Sept. 10, 2002, at A2.

Abdullah Higazy, an Egyptian student staying in a hotel near the World Trade Center on September 11, 2001, was detained for thirty-one days before all charges were dropped. Recently unsealed records disclose a court-ordered investigation into the FBI's conduct. Benjamin Weiser, *F.B.I. Faces Inquiry on a False Confession from an Egyptian Student,* N.Y. Times, Aug. 6, 2002, at B4.

Far from providing a "roadmap" to the substance of the Government's terrorism investigation, these and other stories[3] reveal that our Government has been holding hundreds of people in secret for prolonged periods of time – some with delayed access to counsel, some under difficult conditions, some on minor charges, and some (if not many) without any link to terrorism. That many of the detainees have not even been charged with any crimes heightens the need for the press to "bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

Amici have no desire to jeopardize the Government's terrorism investigation or to rifle through the Government's files to learn the names of everyone it has questioned or has under surveillance. *Amici* also acknowledge that the Government might be able to show that holding back the names of certain current detainees is the only way of protecting the safety of those detainees or the public. But the Government's contention here that it may withhold the names of hundreds of people that that it is jailing without any individualized showing or link to terrorism threatens to stifle public scrutiny into the administration of justice.

[3] Many such articles are cited in Plaintiffs' Brief ("Pltfs' Br.") at 4-8.

Worse yet, it ignores its legal obligation to allow people to monitor how it is exercising one of its most awesome powers.

It is not enough that the press has been able to report on the treatment of a few of the 1,000-plus detainees. That Mr. Oulai had the courage to speak to *The Washington Post* does not mean that we can rely on others in an inherently coercive custodial environment to pick up the phone. Nor should the press have to wait for the Government, in its discretion, to decide which names of which detainees it will reveal. Selective disclosure reinforces the suspicion, founded or unfounded, that the Government is concealing its mistakes while trumpeting its successes. History, tradition, logic, and the law require more.

SUMMARY OF ARGUMENT

I. This is more than just a FOIA case. In a typical FOIA case, complainants seek access to "*traditionally nonpublic* government information . . . under a statutory entitlement." *McGhee v. Casey,* 718 F.2d 1137, 1147 (D.C. Cir. 1983) (emphasis added). But here Plaintiffs are requesting that the Government divulge information – specifically, the names of persons arrested and jailed in the course of a criminal investigation – that has been made available to the public since prior to the founding of our Republic and that remains presumptively available nationwide as a fundamental check on the power of the state. This experience and logic supporting the availability of arrest logs implicates the First Amendment and requires this Court to resolve any close questions under FOIA to mandate disclosure.

II. The constitutional dimension of the Government's blanket no-disclosure policy requires it to demonstrate that its policy is narrowly tailored to serve a compelling interest. It has not met this burden. The Government may not jail

people secretly in order to encourage them to cooperate, and it may not withhold detainees' names for privacy reasons. While the Government may have legitimate concerns regarding national security or grand jury proceedings, those interests can and should be accommodated on a case-by-case basis.

ARGUMENT

I. THE FIRST AMENDMENT RESTRICTS THE GOVERNMENT'S ABILITY TO KEEP SECRET THE NAMES OF PERSONS IT HAS ARRESTED AND DETAINED.

A. The First Amendment Is Implicated When the Government Stops Disclosing Information that Traditionally Has Been Made Public and that Serves as a Vital Check on Governmental Abuses of Power.

The Framers of our Constitution recognized that "[a]n informed public is the most potent of all restraints upon misgovernment." *Grossjean v. American Press Co.,* 297 U.S. 233, 250 (1936). "A popular government without popular information *or the means of acquiring it,* is but a prologue to a farce or a tragedy, or both." James Madison, Letter to W.T. Berry (Aug. 4, 1822), *in* The Complete Madison (1953) (emphasis added); *see also Branzburg v. Hayes,* 408 U.S. 665, 681 (1972) ("without some protection for seeking out the news, freedom of the press could be eviscerated"). Consequently, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v. Belotti,* 435 U.S. 765, 783 (1978). This prohibition guarantees "the indispensable conditions for meaningful communication" regarding important governmental affairs. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 588 (1980) (Brennan, J., concurring); *see also Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 604 (1982) ("[A] major purpose of [the First] Amendment was to protect the free discussion of

public affairs . . . [in order] to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.").

The Supreme Court applied this prohibition against withholding information in *Richmond Newspapers* to prohibit states from unnecessarily conducting criminal trials in secret. The Court held that the government may deny access to trials only if it comes forward with an "overriding interest" in a particular case that cannot be accommodated short of imposing secrecy. 448 U.S. at 581 (plurality opinion). In subsequent years, the Court utilized this same analysis to forbid unnecessary closure of other phases of the criminal process. *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) (preliminary hearings); *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) (*voir dire* examinations).

