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

No. 02-5254

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

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

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellant.

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

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# BRIEF FOR APPELLANT

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties and Amici.

The plaintiffs-appellees are the Center for National Security Studies, American Civil Liberties Union, Electronic Privacy Information Center, American-Arab Anti-Discrimination Committee, American Immigration Law Foundation, American Immigration Lawyers Association, Amnesty International USA, Arab-American Institute, Asian-American Legal Defense and Education Fund, Center for Constitutional Rights, Center for Democracy and Technology, Council on American Islamic Relations, First Amendment Foundation, Human Rights Watch, Multiracial Activist, Nation Magazine, National Association of Criminal Defense Lawyers, National Black Police Association, Inc., Partnership for Civil Justice, Inc., People for the American Way Foundation, Reporters Committee for Freedom of the Press, and the World Organization Against Torture USA.

The defendant-appellant is the United States Department of Justice.

The Washington Legal Foundation and the Jewish Institute for National Security Affairs filed an amicus brief in support of defendant in the district court and have informed us that they plan to file an amicus brief on appeal.

### B. Rulings Under Review.

The ruling under review is the district court's opinion and order of August 2, 2002 (per Kessler, J.), granting in part and

denying in part plaintiffs' motion for summary judgment, and granting in part and denying in part defendant's motion for summary judgment. The opinion will be published; currently it may be found at 2002 WL 1773067 (D.D.C. 2002).

**C. Related Cases.**

_____This case has not previously been before this Court or any other court, and counsel is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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Mark B. Stern

**GLOSSARY**

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| App. | Joint Appendix |
| Exemption 3 | 5 U.S.C. § 552(b)(3) |
| Exemption 7(A) | 5 U.S.C. § 552(b)(7)(A) |
| Exemption 7(C) | 5 U.S.C. § 552(b)(7)(C) |
| Exemption 7(F) | 5 U.S.C. § 552(b)(7)(F) |
| FOIA | Freedom of Information Act |

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## STATEMENT OF JURISDICTION

The district court had jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). On August 2, 2002, the district court entered an order compelling defendant to produce certain information requested by plaintiffs. On August 8, 2002, defendant filed a timely notice of appeal. See Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

In response to this Court's order of August 21, 2002, defendant states that this appeal is limited to that portion of the district court's order requiring the disclosure of the names of the detainees and their attorneys.

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court erred in ordering the disclosure under the Freedom of Information Act, 5 U.S.C. § 552, of the identities of individuals detained in connection with the government's investigation of the September 11 terrorist attacks, and of the identities of their attorneys.

## STATEMENT OF THE CASE

Plaintiffs brought this action under the Freedom of Information Act, 5 U.S.C. § 522, seeking the disclosure of information about individuals detained in connection with the government's investigation of the September 11 terrorist attacks. On cross-motions for summary judgment, the district court ordered the government to release the identities of the detainees and of their attorneys, holding that this information was not exempt from disclosure under the FOIA. The government appealed, and the district court stayed its order pending appeal.

## STATUTORY BACKGROUND

The Freedom of Information Act, 5 U.S.C. § 552, seeks "to balance the public's need for access to official information with the Government's need for confidentiality." Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 144 (1981).[1] To that end, the statute generally mandates disclosure upon request of

[1] The full text of the pertinent statutory provisions is set forth in an addendum to this brief.

records held by an agency of the government but specifically exempts nine categories of records from the general disclosure requirement.

The ruling on appeal concerns the application of three subsections of Exemption 7, which applies to "records or information compiled for law enforcement purposes." § 552(b)(7). As relevant here, this provision exempts those records or information from disclosure if their production

> (A) could reasonably be expected to interfere with enforcement proceedings, . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, . . . or (F) could reasonably be expected to endanger the life or physical safety of any individual.

Ibid.

The case also involves the application of FOIA Exemption 3, § 552(b)(3), which encompasses information that is "specifically exempted from disclosure by statute." § 552(b)(3). This appeal involves the interrelationship of that provision and Fed. R. Crim. P. 6(e)(2), which provides that the government "shall not disclose matters occurring before the grand jury."

## STATEMENT OF THE FACTS

### A. The Investigation Of The September 11 Attacks And Related Terrorist Threats.

1. In response to the terrorist attacks of September 11, 2001, the President ordered, and Congress specifically approved, the use of "all necessary and appropriate force against those

nations, organizations, or persons" determined by the President to have "planned, authorized, committed, or aided the terrorist attacks." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress emphasized that the terrorists "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." Ibid. It also stressed that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

The President ordered a worldwide investigation into the September 11 attacks and related terrorist threats to the United States. See Declaration of James S. Reynolds at ¶ 2. This investigation is ongoing and extremely sensitive: the FBI and other law enforcement agencies continue their efforts to identify and apprehend those responsible for September 11 and to prevent further attacks. Ibid.

2. The government has detained a number of individuals during the course of this investigation. As relevant here, the detainees fall into three general categories. All three categories of persons were originally detained because evidence suggested they might have connections with, or possess information pertaining to, terrorist activity against the United States. Reynolds Dec. ¶ 10; Watson Dec. ¶ 8.

The first category of detainees comprises those persons who were questioned in the course of the September 11 investigation and detained by the INS for violations of the immigration laws. Reynolds Dec. ¶ 10. Law enforcement agents learned of these violations in the course of questioning the subjects, often from the subjects themselves. In some instances, they also determined that the detainees may have links to other facets of the investigation. Ibid.; Watson Dec. ¶ 8. The INS instituted removal proceedings against many of these aliens. Hundreds have been deported. Others have been released. During the investigation, a total of 751 individuals have been detained on immigration violations. Opinion ("Op.") 7. As of June 2002, only 74 were still in custody. Ibid.

Individuals detained on immigration charges are provided with lists of attorneys who are willing to represent them on a pro bono basis. See Reynolds Dec. ¶ 21; 8 U.S.C. § 1229(b)(2). "No one has been denied their right to talk to an attorney." Reynolds Dec. 21. They have access to the courts to file habeas petitions. They also are able to contact reporters or members of the public at large. Id., ¶ 23.

The second category of detainees consists of individuals held on federal criminal charges. Reynolds Dec. ¶ 27. While the nature of the charges pending against each of these detainees varies, until these investigations are concluded, none can be

eliminated as a potential source of relevant or probative information. Idid. As of June, 2002, as result of the investigation, 129 individuals have been charged and detained on federal criminal charges, and 73 were still in custody. See Def. Response to Order of May 31.