The prohibition against unnecessary secrecy in vital governmental affairs is not limited to formal criminal proceedings. As Justice Stevens explained, *Richmond Newspapers* "unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." 448 U.S. at 583 (Stevens, J., concurring). Federal courts of appeals thus have applied *Richmond Newspapers* to find a prohibition against unnecessary withholding of governmental information – including lists of names – in a variety of contexts. *See Whiteland Woods, L.P. v. Township of W. Whiteland,* 193 F.3d 177, 181 (3d Cir. 1999) (meeting of town planning commission); *Cal-Almond, Inc. v. United States Dept. of Justice,* 960 F.2d 105, 109 (9th Cir. 1992) (Department of Agriculture's voters list); *In re Search Warrant for Secretarial Area Outside Office of Gunn,* 855 F.2d 569, 572-73 (8th Cir. 1988) (affidavit in support of search warrant); *United States v. Smith,* 776 F.3d 1104, 1114 (3rd Cir. 1985) (bill of particulars listing unindicted alleged co-

conspirators); *N.H. Newman v. Graddick,* 696 F.2d 796, 801 (11th Cir. 1983) (civil trials regarding prison conditions); *United States v. Doherty,* 675 F. Supp. 719, 723-24 (D. Mass. 1987) (list of jurors' names).

To be sure, neither the First Amendment nor FOIA grants the press "access to all sources of information within government control." *Houchins v. KQED, Inc.,* 438 U.S. 1, 14 (1978). Nor does the law require the government to divulge information that "reveals little or nothing about [its] conduct." *United States Dept. of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 773 (1989). But the *Richmond Newspapers* test ensures that the Government cannot unnecessarily withhold information that (i) traditionally has been made public and (ii) serves an important function of monitoring governmental conduct in our justice system. *See, e.g., Washington Post Co. v. Robinson,* 935 F.2d 282, 288 (D.C. Cir. 1991).

Whatever the precise universe of practices subject to analysis under this "experience and logic" test might be, even the Government has previously acknowledged that it must be triggered when it arrests people on American soil and detains them in the course of a criminal investigation. Brief for United States at 27 n.15, *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32 (1999), *at* 1999 WL 280450 (*Richmond Newspapers* test applies in these circumstances); *accord Newman,* 696 F.2d at 801. That is what is happening here; all of the detainees were "originally detained" for criminal reasons. DOJ Br. at 4.[4]

[4] Accordingly, this Court need not weigh in regarding whether the First Amendment prohibits closing deportation hearings. *Compare Detroit Free Press v. Ashcroft,* 303 F.3d 681 (6th Cir. 2002) (*Richmond Newspapers* test prohibits closure) *with North Jersey Media Group v. Ashcroft,* 2002 WL 31246589 (3rd Cir. 2002) (*Richmond Newspapers* test applies but is not satisfied). Not only does this

A detention strips a person of his physical liberty, and it is the first step in the process that can lead to criminal charges or – under the Government's current interpretation of material witness law – to months of jail time for no wrongdoing at all. When the government invokes its power in this way, all six courts to consider the question have held that withholding basic information regarding arrestees "may so undermine the function of the First Amendment that is both appropriate and necessary" to test the government's nondisclosure against First Amendment principles – even if only as an interpretive lens through which to interpret public records statutes. *Herald Co. v. McNeal,* 553 F.2d 1125, 1131 n.10 (8th Cir. 1977) (withholding arrest logs "at least present[s] a colorable constitutional question"); *infra* at 13-14 (other cases holding that withholding arrest logs implicates First Amendment).

B. Arrest Logs Traditionally Are Open to the Public.

"[B]ecause a tradition of openness implies the favorable judgment of experience," this Court must first consider whether the information sought has "historically been open to the press and the general public." *Press-Enterprise,* 478 U.S. at 8 (internal quotations and citations omitted). This inquiry requires the review of available pre-Founding evidence, but the Supreme Court has held that it is sufficient if "[t]he vast majority of States considering the issue" reached the same conclusion during the nineteenth and twentieth centuries. *Id.* at 10. Here, centuries of practice leave no doubt that the government traditionally discloses the

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case not involve substantive hearings, but none of the detainees were arrested for immigration-related reasons.

names of persons whom it arrests and jails in the course of criminal investigations,[5] even when those investigations involve threats to the national security.

1. Historical roots

The English common law justice system purposely distinguished itself from the inquisitorial process by disclosing information from the moment a person was arrested. The inquisitorial system, utilized in continental Europe in the sixteenth century, cited and arrested people "in secrecy" and relied heavily on self-incrimination. Leonard W. Levy, Origins of the Fifth Amendment 34 (2d ed. 1986). England's infamous Star Chamber during the Middle Ages likewise "privately arrested" people and brought them before the King's Council on "secret information." Sources of Our Liberties 166 n.3 (Richard L. Perry ed. 1959) (quoting Albert Venn Dicey, The Privy Council 102-03 (1887)). In 1641, recognizing that its experiment with the inquisitorial system had been particularly abused "in civil causes" and "by experience [had] been found to be . . . the means to introduce an arbitrary form of government," England abolished the Star Chamber. Act Abolishing the Star Chamber II(3)-(4), *in* Sources of Our Liberties, at 139. From that point forward, "publicity bathed the English common-law procedure." Levy, *supra*, at 34. "Secret arrests" were deemed "unlawful, indeed,

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[5] All of the detainees involved in this case fit this description. That many are suspected now only of violating immigration laws or of being "material witness" to criminality does not change the "original[]" reason for their arrests, DOJ Br. at 4, or make the curtailment of their liberty any less severe. Indeed, if the government must disclose the names of those it charges with criminal offenses, surely it may not avoid that obligation by not charging persons or by continuing to detain them for non-criminal reasons. *See, e.g., Grove Fresh Distributors v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (extending First Amendment presumption of openness from criminal to civil proceedings when "the contribution of publicity is just as important").

repugnant," U.S. Dept. of Justice, Criminal Justice Information Policy, Original Records of Entry, NCJ-125626, at 28 (1990) ("Original Records of Entry"), because they led to coerced confessions and other unreliable statements from detainees. Levy, *supra*, at 34.

The Founders of our Constitution shared the common law's insistence on making the identities of arrestees publicly available. In the Federalist Papers, Alexander Hamilton, drawing upon the words of Blackstone, described secret arrests as more abhorrent than depriving a man of his life without due process:

> "To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious act of despotism, as must at once convey the alarm of tyranny throughout the 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 (J. Cooke ed. 1961), at 577 (quoting 1 Blackstone, Commentaries 136); *see also Reporters Committee,* 489 U.S. at 772 (Founders "thought secrecy in government one of the instruments of Old World tyranny") (quotation omitted).

The Founding generation adhered to this view even in implementing the Alien and Sedition Acts of 1798. As soon as people were arrested for violating the Sedition Act, the press reported their names, despite threatened war with France. *See* John C. Miller, Crisis in Freedom: The Alien and Sedition Acts 64-65, 99-100 & n.31 (1951). And even though the Alien Enemies Act gave the president the power to detain or deport any "dangerous" alien during wartime, Justice Washington, riding circuit and reviewing the detention of an Englishman during the War of 1812, called such detentions "public measures." *Lockington v. Smith*,

15 F. Cas. 758, 760 (D. Penn. 1817). When aliens were arrested in subsequent wars under this Act, the government was open about their detentions – so much that the aliens' names are listed in captions of cases challenging their jailing. *See, e.g., Ex Parte Fronklin*, 253 F. 984 (N.D. Miss. 1918); *Bauer v. Watkins*, 171 F.2d 492 (2d Cir. 1948).

Our Nation's commitment to transparency of detentions was demonstrated perhaps most vividly in the Civil War. When President Lincoln suspended the writ of habeas corpus, the federal militia arrested a number of civilians who were giving aid to the Rebels. Michael Kent Curtis: Free Speech, "The People's Darling Privilege" 305-06 (2000). Because the Nation faced "one of the most extreme threats in [its] history," Lincoln's administration continued to detain these individuals on non-criminal grounds, subject only to potential proceedings before military tribunals. *Id.* During rebellion, Lincoln said, "arrests are made, not so much for what has been done, as for what probably would be done." *Id.* at 339-40. Upon learning of this practice, Congress was so concerned that within months it passed the Act of March 3, 1863. That Act accepted the suspension of habeas corpus, but it required the secretaries of state and war to furnish the federal courts with:

> a list of all persons . . . who are now, or may thereafter be, held as prisoners of the United States, by order or authority of the President . . . as state or political prisoners, or otherwise than as prisoners of war.

An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, March 3, 1863, 12 Stat. 755, ch. 81, § 2 (1863). Even though "the great writ" could be suspended, secret arrests would not be tolerated.

In the 1800's, many local police departments began keeping records that became known as "police blotters." While the precise information kept in these records varied (as it still does today), a police blotter generally "chronicle[s] each day's significant, formal criminal justice contacts between members of the police force and the public, such as arrests and detentions." Original Records of Entry, at 1. It records the names of all persons taken into custody and often includes the place and time of arrests, a brief physical description of detainees, the name of the arresting officers, and any allegations against detainees. Walter A. Steigleman, *The Legal Problem of the Police Blotter,* 20 Journalism Q. 30, 30 (1943).