The third category consists of persons detained after a judge issued a material witness warrant to secure their testimony before a grand jury. Reynolds Dec. ¶ 31; see also 18 U.S.C. § 3144. The district courts before which the witnesses have appeared have issued sealing orders that prohibit the government from releasing any information about the proceedings. Reynolds Dec. ¶ 32. The government has not publicly released the number of individuals being held on material witness warrants. Like those persons held on criminal charges, those detained on material witness warrants are provided court-appointed counsel. Reynolds Dec. ¶ 21.

**B. Plaintiffs' FOIA Requests.**

The plaintiffs in this case are organizations seeking information about the individuals detained in connection with the government's investigation. In October 2001, the plaintiffs submitted three FOIA requests to the Department of Justice. Each request sought information regarding

> the individuals 'arrested or detained,' in the words of Attorney General Ashcroft, in the wake of the September 11 attack and referred to by the President, the Attorney

General and the FBI Director in various public statements.

Hodes Dec. Exh. A.

The requesters sought four types of information regarding the individuals arrested or detained in the wake of the September 11 attacks:

1. (1) their names and citizenship status; (2) the location where each individual was arrested or detained initially and the location where they are currently held; (3) the dates they were detained or arrested, the dates any charges were filed, and the dates they were released, if they have been released; and (4) the nature of any criminal or immigration charges filed against them or other basis for detaining them, including material witnesses warrants and the disposition of such charges or warrants.

2. The identity of any lawyers representing any of these individuals, including their names and addresses.

3. The identities of any courts, which have been requested to enter orders sealing any proceedings in connection with any of these individuals, any such orders which have been entered, and the legal authorities that the government has relied upon in seeking any such secrecy orders.

4. All policy directives or guidance issued to officials about making public statements or disclosures about these individuals or about the sealing of judicial or immigration proceedings.

Reynolds Dec. ¶ 6.

The government has publicly disclosed much of the requested information. For INS detainees, the government has released (1) their place of birth, (2) their citizenship status, (3) the immigration charges brought against them, and (4) the date charges were filed. Reynolds Dec. ¶ 7; Exhs. 5-6 to Def. Motion

for Summ. Judgment. With respect to the detainees facing federal charges, the government has disclosed (1) their names, (2) the dates any charges were filed, (3) the date the detainee was released, if released, (4) the nature of the criminal charges filed against them, and (5) their lawyer's identity. Reynolds Dec. ¶ 8. The government has also released two documents in response to the request for "policy directives."

The government withheld the remainder of the information requested by plaintiffs. With respect to the INS detainees, the government withheld the names of those detained, the dates and locations of their arrest and detention, the dates of release of those who were released, or the identities of their lawyers. Reynolds Dec. ¶ 11. With respect to those facing federal criminal charges, the government refused to disclose the dates and locations of the detainees' arrest or the dates and locations of detention. Reynolds Dec. ¶ 28. The government also withheld all of the information with respect to the material witnesses. Reynolds Dec. ¶ 31.

The government determined that the release of the withheld information could compromise the ongoing terrorism investigation, threaten public safety, and invade the personal privacy and threaten the safety of detainees and material witnesses. The government thus concluded that the information is subject to FOIA Exemptions 7(A), 7(C), and 7(F). Reynolds Dec. ¶¶ 12-38.

With respect to material witnesses, the government invoked not only Exemption 7 but also Exemption 3, noting that the information at issue is shielded by Fed. R. Crim. P. 6(e), which prohibits the disclosure of information about grand jury witnesses. Reynolds Dec. ¶ 33.

**C. District Court Proceedings.**

1. On December 5, 2001, plaintiffs filed this FOIA action in district court to compel disclosure of the information that the government believed to be exempt from disclosure. See Complaint.

The parties filed cross-motions for summary judgment. In support of its motions, the Government submitted the declarations of James Reynolds, Director of the Terrorism and Violent Crime Section of the Department of Justice, and of Dale Watson, FBI Executive Assistant Director for Counterterrorism, career officials with central responsibility for the ongoing terrorist investigation. See Reynolds Dec.; Reynolds Supp. Dec.; Reynolds Second Supp. Dec.; Watson Dec. These declarations explained that release of the requested information would effectively provide terrorist organizations with an overview of the government's terrorist investigation. See Reynolds Dec. 16; Reynolds Supp. Dec. ¶ 6. Releasing that information, Mr. Reynolds explained, could reveal the direction and progress of the investigations by identifying both the focus of the government's investigation and

those areas on which the government has not concentrated its efforts. See Reynolds Dec. 16; Reynolds Supp. Dec. ¶ 6. Release of the information could enable terrorist groups to alter their own behavior in response in ways that could increase the danger to the public, see Reynolds Dec. ¶ 16; Watson Dec. ¶ 15, while simultaneously chilling the cooperation of potential witnesses and the detainees themselves. Reynolds Dec. ¶ 15.

As Mr. Reynolds explained, release of the requested information would also result in an unwarranted invasion of the privacy of persons who may wish that law enforcement interest in their activities not be made public. Reynold Dec. ¶¶ 19-23. Indeed, as Mr. Reynolds stated, release of the information may, in some cases, even pose a threat to the detainees' physical safety. Reynold Dec. ¶ 19.

2. On August 2, 2002, the district court granted partial summary judgment in plaintiffs' favor.

The court concluded that disclosure of the names of the INS detainees could not reasonably be expected to interfere with the ongoing enforcement proceedings and that the names were therefore not protected from disclosure under Exemption 7(A). Op. 14-24. The court rejected the government's assessment of senior government officials that release of the identities of those persons in whom it had a law enforcement interest could reasonably be expected to impair its ongoing investigation by

providing terrorist groups with knowledge regarding the focus of the government's investigation. The court believed that the government's predictive judgments of harm were entitled to no deference because, in the court's view, such deference is only appropriate when the government seeks to protect information affecting the national security under FOIA Exemption 1. Op. 20-21. The court further held that, as a matter of law, it could not properly consider the use that terrorist groups might make of the aggregate disclosure of identities, reasoning that under Exemption 7(A) it is irrelevant whether release of the identities would contribute to a "mosaic" of intelligence by helping terrorist organizations to map the direction and course of the government's investigation. Op. 21-22.