From their inception, police blotters were made available to the press and the public. *See* Frank Luther Mott, American Journalism: A History of Newspapers in the United States Through 250 Years 222 (1941) (describing press access to police blotter dating back to 1830's). A 1920 Ohio decision reinforced their availability by admonishing the Cleveland police chief for closing the city's police blotters and holding that the First Amendment entitled the press to inspect those records. *The Cleveland Co. v. Smith* (Ohio Ct. Common Pleas July 21, 1920), *reprinted in* Harold L. Cross, The People's Right to Know 95 (1953). A 1933 Virginia decision granted a writ of mandamus permitting newspapers to inspect city "police blotters, the list of arrested persons, with their descriptions," ruling that withholding such access impinged "the constitutional rights of petitioners and the security and protection of the public and arrested persons as well." *Times Dispatch Publishing Co. v. Sheppard* (Hustings Ct. of City of Richmond Jan. 13, 1933), *reprinted in* The People's Right to Know, at 100. The Florida and Alabama Supreme Courts similarly made it clear on statutory grounds that official documents listing names of arrestees were "public records." *Lee v. Beach Publishing Co.,* 173 So. 440 (Fla.

1937) (police department books); *Holcombe v. State,* 200 So. 739, 748 (Ala. 1941) ("jail dockets").

In 1954, when the District of Columbia attempted to impose limitations on access to its arrest records, Congress again reacted promptly and decisively. Recognizing the "long custom and practice" of "keeping arrest books and [making] them available for public inspection," the House Committee on the District of Columbia resolved that such records should be public as a matter of law "both for the protection of the public against secret arrests and against the abuse in any way of the arrest power." H.R. Rep. No. 2332, 83rd Cong., 2d Sess., at 1 (1954). Congress enacted 4 D.C. Code §135 (now codified at D.C. Official Code 5-113.01), which requires all arrest books to be "open for public inspection." Years later, this Court observed that this law guaranteed that there would be no "'secret arrests,' a concept odious to a democratic society." *Morrow v. District of Columbia,* 417 F.2d 728, 742 (D.C. Cir. 1969).

Studies in the 1950's and 1960's confirmed that the overwhelming majority of jurisdictions allowed access to police blotters, even though most of these jurisdictions were still not even required to do so by statute. A 1953 study of court decisions could find only one decision leaving disclosure of arrest logs to the discretion of a police department, and even there the department had permitted public inspection of these logs "for a long period of years." The People's Right to Know, at 102. In 1966, a random sample by the American Bar Association found that 93% of local police chiefs permitted access to their blotters. ABA, *Standards Relating to Fair Trial and Free Press,* at 230-31 (1966). A concurrent ABA survey of 16 newspaper editors revealed that police departments made their blotters available in every instance. *Id.* at 242. In another study, 31 of 33 state

attorneys general responded that police departments in their state allowed reporters and the public to inspect blotters. Michael J. Petrick, *The Press, the Police Blotter, and Public Policy,* 46 Journalism Q. 475, 477 (1969).

2. Recent tradition

Following the proliferation of modern freedom of information laws, a 1990 Department of Justice publication reported that statutes made "police blotter information" publicly available in over two-thirds of states, and that every other state save one or two required disclosure of such information by means of an attorney general opinion, court decision, or tradition. Original Records of Entry, at 16 & Appendix (categorizing states). What is more, "*every court*" during this period that considered whether "contemporaneous information describing an arrest and an arrestee is available to the public [] found some basis, constitutional or otherwise, on which to make such information available." Original Records of Entry, at 37 (emphasis added). In 1974, for example, when the Houston Police Department began denying access to daily "arrest sheets" that the Department previously had disclosed "[f]or as long as veteran newspaper editors and reporters could recall," the Texas Court of Appeals ordered the Department immediately to resume its prior policy of access on the ground that the "press and the public have a constitutional right of access" to such basic criminal activity information. *Houston Chronicle Publishing Co. v. City of Houston,* 531 S.W.2d 177, 180-81, 186-87 (Tex. App. 1975).

During this same time, the Supreme Courts of Vermont, Wisconsin and Wyoming, and several Justices of the Ohio Supreme Court also found that the government's denial of access to police blotter information implicated constitutional concerns. *See Caledonian Record Publishing Co. v. Walton,* 573

A.2d 296, 299 (Vt. 1990) (statutory access to "arrest records" compelled "[p]ursuant to First Amendment"); *Newspapers, Inc. v. Breier,* 279 N.W.2d 179, 187 (Wis. 1979) (public has a statutory and common law right to inspect arrest records, which is "consistent with the views of the Constitution of the United States, particularly the First Amendment"); *Sheridan Newspapers, Inc. v. City of Sheridan,* 660 P.2d 785, 793-96 (Wyo. 1983) (police department's "blanket withdrawal of the rolling log" of arrests and incident complaints made to police violates the First Amendment and state open records statutes; case-by-case analysis is necessary); *Dayton Newspapers v. City of Dayton,* 341 N.E.2d 576, 579 (Ohio 1976) (Corrigan, J. concurring) (stating that Due Process Clause requires jail logs to be kept public; majority did not reach issue because it mandated access on statutory grounds). This Circuit's district court also held that the First Amendment restricts the ability of state universities to withhold names on arrest reports. *Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1233-34 (D.D.C. 1991).

Several other courts mandated disclosure of arrest and jail logs under freedom of information statutes – often holding explicitly that such information was not sufficiently "investigative in nature" to impede any law enforcement activities.[6] And in two instances in which such laws were not yet on the books, state legislatures swiftly responded to police departments' denials of access "to continue the common law tradition of contemporaneous disclosure of

[6] *See Hengel v. City of Pine Bluff,* 821 S.W.2d 761, 764-65 (Ark. 1991) (jail log not "sufficiently investigative in nature to qualify for the exception"); *State v. Brown,* 467 So.2d 1151 (La. App. 1985) (arrest log); *Lebanon News Publishing Co. v. City of Lebanon,* 451 A.2d 266 (Pa. Commw. Ct. 1982) (police blotters); *Sheehan v. City of Binghampton,* 398 N.Y.S.2d 905 (App. Div. 1977) ("police blotters and booking records"); *see also* 63 Op. Att'y General 543 (Md. 1978) (arrest logs).

individualized arrest information in order to prevent secret arrests and to mandate the continued disclosure of customary and basic law enforcement information to the press." *County of Los Angeles v. Superior Court,* 22 Cal. Rptr. 2d 409, 416 (Cal. App. 1993) (describing California statute); *see also Gifford v. Freedom of Information Comm'n,* 631 A.2d 252, 262 (Conn. 1993) (Conn. Gen. Stat. §1-20b, which requires immediate disclosure of all adult arrestees' names, was passed "to make sure when somebody was booked there would be no way of keeping that information from the public") (quotation omitted). In the only reported instance of a public official refusing to disclose information regarding federal detainees, a federal district court held that it was not enough that a United States Attorney divulge the names of all persons whom had been "arrested or charged" with criminal violations. *Tennesean Newspaper, Inc. v. Levi,* 403 F. Supp. 1318, 1319 (M.D. Tenn. 1975). The court held that FOIA also required disclosure of other basic information that was "traditionally and routinely disseminated to the news media" – arrestees' ages, their employment status, and circumstances regarding their arrests. *Id.* at 1319-21.

Today, it appears that every state makes its police departments' arrest and detention logs open for public inspection, regardless of whether the detainees have been charged with any crime. *See* Bureau of Justice Statistics, Report on the National Task Force on Privacy, NCJ 187669 (2001) at 13 (not noting any exceptions).[7] Even when states curtail access to individual rap sheets, they still

[7] Some jurisdictions distinguish between arrestees' names and their home addresses, curtailing access to the latter for privacy reasons. *See, e.g., Los Angeles Police Dept.,* 528 U.S. at 34-35 (California statute requiring disclosure of names but not addresses). The refusal to disclose arrestees' addresses information for

agree with the judgment of history that the urgency and seriousness of current detentions requires them to "provid[e] that other arrest-related documents, such as arrest logs, the name of the person being held in custody . . . are public documents open for inspection." Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes,* 28 Urb. Law. 65, 87 (1996). Prior to this case, the Department of Justice also followed this practice. *See* 28 C.F.R. §20.20(b)(2) (confidentiality requirements regarding criminal records do not apply to "original records of entry such as police blotters maintained by criminal justice agencies compiled chronologically and required by law or long-standing custom to be made public").

C. Disclosure of Arrest Logs Serves Vital Functions in Our System of Self-Government.

The next question is whether disclosure of the information at issue "plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II,* 478 U.S. at 8; *accord Washington Post Co. v. Robinson,* 935 F.2d 282, 288 (D.C. Cir. 1991). The disclosure of arrest logs plays a positive role in monitoring the government's arrest power. This role is confirmed by a review of important press coverage that would not be possible without arrestees' names.

1. Positive role of disclosure

The release of the names of detainees serves several functions of the highest order in our democracy.

First, disclosure of arrest records deters the government from making illegal arrests. In *Richmond Newspapers,* the Supreme Court observed that public access not only served as a check on government abuse but also fostered "the proper

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commercial purposes does not raise constitutional concerns. *Id.* at 40 (majority opinion) & 43 (Ginsburg, J., concurring).

functioning" of the process at issue. 448 U.S. at 569 (plurality opinion). Publicity here likewise serves valuable preventative purposes. A former editor of *The Washington Post* explained that "[t]he police, knowing that each arrest must be [publicly] recorded, and may have to be explained, are naturally reluctant to use arrest powers frivolously. . . . The entry in the arrest book, to which the people have full access, is the individual's assurance that his disappearance will not go unnoted, the cause of his detention unmentioned, and the means of his defense unprovided." James Russell Wiggins, Freedom or Secrecy 54 (1964); *see also Caledonian,* 573 A.2d at 303 (exposing arrests to public view promotes "responsible and nondiscriminatory" use of that power).