The court rejected the government's view that disclosure of the names of detainees would deter them from cooperating with the investigation because the argument "assumes terrorist groups do not already know that their cell members have been detained." Op. 15. And it concluded that there was insufficient evidence that disclosure of the names of detainees could enable terrorist groups to create false and misleading evidence. Op. 23-24. For similar reasons, the court determined that the names of the detainees' attorneys were not protected. Op. 34-36.

The court also rejected the government's assertion of Exemptions 7(C) and 7(F). The court recognized that disclosure

of the requested information raised privacy and safety concerns. It believed, however, that the appropriate course under the FOIA was to require disclosure but to permit detainees to opt out of disclosure by submitting a signed declaration within fifteen days. Op. 24-27. The court did not address the impact on the public safety that could result from compelled disclosures.

As to material witnesses, the court held that Exemption 3 did not apply because Fed. R. Crim. P. 6(e) did not bar the disclosure of the identities of persons detained as material witnesses. Op. 27-31. To the extent the government relied on court sealing orders to withhold the names of material witnesses, the court directed the government to produce copies of those orders for further consideration. Op. 31-32.

The court agreed with the government that the dates and locations of arrest, detention, and release were properly withheld under Exemption 7(A). Op. 32-34. Disclosure of that information "would be particularly valuable to anyone attempting to discern patterns in the Government's investigation and strategy," and it would make detention facilities "vulnerable to retaliatory attacks." Ibid. Finally, the court directed the government to conduct a more thorough search for policy directives responsive to plaintiffs' requests. Op. 36-40.

3. Under the court's order, the government was required to release information within fifteen days. See Order 2. On August 15, 2002, the district court entered a stay. See Stay Order.

**SUMMARY OF ARGUMENT**

In the wake of the September 11 terrorist attacks on this country, the United States began a comprehensive and ongoing investigation of terrorist organizations in the United States and their operatives. That investigation seeks to bring to justice those involved in planning and executing the attacks of September 11, and to thwart any future attacks against the United States and its citizens.

As part of that effort, the Department of Justice has questioned many persons who may have relevant knowledge of, or be connected to, the attacks. In the course of this questioning, the government has concluded (often based on the information provided by the subjects) that some of these persons were in this country in violation of the immigration laws. In other cases, the government has brought criminal charges or has obtained material witness warrants.

The district court's ruling in large measure conceives of this action as a challenge to the government's right to maintain a system of secret detention. But under the law governing INS detainees, criminal defendants, and material witnesses, no one is held in secret detention. Those persons held on criminal charges

or as material witnesses have the right to court-appointed lawyers. Those held by the INS are provided with lists of pro bono attorneys. In addition, all of these detainees are free to disclose their identities to the press and public. The issue here is not whether detainees can be held incommunicado, but whether the government is required to provide a composite list of all persons whom it has questioned in connection with its September 11 investigation and to disclose the identities of persons who would prefer that their connection to the investigation not be made public.

The government properly invoked Exemption 7 of the FOIA with respect to the collection of information that would reveal the identities of these detainees and of their attorneys.

1. Release of the requested information can reasonably be expected to interfere with the government's ongoing investigation into terrorist activities and is thus subject to Exemption 7(A). As the government explained in the declarations of two career officials with central responsibility for the ongoing terrorism investigation, the requested disclosure will provide terrorist groups with the identities of those persons whom the government has investigated, and, equally important, those whom it has not investigated in connection with the terrorist attacks. This information can enable terrorist groups to alter their own plans, allow them to provide misinformation, and undermine the

usefulness of informants. Moreover, if persons who have been or will be detained by the government in connection with its terrorism investigation believe that the government has little ability to protect the release of their identities, cooperation with law enforcement officials will predictably be discouraged.

The district court at no point explained why releasing the identities of all persons questioned in connection with September 11 would not interfere with the ongoing investigation. Indeed, the court itself recognized that the government could not be compelled to disclose the "dates and locations of arrest, detention, and release," of persons detained in connection with the September 11 investigation, Op. 32-34, because disclosure of "detailed information of this nature . . . would 'inform organizations of routes of investigation that were followed but eventually abandoned . . . [and] could provide insights into the past and current strategies and tactics of law enforcement agencies conducting the investigation.'" Op. 33 (quoting Supp. Reynolds Dec. ¶ 6). The court erred in setting aside the considered judgment of those responsible for the investigation, and in failing to recognize that the effect of releasing the identities of the same persons would also undermine the government's investigation.

2. The government properly invoked Exemption 7(C), which bars disclosures that would result in an unwarranted invasion of

privacy, and Exemption 7(F), which exempts disclosures that threaten the safety of individuals. Individuals held in connection with the worst acts of terrorism ever to occur on American soil have a strong interest in avoiding the involuntary disclosure of their identities. That disclosure might be stigmatizing and might in some cases even subject persons to physical danger. Indeed, the district court did not conclude to the contrary. It believed, however, that the appropriate course would be to require disclosure except where the government produced a sworn declaration showing that a detainee wished to avoid disclosure.

That ruling is unsound and unworkable. The law is settled that where disclosure would result in an unwarranted invasion of privacy, disclosure is not required. The court's order impermissibly rewrites the terms of the governing statute by requiring disclosure of protected information. That error is not rectified by the creation of an opt-out procedure that has no basis in the statute. The immediate consequences of the court's departure from the scheme established by Congress are plain: hundreds of those already released have been deported or may otherwise be difficult to contact. Their privacy interests, which even the district court understood to be substantial, will be wholly unprotected.

The court's analysis of Exemption 7(F)also fails to consider the harm to the public safety created by disclosures that will impair the conduct of the ongoing terrorism investigation. The damage to this investigation, a major purpose of which is to protect the nation from future terrorist attacks, may be measured not only by failed prosecutions but by lost lives. The harm to the ongoing investigation thus implicates the protections of both Exemption 7(A) and Exemption 7(F).

3. All subsections of Exemption 7 that the government invoked with respect to the detainees apply as well to the identities of the detainees' attorneys. The names of attorneys are sought only as a proxy for the names of the detainees themselves, and the harm to the ongoing investigation and to the detainees' privacy parallels the harm created by disclosing the identities of the detainees. Moreover, the attorneys have an independent privacy interest in avoiding disclosure of their connection to persons questioned in connection with September 11. Many attorneys, of course, have no interest in protecting such information, and they are free to contact the press and public, as are the detainees themselves. What should be clear is that the FOIA does not require the government to disclose the identities of persons who choose to avoid such disclosures.