Second, public knowledge regarding whom our government is holding in jail serves as a vital check against prolonging unsupported detentions or mistreating detainees. The Department of Justice itself has recognized that "[a]ccess to public record information [regarding the criminal justice system] helps the public monitor government activities, thereby assisting the public to hold elected officials and nonelected civil servants accountable and protecting against secret activities." Report on National Task Force on Privacy, at 8. Courts and commentators have agreed, concluding that the disclosure of arrestees' identities protects the citizenry against unsupported prosecutions and abuse in prisons. *See Sheridan Newspapers,* 660 P.2d at 791 (opening the judicial process serves "to insulate the process against attempts to use the courts for tools of persecution") (quotation omitted); *Kilgore v. Koen,* 288 P. 192, 196 (Or. 1930); *supra* at 9 (preventing coerced confessions).

This need for public monitoring of the government's arrest power is even more compelling when, as here, the government jails people without charging them

with any criminal offense. As the Supreme Court of Wisconsin explained in rejecting the Milwaukee Chief of Police's desire to withhold police blotter information regarding detainees until "formal charges" were filed against them:

> An arrest represents the exercise of the power of the state to deprive a person of his liberty . . . It is an initial step in the judicial process, which may be reviewed. . . . We cannot view the arrest, as the Chief of Police does, as merely a tentative or incomplete jural act. Whether an arrest is subsequently ratified by the issuance of a charge of the same or greater magnitude at some later time, it is, nevertheless, at the time it is made, a competed official act of the executive branch of government.
>
> The power to arrest is one of the most awesome weapons in the arsenal of the state. It is an awesome weapon for the protection of the people, but it also a power that may be abused.

Breier, 279 N.W.2d at 188; *see also Seattle Times Co. v. United States District Court,* 845 F.2d 1513, 1517 (9th Cir. 1988) (logic supports First Amendment right to information relating to pretrial detention because "[t]he decision to hold a person presumed innocent of any crime without bail is one of major importance to the administration of justice") (quotation omitted). The common denominator in these decisions is that whenever the government restrains an individual's liberty, revealing the target of that action "serves an important function in monitoring prosecutorial or judicial misconduct." *Robinson,* 935 F.2d at 288.

Third, disclosure of detainees' names promotes accurate factfinding in the government's investigations. In the American system of justice, the press has come to "play an essential role in overseeing the investigative process and in conducting independent investigations into criminal matters." Sarah Henderson

Hutt, *In Praise of Public Access,* 41 Duke L.J. 368, 381 (1991). Court decisions thus commonly emphasize the truth-seeking value of disclosing basic information regarding investigations. *See Detroit Free Press, Inc. v. Department of Justice*, 73 F.3d 93, 98 (6th Cir. 1996) (FOIA requires government to release mug shots of detainees in part because these photos can "reveal the government's glaring error in detaining the wrong person for an offense"); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n,* 710 F.2d 1165, 1178 (6th Cir. 1983) ("When information is disseminated to the public through the media, previously unidentified witnesses may come forward with evidence.").

Fourth, disclosure of the names of detainees allows the public to monitor the progress of broad-based investigations such as this one and to judge whether their taxpayer dollars are being well spent. While much has been said about how our law enforcement and intelligence agencies performed pre-September 11, their performance since must also be held up to public scrutiny. The Government's detention practices are one important indicia of this performance. Especially if many of the detainees turn out to have no links to terrorism, the public should be able to question whether the Department of Justice's tactics are worth their impact on civil liberties.

Finally, disclosure of the identities of prisoners promotes public confidence in the fairness of our justice system – both at home and abroad. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers,* 448 U.S. at 572 (plurality opinion). This is particularly so in times of national crisis. As the Supreme Court noted years ago, "the greater the importance of safeguarding the community from . . . force and violence," the "more imperative" is to preserve

First Amendment rights "in order to maintain the opportunity for free political discussion." *DeJonge v. Oregon,* 299 U.S. 353, 365 (1937). A showing that a *particular type* of threat to national security or a release of a *particular name* would contravene the public interest may permit the government to withhold information in a certain case. But such a showing cannot undermine the basic presumption against withholding detainees' identities or support a blanket policy of non-disclosure. *See Detroit Free Press,* 303 F.3d at 703-07 (specific national security concerns figure into compelling interest analysis, not logic prong of *Richmond Newspapers* analysis); *North Jersey Media Group*, 2002 WL 31246589, at *23-24 (Scirica, J., dissenting) (same); *United States v. Pelton,* 696 F. Supp. 156, 159 (D. Md. 1986) (same).

2. Use of arrest logs in the press

The significant positive role of disclosing jail logs is confirmed by the various uses to which it is put in the press.