4. The identities of material witnesses are independently protected by Fed. R. Crim. P. 6(e), which creates a broad rule of

secrecy covering all proceedings before the grand jury. Disclosure here would permit identification of grand jury witnesses: even if the government did not identify which persons are being held pursuant to grand jury material witness warrants, as contemplated by plaintiffs' FOIA request, any citizen on the list produced by the government who is not subject to criminal charges (which are a matter of public record) might be assumed to be a grand jury witness.

## STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. See Summers v. Department of Justice, 140 F.3d 1077, 1079 (D.C. Cir. 1998).

## ARGUMENT

### I. THE IDENTITIES OF THE DETAINEES, MATERIAL WITNESSES, AND THEIR ATTORNEYS ARE PROTECTED FROM DISCLOSURE BY FOIA EXEMPTION 7(A).

#### A. Exemption 7(A) Bars Disclosure If Releasing The Identities Of All Persons Detained In Connection With The September 11 Investigation Could Reasonably Be Expected To Interfere With Ongoing Enforcement Efforts.

The Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), represent a balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, 89th Cong., 2d Sess. 6 (1966)). Thus, while the FOIA embodies "'a general philosophy

of full agency disclosure,'" Department of the Air Force v. Rose, 425 U.S. 352, 360 (1976) (quoting S. Rep. 89-813, 89th Cong., 1st Sess. 3 (1965)), the statute recognizes "that public disclosure is not always in the public interest." Baldrige v. Shapiro, 455 U.S. 345, 352 (1982). Consequently, FOIA "provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." Ibid. As the Supreme Court has stressed, the statutory exemptions must be construed "to have a meaningful reach and application." John Doe Agency v. John Doe Corp., 493 U.S. at 152.

Exemption 7(A) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (A) could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7). Exemption 7(A) applies "whenever the government's case in court . . . would be harmed by the premature release of evidence or information." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978). "Congress [in enacting this Exemption] recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations." Id. at 224.

As the district court recognized (see Op. 14 n.8), there is no question that the records at issue are "records or information

compiled for law enforcement purposes." As the court also noted, application of the privilege does not depend on the existence of a specific pending proceeding. See Op. 14 n.9. It is sufficient that the government's September 11 terrorism investigation is likely to lead to law enforcement proceedings. See Mapother v. Department of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993) (Exemption 7 requires that enforcement proceedings be "pending or reasonably anticipated"); Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986). Thus, the only question presented as to the application of Exemption 7(A) is whether releasing the identities of all those persons in custody who have been questioned in connection with the ongoing September 11 investigation could reasonably be expected to "hinder[]" that uniquely important investigation. Robbins Tire & Rubber, 437 U.S. at 224.

### B. Providing Terrorist Groups With A Virtual Roadmap To The Government's September 11 Investigation Can Reasonably Be Expected To Interfere With The Government's Ongoing Investigation.

Following the attacks of September 11, the United States government launched an extensive, worldwide investigation of those terrorist attacks and of threats and attempts to perpetrate any further terrorist acts against United States citizens and interests. Reynolds Dec. ¶ 2. Four thousand FBI agents are engaged with their international counterparts in an unprecedented

effort to prevent further attacks. This is an open and ongoing investigation; the FBI is continuing to follow leads and conduct interviews. Ibid.[2]

As part of this investigation, law enforcement agents have questioned over one thousand individuals about whom concern has arisen. Some of these persons have been detained by INS for immigration violations. Reynolds Dec. ¶¶ 3-4. These individuals 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. 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 Dec. ¶ 10; Watson Dec. ¶ 8.

These are the persons whose identities plaintiffs insist should be made public. If plaintiffs had sought the identities of every person questioned in connection with the terrorism

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[2] The worldwide investigation has recently resulted in the arrests of al Qaeda terrorist cell members in the United States and the arrest of al Qaeda terrorist leaders abroad. See, e.g., Michael Powell and Christine Haughney, Terror Cell Broken, U.S. Says, Wash. Post (Sept. 15, 2002), at A1; Christine Haughney and Michael Powell, N.Y. Men Are Called Al Qaeda Trainees, Wash. Post (Sept. 19, 2002), at A12; Kamran Khan and Susan Schmidt, Key 9/11 Suspect Leaves Pakistan in U.S. Custody, Wash. Post (Sept. 17, 2002) at A1.

investigation, the devastating impact the ongoing enforcement efforts would be plain. The impact should be no less evident here, where plaintiffs have sought the identities of a significant subset of the persons on whom the government has focused attention. As the declarations submitted by the government in this case make clear, release of the composite information would provide terrorist groups with an overview of the government's investigation that can reasonably be expected to interfere with its ongoing enforcement efforts.

The government's principal declarants -- James S. Reynolds, Director of the Terrorism and Violent Crime Section of the Department of Justice, and Dale Watson, FBI Executive Assistant Director for Counterterrorism -- are career officials with central responsibility for the September 11 investigation.[3] Based on their law enforcement experience and their knowledge of the structure, operations, intelligence-gathering capabilities, and methods of foreign terrorist groups, these officials explained that disclosure of the identities at issue would threaten the ongoing investigation. See Reynolds Dec.; Reynolds Supp. Dec.; Reynolds Second Supp. Dec.; Watson Dec.

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[3] As the district court noted, Mr. Watson's declaration was originally prepared for use in litigation regarding the opening of INS administrative proceedings for a September 11 detainee. Op. 22. Contrary to the district court's suggestion, Mr. Watson, like Mr. Reynolds, also speaks to the harms that would flow from the disclosure of the identities of the detainees at issue here. See Watson Dec. ¶¶ 15, 18.

1. a. As the declarations explain, the requested information 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. Reynolds Dec. ¶ 16. Releasing the names of the detainees who may be associated with terrorism would reveal the direction and progress of the investigation by identifying where the government is focusing its efforts – and, perhaps as important - where it is not focusing its efforts. Reynolds Dec. ¶ 16; Watson Dec. ¶ 15. The records sought are thus quintessentially the type protected from disclosure by Exemption 7(A). See Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996) (Exemption 7(A) allows an agency to keep secret those records which "could reveal much about the focus and scope" of the investigation); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998)(same); Mapother, 3 F.3d at 1543 (where disclosure would "identif[y] the gleanings from a mass of potential evidence that the agency considers probative of its case," it is likely "to provide critical insights into its legal thinking and strategy").