Printing police blotter information, a staple of community papers nationwide, has long assisted the press in its "discharge of its obligation to inform the public" regarding public safety issues in their community. *Houston Chronicle,* 531 S.W.2d at 186. Today, simply entering the words "arrest log" or "police blotter" into an internet search engine produces hundreds of media and police department websites reproducing such logs. Reporters often use these original sources to identify arrested individuals. *See, e.g., Policeman Arrested in Alleged Sex Assault,* Honolulu Advertiser (Oct. 21, 2000).[8] Local groups also monitor and study these logs in efforts to craft community safety policies. *See, e.g.,* 1 *Building*

[8] Available at: www.the.honoluluadvertiser.com/2000/Oct/21/1021localnews12.htm.

Safe Communities Newsletter No. 3, Dec. 1997/Jan. 1998 (discussing study of New Mexico drunk driving arrests).[9]

Reporters also use arrest logs, as Plaintiffs wish to do here, in order to undertake systematic studies of police arrest practices. A Massachusetts newspaper, for instance, reviewed arrest logs in a racial profiling investigation and reported that 68% of persons arrested had Hispanic surnames. Cathleen F. Cowley, *Crime in Lawrence: "It Knows No Race,"* Mass. Eagle-Tribune (Aug. 10, 2001).[10] Another newspaper inspected the arrest log from a Mardi Gras disturbance in order to determine the ages of eighty-four arrestees. Anne Quinn, *Magic, Not Madness,* San Luis Obispo New Times (Mar. 15, 2001).[11] A "name-by-name" review of the Washington, D.C. police log revealed that the Metropolitan Police Department released seriously distorted the crime statistics. Freedom or Secrecy, *supra,* at 55.

The federal government's aggressive use of its arrest power in this terrorism investigation has elevated the need for arrest logs. It is hard to imagine information more critical to the public than what *Amici* have reported based on a few names of detainees and their counsel. If the Government continues to detain persons arrested in investigating terrorism, however tangential their connection to criminal activity, media stories that report those detentions will be critical to enabling the public to determine whether they think this is desirable law enforcement policy.

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[9] Available at: www.edc.org/buildingsafecommunities/vol1_3/datadwi.htm.
[10] Available at: www.eagletribune.com/specials/buildingbridges/20010810/FP_006.htm.
[11] Available at: www.newtimes-slo.com/archives/cov_stories_2001/cov_03152001.htm.

II. THE GOVERNMENT HAS NOT SHOWN THAT IT IS NECESSARY TO KEEP THE NAMES OF THE DETAINEES SECRET.

To the extent that the First Amendment limits the Government's ability to withhold the names of persons it arrests in criminal investigations, this Court must "go beyond the FOIA standard of review," *McGhee,* 718 F.2d at 1148, and require the Government to show that nondisclosure is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Press-Enterprise,* 464 U.S. at 510 (quoting *Globe Newspaper,* 457 U.S. at 607).

A. Cooperating With Government

The Government's concern that "disclosure of [the detainees'] identities will deter such individuals from cooperating with [it]," DOJ Br. at 38, is not compelling. The principal reason our forbearers banned secret detentions was to prevent the government from pressuring detainees into making incriminating statements. *See supra* at 8-9. Accepting the Government's justification here would condone a method of interrogation not tolerated since the Star Chamber. *Id.*

B. Privacy

Whatever statutory leeway FOIA may give the Government to withhold information on privacy grounds generally, a detainee's privacy cannot trump the public's right to know whom their government is jailing. The Supreme Court has held that persons lack a constitutional interest in preventing the dissemination of the fact of their arrest, even when a person was never convicted and is not in custody. *Paul v. Davis,* 424 U.S. 693 (1976). That being so, the privacy concerns of arrestees – particularly when they are being detained – pale in comparison to the public's constitutional right to learn the identities of persons whom their government is jailing. *See Breier,* 279 N.W.2d at 439; *Alexander*, 778 F. Supp. at 1234.

Contrary to the District Court's decision, the wishes of the particular detainees cannot tip this balance. As then-Justice Rehnquist remarked when asked to comment on the privacy implications of releasing arrestee' names:

> An arrest is not a "private" event. An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record, and by the very definition of the term it involves an intrusion into a person's bodily integrity. To speak of an arrest as a private occurrence seems to me to stretch even the broadest definitions of the idea of privacy beyond the breaking point.

William H. Rehnquist, *Is an Expanded Right to Privacy Consistent with Fair and Effective Law Enforcement?,* 23 Kan. L. Rev. 1, 8 (1974). Years later, the Supreme Court joined this assessment, stating that "[a]rrests . . . are public events." *Reporters Committee,* 489 U.S. at 753.

C. National Security

No one, least of all *Amici*, disputes that the government has a compelling interest in protecting our country from terrorist attacks. But that cannot be the end of the matter, for

> [h]istory teaches us how easily the specter of a threat to "national security" may be used to justify a wide variety of repressive governmental actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re The Washington Post Co., 807 F.2d 383, 391-92 (4th Cir. 1986). Accordingly, "the ready resort to suppression is for societies other than our own;

an accommodation of competing values remains the commendable course." *In re Application & Affidavit for a Search Warrant,* 923 F.2d 324, 331 (4th Cir. 1991).