The impact on the law enforcement investigation in this case is of immeasurable significance because the government's ongoing investigation is directly linked to its ability to protect the

public against the current threat of terrorist attacks. By providing insight into what the government knows -- and does not know -- about their operations, release of the information may enable terrorists to alter their own behavior to frustrate the government's ability to halt ongoing conspiracies. Reynolds Dec. ¶16; Watson Dec. ¶ 15; Reynolds Supp. Dec. ¶ 6. As Mr. Watson explained, "[u]pon learning that a particular terrorist cell has been compromised . . ., the terrorists may switch to an alternative cell, thereby retaining the ability to mount future terrorist attacks." Watson Dec. ¶ 15. If the identities of those associated with cell members are disclosed, there is also the very real threat that the disclosure could also cause the terrorist groups to "accelerate the timing of a planned attack." Ibid. Such damaging information is exempt from disclosure under Exemption 7(A). See Moorefield v. United States Secret Serv., 611 F.2d 1021, 1026 (5th Cir. 1980) (disclosure barred where it would enable targets to keep abreast of investigations and to evade their scrutiny).

As the district court itself recognized, disclosing information that would reveal the course of the government's investigation will plainly interfere with ongoing enforcement efforts. Thus, the court correctly held that the government could not be compelled to disclose the "dates and locations of arrest, detention, and release," of persons detained in

connection with September 11 investigation, Op. 32-34, declaring that disclosure of "detailed information of this nature could interfere with the investigation because it would 'inform organizations of routes of investigation that were followed but eventually abandoned . . . [and] could provide insights into the past and current strategies and tactics of law enforcement agencies conducting the investigation.'" Op. 33 (quoting Reynolds Supp. Dec. ¶ 6). The court also cited the government's explanation that "dates and locations would be particularly valuable to anyone attempting to discern patterns in the Government's investigation and strategy." Op. 33.

As the district court itself recognized, it could not properly ignore the cumulative impact of disclosing the time and place of hundreds of arrests, even if information regarding a single arrest might not provide insight into the government's tactics and strategies. The court's logic in refusing to compel disclosure of that information applies with at least as much force to the names of all the individuals detained in connection with the September 11 investigation.

b. Contrary to the district court's understanding, Op. 18-19, 22 n.15, that the government has already released a detainee in no way suggests that disclosure of his identity as part of a "September 11" list would no longer impair ongoing investigations. That a detainee has been released does not mean

that he did not impart valuable information or that he might not continue to be a source of future information.[4]

More importantly, the path of the government's investigation includes all those questioned in connection with the September 11 investigation, including those who have been released or deported. The list requested by plaintiffs identifies with some precision who has and who has not attracted the attention of the U.S. government in connection with the terrorism investigation. Disclosure of that list - including those persons no longer in custody - would enable onlookers to plot the progress of the government's investigation, to make inferences as to what it has and has not learned, and to assess strengths and vulnerabilities in the government's intelligence-gathering. Indeed, as Mr. Reynolds explained, terrorists could make use of the disclosures in future recruitment, Reynolds Dec. ¶ 16, and could even seize upon the opportunity presented to provide misleading evidence, Reynolds Dec. ¶ 17. Cf. Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 312 (D.C. Cir. 1988) (because disclosure "would expose the particular types of allegedly illegal activities being

[4] That a detainee has been deported from the United States on grounds unrelated to terrorism does not indicate that he or she had no knowledge of or connection to terrorism. Even if a detainee could also have been charged with removability on terrorism grounds, the INS was not required to include such a charge, which might itself have jeopardized the ongoing investigation.

investigated," it would "allow for the destruction or alteration of relevant evidence, and the fabrication of fraudulent alibis").

c. As Mr. Reynolds and Mr. Watson also explained, disclosure could impair the government's ability to obtain information from detainees who may be reluctant to expose themselves to the consequences of cooperation if the fact of their detention is made public. Reynolds Dec. ¶ 14; Watson Dec. ¶ 18. Similarly, the government's ability to make use of a detainee as a future source of information may be compromised once his detention is publicized, Reynolds Dec. ¶ 15, and the detainee's future usefulness as a witness may be affected by threats of intimidation, ibid. See Robbins Tire & Rubber, 437 U.S. at 239 ("The most obvious risk of 'interference' with enforcement proceedings is that [targets of an investigation] will coerce or intimidate [witnesses] in an effort to make them change their testimony or not testify at all"); Solar Sources, Inc. v. United States, 142 F.3d at 1039 ("Public disclosure of information could result in . . . chilling and intimidation of witnesses").

2. The same reasoning that bars compelled disclosure of the identities of detainees also precludes disclosure of the names of their attorneys. In this context, the names of attorneys function as a proxy for the names of the detainees themselves, and release of their identities would directly facilitate

identification of their clients. Reynolds Dec. ¶ 18. The district court refused to protect the identities of the attorneys, which are being sought as proxies for the detainees' identities, because it rejected the "[Exemption 7(A)] rationales as applied to the detainees' identities." Op. 34. If, however, as we have shown, the identities of the detainees are exempt from disclosure under Exemption 7(A), there is no basis for requiring the government to disclose the identities of all attorneys to permit interested persons to ascertain the names of all of the detainees.

3. Finally, the government's interest in preserving the efficacy of its investigation is especially compelling with respect to those persons detained as material witnesses -- persons believed to have evidence directly relevant to acts of terrorism. Disclosure of the information regarding persons as to whom courts have issued warrants because of their importance as potential witnesses could send clear signals regarding the strategy or direction of the investigation.[5] Reynolds Dec. ¶ 35.

[5] The district court believed that the "Government's rationale is contradicted by its own extensive disclosures," Op. 16, citing plaintiffs' pleadings, which claimed that "at least 26 individuals held on material witness have been publicly identified . . ., some reportedly by the Government." Ibid. These pleadings cite to newspaper articles that discuss several individuals who have self-disclosed their identities to the press, and other individuals publicly charged with criminal offenses. Pl. Reply in Support of Their Motion for Summary Judgment, 16 n.24 & Exh. 14-15, 18. Access to isolated public data -- through self-disclosure or through a public criminal charge -- is not the equivalent of a composite list of hundreds

### C. The District Court Erred In Setting Aside The Government's Predictive Judgments And In Believing That It Should Not Consider The Ability Of Terrorist Organizations To Map The Government's Investigation On The Basis Of A Composite List.

In ordering disclosure of the names of all persons held in connection with the September 11 investigation, the district court concluded that "[t]he government has failed to demonstrate that disclosure of names could enable terrorist groups to map its investigation." Op. 20. The district court offered no sound basis for this ruling.

1. At no point in its analysis did the district court explain why the government was wrong in stating that providing a list of the names of the September 11 detainees would provide the terrorist groups a valuable insight into the investigation's direction, its strengths, and the areas it has yet to develop.

The court's reasoning depended heavily on its view that it could freely substitute its own assessment of the impact of compelled disclosure on the ongoing investigation for that of the persons charged with operating the investigation. In the court's view, because the government did not rely on Exemption 1, deference to its judgments would be inappropriate. Op. 21.

This understanding is mistaken. Indeed, Exemption 7(A) necessarily requires a predictive judgment of what "could

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of persons questioned in connection with the terrorism investigation.

reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). It is entirely appropriate to withhold material under Exemption 7(A) based upon the predictive judgment of the two career officials with significant responsibility for the ongoing terrorism investigation that the release of the list of names at issue here could provide the terrorist groups with valuable information -- information that could permit the terrorists to both avoid capture and to take actions that would endanger public safety -- and could impede the investigation by deterring further cooperation by these and future detainees. Indeed, these predictive judgments are unrebutted in this case.

It is, of course, settled that a reviewing court examines de novo an agency's assertions that data is exempt from disclosure. See Summers v. Department of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998). And a court should not accept the government's assessments of harm without question. See Pratt v. Webster, 673 F.2d 408, 421 (D.C. Cir. 1982) ("while our measure of a criminal law enforcement agency's 'law enforcement purpose' is necessarily deferential, in recognition of the realities of these agencies' duties and the importance of their functions, it is not vacuous").

Equally, however, when a court examines the government's assessment of the ways in which terrorist organizations will use

information gleaned about the government's ongoing investigations, substantial deference to the government's predictive judgments is plainly proper. See Church of Scientology of California v. IRS, 792 F.2d 153, 168 n.6 (D.C. Cir. 1986) (Silberman, J., concurring) ("Congress recognized that even within the de novo review that it directed courts to conduct under FOIA, there was room for deference to the agency on factual issues relating to the availability of an exemption in a particular case within the agency's delegated area of responsibility"); cf. McGehee v. CIA, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (courts should not attempt to "test the expertise of the agency" in evaluating FOIA exemption claims based on national security). Deference is accorded because the officials charged with responding to threats to the national security "must of course be familiar with 'the whole picture,' as judges are not * * *" Sims, 471 U.S. at 179. That reasoning does not cease to be applicable when a court considers the harm that will result from revealing information about an ongoing terrorism investigation. Indeed, as the Supreme Court has explained, "terrorism or other special circumstances" warrant "heightened deference to the judgments of the political branches with respect to matters of national security." Zadvydas v. Davis, 533 U.S. 678, 696 (2001).

The district court cited no respect in which the detailed and unrebutted assessments of career officials responsible for implementing the investigation into terrorism were unreasonable, and erred in setting aside these predictive judgments.

2. The court's ruling also turned in significant part on its mistaken view that it could not, as a matter of law, apply a "mosaic theory" in determining the applicability of the exemption. Op. 20-21. By this, the district court meant that it was legally precluded from considering the cumulative effect of releasing the identities of all September 11 detainees (as opposed to any individual identity in isolation) and also from considering the use to which the list could be put when examined together with other sources of information. Nothing in law or logic supports this reasoning.

As an initial matter, this is not a case in which a FOIA requester seeks information whose use to foreign intelligence is not readily apparent. Compare Sims, 471 U.S. at 177 (disclosure of the fact that the CIA subscribed to a publicly available East European journal "could thwart the Agency's efforts to exploit its value as a source of intelligence information"). What plaintiffs seek here is not so much the building blocks of a mosaic as the mosaic itself-- the list that establishes precisely who has and who has not been questioned in connection with the September 11 investigation. The "mosaic" principle, as applied

to this case, simply confirms the obvious point that in evaluating the harm to ongoing investigations, the court must consider the cumulative impact of releasing the list in its entirety to the terrorist groups that are the subject of the investigation. Cf. Swan, 96 F.3d at 500 (a court "must evaluate the risk of disclosing records to some particular FOIA requester not simply in terms of what the requester might do with the information, but also in terms of what anyone else might do with it").

In any event, the "mosaic theory," as this Court has long recognized, is principally an exercise of common sense. As this Court explained in Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978), "[i]t requires little reflection to understand that the business of foreign intelligence gathering . . . is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair." The Court elaborated in Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980), that "each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself." And the Supreme Court explained in Sims, 471 U.S. at 176, that "intelligence work . . . often involves seemingly innocuous sources as well as unsuspecting individuals who provide valuable intelligence information." See also United States. v.

Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972) (applying the mosaic principle to a First Amendment claim, explaining that "[t]he significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context").

Nothing in the logic of Exemption 7(A) suggests that a court should fail to take into account the ways in which foreign terrorist organizations may use compelled disclosures regarding the government's investigation into their activities. Indeed, the district court's understanding is directly contrary to that of Congress. When Congress reviewed (and, later, significantly expanded) Exemption 7 in 1983, the Senate Report observed:

> Although Exemption 7 currently attempts to protect confidential informants and investigations, this protection can be compromised when small pieces of information, insignificant by themselves, are released and then pieced together with other previously released information and the requester's own personal knowledge to complete a whole and accurate picture of information that should be confidential and protected, such as an informant's identity.

S. Rep. No. 98-221, at 23 (1983).

Contrary to the district court's understanding, see Op. 20, courts have also applied "mosaic" principles in analyzing other FOIA exemptions. See Cappabianca v. Commissioner, 847 F. Supp. 1558, 1563 (M.D. Fla. 1994) (upholding Exemption 2 claim applied

to codes used to label agency files because "disclosure of the file number, if the code were cracked" could lead to circumvention of the law); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 712 (W.D.N.Y. 1991) (upholding Exemption 2 claim applied to "source symbol numbers" on agency files because "accumulation of information known to be from the same source" could facilitate identification of sources); Timken Co. v. U.S. Customs Serv., 491 F. Supp. 557, 559-560 (D.D.C. 1980) (upholding Exemption 4 claim applied to information about prices because "even if the price data would be insufficient, standing by itself, to allow computation of the cost of production, this cost would be ascertainable when coupled with other information either possessed by plaintiff or sought by plaintiff in other pending FOIA actions").