Weighing the competing values here demonstrates that the Government's blanket no-disclosure policy is unjustified. Press reports and the Government's own admissions reveal that many, if not most of the detainees neither are terrorists nor have any knowledge concerning terrorism. Even if some of the detainees relate to terrorism, the Government has not advanced any reason to believe that Al Qaeda – unlike any other rebellious faction in history – is so cunning that it can build a "mosaic" from simple names of detainees, or that it is so inept that it doesn't even know when significant people have been detained. As the Sixth Circuit correctly observed, "there seems to be no limit to the Government's [mosaic intelligence] argument." *Detroit Free Press,* 303 F.3d at 709.

Furthermore, the Government may not justify an impairment of First Amendment rights by advancing interests that it is undercutting in other ways. *See Greater New Orleans Broad. v. United States,* 527 U.S. 173, 190-91 (1999). The Government already has released so much information regarding its terrorism investigation that disclosing a list of names, many of whom are no longer in custody, will not materially jeopardize the security of the American people. *See* Pltfs' Br. at 22-24. Indeed, the Government's own policy that detainees can publicize their own identities belies any assertion that the release of this information will impair its investigation or the national security.

D. Grand Jury Evidence

Plaintiffs' brief amply explains why the Government cannot justify its blanket withholding of names by declaring that some "material witnesses" may testify before grand juries. Pltfs' Br. at 34-35. If another court has ordered any

detainees' names sealed, the District Court's decision appropriately accommodates that interest on a case-by-case basis by requiring simply that the Government produce relevant court orders.

CONCLUSION

For the foregoing reasons, this Court should hold that the Government must disclose basic information concerning the detainees.

RESPECTFULLY SUBMITTED this _____ day of October, 2002.

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By _____
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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Circuit Rule 32. The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 7000, not including the certificate, corporate disclosure statement, table of contents, table of authorities, certificate of service, Addendum A, and the certificate of compliance.

DATED this _____ day of October, 2002.

Davis Wright Tremaine LLP
Attorneys for *Amici*

By _____
Laura Handman

ADDENDUM A

The Washington Post Company publishes of the newspaper *The Washington Post,* a daily newspaper with a nationwide daily circulation of over 782,000 and a Sunday circulation of over 1.06 million.

ABC, Inc., through its subsidiaries, owns ABC News, the ABC Radio Network, and local broadcast television stations that gather and report news to the public. ABC Produces, among other programs, the news programs WORLD NEWS TONIGHT WITH PETER JENNINGS, 20/20, and NIGHTLINE.

American Society of Newspaper Editors is a non-profit organization founded in 1922 and has a nationwide membership of approximately 850 persons who hold positions as directing editors of daily newspapers.

Cable News Network LP, LLLP, a division of Turner Broadcasting System, Inc., an AOL Time Warner Company, is one the world's most respected and trusted sources for news and information. Its reach extends to 15 cable and satellite television networks; 12 Internet web sites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than 1 billion people in more than 212 countries and territories.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine shows, such as 60 MINUTES and 48 HOURS. CBS owns and operates broadcast television stations

nationwide and, through a related company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

The Copley Press, Inc. publishes nine daily newspapers that regularly cover national and international news and operates an international news service.

Magazine Publishers of America, Inc. is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

National Broadcasting Company, Inc. is a diversified media company that produces and distributes news, entertainment and sports programming via broadcast television, cable television, the internet and other distribution channels.

National Press Club, established in 1908, is an organization of journalists and communicators with 4,000 members in Washington, D.C. and around the world. Created in part to promote the ethical standards of journalists, the National Press Club serves as a center for the advancement of professional standards and skills and the promotion of free expression.

Newspaper Association of America represents more than 2,000 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for approximately eighty-seven percent of the U.S. daily newspaper circulation.

The New York Times Company publishes *The New York Times,* a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million.

Philadelphia Newspapers, Inc. is the publisher of *The Philadelphia Inquirer* and the *Philadelphia Daily News*, both newspapers of general circulation primarily in the Philadelphia region. It is a wholly owned subsidiary of Knight Ridder, Inc., the stock of which is publicly held and traded.

Society of Professional Journalists works to improve and protect journalism. The organization is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 135 magazines in the United States and abroad. Its major titles include *Time, Fortune, Sports Illustrated, People, Money,* and *Entertainment Weekly.*

Tribune Company, through its publishing, broadcasting, and interactive operations, publishes eleven market-leading newspapers, including the Baltimore Sun and Newsday (Long Island, New York); owns and operates 22 major market television stations; and operates a network of local and national news and information web sites throughout the United States.