Indeed, as noted above, see pages 24-25, supra, the district court itself adopted the logic of the mosaic principle under Exemption 7(C) when it held that the government could not be compelled to disclose the "dates and locations of arrest, detention, and release," Op. 32-34, recognizing that disclosure of "detailed information of this nature could interfere with the investigation because it would 'inform organizations of routes of investigation that were followed but eventually abandoned. . . [and] could provide insights into the past and current strategies and tactics of law enforcement agencies conducting the

investigation.'" Op. 33 (quoting Supp. Reynolds Dec. ¶ 6). The same analysis is fully applicable to plaintiffs' attempt to identify by name all persons held in connection with the September 11 investigation.

The district court expressed concern that the government might regularly be able to avoid disclosure of information if it were able "to lump together all information related to an ongoing government investigation and withhold it solely because innocuous parts of data might be pieced together by terrorist groups." Op. 21. But the threat to law enforcement arises here not because the government has artificially "lumped together" information, but because plaintiffs seek the composite data that describe precisely those persons questioned as part of the terrorist investigation. And the government's concern regarding the use of the information by terrorist groups arises here because the investigation at issue is the investigation into the most devastating act of terrorism ever to take place on American soil. Nothing in the government's position suggests that Exemption 7 be broadened beyond the scope intended by Congress.

3. As discussed, the district court wrongly disregarded the government's assessment that production of the list of detainees would allow terrorist groups to map the course of the government's investigation and to shape their own future behavior in response, permitting them to prey on perceived gaps in the

government's information, to generate misleading information, and to identify possible informants.

In reaching this conclusion, and in rejecting the other concerns set out in the Reynolds declarations, the court not only failed to accord any deference to the government's predictive judgments, but also, at times, appeared to misunderstand the nature of the group of detainees at issue. See Op. 15-16. That group does not consist wholly of persons suspected of involvement in terrorist activities. It also contains persons not suspected of any criminal offense who might have valuable knowledge about terrorist activities, perhaps entirely without the knowledge of terrorist groups.

Thus, the court was plainly mistaken in concluding that the government's fear of impaired cooperation from detainees was groundless because "it assumes terrorist groups do not already know that their cell members have been detained." Op. 15-16. Not all detainees at issue are or were suspected of being cell members, and many, for various reasons, have chosen not to publicly identify themselves.

The court further believed that the government's concern with obtaining the cooperation of detainees was misplaced because it was not clear whether all detainees have valuable knowledge. Op. 17-18. But the district court offered no reason for doubting the government's assessment that detainees who have valuable

information regarding terrorist groups would be unlikely to provide that information if they knew that those groups would be given their names. See CIA v. Sims, 471 U.S. 159, 172 (1985) (noting that intelligence sources will "'close up like a clam'" unless the government maintains complete confidentiality). Indeed, the court's reasoning on this point cannot be reconciled with its recognition that individuals wish to withhold their identities to avoid endangering their personal safety. See Op. 26-27. For the same reasons, disclosure of their identities will deter such individuals from cooperating with the government. Cf. Manna v. Department of Justice, 51 F.3d 1158, 1165 (3d Cir. 1995) (because La Cosa Nostra is "so violent and retaliatory," names of all "interviewees, informants, [and] witnesses" in criminal investigation may be withheld under Exemption 7(A)).

Moreover, the court erred in believing that the government's concern with obtaining the cooperation of detainees is limited to those who have been or are now in detention. If it is established that the government has no ability to protect the identities of potential informants from disclosure under Exemption 7(A), future potential witnesses in this investigation may likewise be reluctant to cooperate with law enforcement officials.

In sum, the district court erred in concluding that the identities of detainees and their attorneys and of material witnesses are not protected from disclosure by Exemption 7(A).

## II. THE NAMES OF THE DETAINEES AND THEIR ATTORNEYS ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTIONS 7(C) AND 7(F) BECAUSE THE DISCLOSURE OF THE INFORMATION WOULD COMPROMISE THEIR PRIVACY AND ENDANGER THEIR SAFETY AND THAT OF THE PUBLIC.

### A. Compelled Disclosure Would Result In An Unwarranted Invasion Of Privacy.

Exemption 7(C) bars disclosure of requested records where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The determination whether an invasion of privacy is "unwarranted" under Exemption 7(C) requires a balancing of the public interest in disclosure against the privacy interest that Congress intended to protect through the exemption. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989). Both aspects of this inquiry compel the conclusion that the identities of detainees and their attorneys are shielded from disclosure.

1. a. This Court has repeatedly recognized "that individuals have an obvious privacy interest cognizable under Exemption 7(C) in keeping secret the fact that they were subjects of a law enforcement investigation." Nation Magazine v. Customs Serv., 71 F.3d 885, 894 (D.C. Cir. 1995); see also Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984) ("[i]ndividuals have a strong

interest in not being associated unwarrantedly with alleged criminal activity"). Indeed, the mere "mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990).

These concerns are particularly acute given the nature and magnitude of the September 11 attacks. The detainees have a strong interest in avoiding the stigma that might result from association with the worst terrorist attack in American history. The strength of the detainees' privacy interests (and concerns about harassment or reprisal) are particularly strong with regard to the hundreds of individuals who have already been deported – some to countries which have a substantial number of persons who support or are sympathetic to the terrorist organizations. This point is vividly illustrated by the facts alleged in Turkmen v. Ashcroft, No. 02-CV-02307-JG (E.D.N.Y. 2002), cited by the district court. See Op. 26 n.17. The plaintiffs in that case have alleged that, after being deported, they were subjected to abuse in their home countries because of their perceived connection to terrorism, and that a "presumption of guilt" followed them after their deportation. Turkmen v. Ashcroft, No. 02-CV-02307-JG, First Amended Class Action Complaint at ¶¶ 70-72, 89, 125, 148.[6]

[6] There is also a danger of reprisal for those who may have (or are believed to have) provided the United States helpful

b. Release of the identities of the detainees' attorneys could threaten privacy interests in two ways. First, the attorneys' names are sought to facilitate identification of the detainees they represent. While such identification may not be possible as to each detainee, it is established that the "government need not 'prov[e] to a certainty that release will lead to an unwarranted invasion of personal privacy.'" Keys v. Department of Justice, 830 F.2d 337, 346 (D.C. Cir. 1987). Under the statute, it is necessary only that the privacy violation "could reasonably be expected" – language that Congress deliberately changed from an earlier version of the statute, which had required that the disclosure "would constitute" an invasion of privacy. See Reporters Committee, 489 U.S. at 756 & n.9.

Second, the attorneys have privacy interests of their own that would be violated by disclosure of their names. To be sure, the attorneys are not themselves accused or suspected of any wrongdoing. But in the eyes of some, a stigma may attach to the representation of individuals connected to one of the worst crimes in American history. This Court has made clear that the protection of Exemption 7(C) is not limited to "intimate embarrassing information" but can extend to "professional

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information in its war against terrorism. See Daniel Williams, Arab Reporter Fears Reprisal From Allies Of Al Qaeda Suspect, Wash. Post (Sept. 16, 2002) at A12.

activities." McCutchen v. Department of Health and Human Servs., 30 F.3d 183, 187 (D.C. Cir. 1994). Nor is the exemption limited, as the district court apparently believed, to cases in which individuals "have an expectation of anonymity." Op. 35. To the contrary, the fact that "'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" Reporters Committee, 489 U.S. at 770.

Indeed, that principle applies with particular force here where the lawyers in question have made a deliberate choice not to identify themselves and their clients. These attorneys have chosen to avoid the very publicity that plaintiffs seek to impose upon them.

2. While the privacy interest is plain, the public interest in disclosure is not readily apparent. The "only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties.'" Department of Defense v. FLRA, 510 U.S. 487, 497 (1994), quoting Reporters Committee, 489 U.S. at 773; see also Bibles v. Oregon Natural Desert Ass'n, 519 U.S. 355 (1997). As this Court explained in Nation Magazine, "FOIA extends only to those records which reveal something about agency action." 71 F.3d at 894.

Releasing the names of the detainees will not advance, in any meaningful way, the public's interest in knowing "'what their government is up to.'" Reporters Committee, 489 U.S. at 773; cf. Senate of Puerto Rico v. Department of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987) (explaining that the court must determine the public interest in disclosure of "the specific information being withheld"). In their initial FOIA request, the plaintiffs asserted that "'there is an overriding public interest in knowing the activities of the government in detaining people in connection with the September 11 attack.'" Reynolds Dec. ¶ 20. Whatever the merit of that assertion, the government has already released extensive information regarding persons questioned in connection with its terrorism investigation. With respect to INS detainees, the government has released (1) their place of birth, (2) their citizenship status, (3) the immigration charges brought against them, and (4) the date charges were filed. Reynolds Dec. ¶ 7. With respect to the detainees facing federal charges, the government has disclosed (1) their names, (2) the dates any charges were filed, (3) the date the detainee was released, if released, (4) the nature of the criminal charges filed against them, and (5) their lawyer's identity. Reynolds Dec. ¶ 8. In addition, as the district court itself emphasized, detainees are free to disclose their identities to the public and speak to journalists about their detention.

Plaintiffs have failed to explain how knowing the names of the detainees who have not chosen to disclose their identities voluntarily would materially contribute to evaluating the government's performance of its statutory duties. It is the incremental value of that information that is at issue. In that respect, the case parallels Department of State v. Ray, 502 U.S. 164 (1991), in which the government had already released redacted documents about its interviews with repatriated Haitian refugees but had not released the refugees' names. The Court held that given the information already released, "[t]he addition of the redacted identifying information would not shed any additional light on the Government's conduct." Id. at 178.

The district court nevertheless believed that a public interest in disclosure exists based on "concerns about . . . denial of the right to counsel and consular notification, to discriminatory and arbitrary detention, to the failure to file charges for prolonged periods of detention, to mistreatment of detainees in custody." Op. 25. This theory is doubly flawed.

First, simply knowing the names of the detainees will do little to help the public determine whether the investigation has been conducted appropriately. Cf. Safecard Services v. SEC Reporters Comm., 926 F.2d 1197, 1205 (D.C. Cir. 1991) (the identities of individuals who appear in law enforcement files are rarely "very probative of an agency's behavior or performance").

The district court's contrary view rested on a serious misunderstanding of the nature of the detentions. The court observed that "[s]ecret arrests are 'a concept odious to a democratic society,'" Op. 3, quoting Morrow v. District of Columbia, 417 F.2d 728, 741-42 (D.C. Cir. 1969). But the detainees are not being held in "secret" in the sense suggested by the district court. All detainees have the rights and protections afforded by the Constitution and governing statutes and regulations. They are informed of the charges against them, and they have access to telephones in order to contact lawyers. Those detained on material witness warrants are provided court-appointed counsel, while those detained on immigration charges are provided with lists of attorneys who are willing to represent them on a pro bono basis, see 8 U.S.C. § 1229(b)(2). They have access to the courts to file habeas petitions, and as the district court noted, some have even filed lawsuits complaining of alleged abuses. See Op. 26 n.17. In addition, they are free to contact reporters or members of the public at large. Indeed, the district court heavily emphasized the detainees' ability to disclose their identities to the public voluntarily. See Op. 20. There is minimal public interest in the disclosure of a list of names of those detainees who have chosen not to identify themselves to the press and public.

Second, an asserted public interest in disclosure must be based on something more than bare allegations of government misconduct. As this Court explained in Safecard Services v. SEC:

> [U]nless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant.

926 F.2d at 1205-06 (emphasis added); see also Quiñon v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996); McCutchen, 30 F.3d at 188 (the "mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by Exemption 7(C)").[7]

3. The district court itself recognized the significant individual privacy and personal safety interests implicated by

[7] The court apparently believed that an investigation by the Justice Department's Office of the Inspector General, which is examining the government's treatment of the detainees, suggests that there is merit to claims that some detainees have been allegedly abused. See Op. 26. No wrongdoing can be properly be presumed from the Inspector General investigation. The governing statute calls for Inspector General review of complaints received and requires a semi-annual report to Congress. See USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 391 (2001), to be codified at 5 U.S.C. App. 3 § 8E note. As relevant here, the investigation confirms that the disclosures sought are unnecessary to vindicate the public interest in knowing whether detainees are treated properly. Cf. McCutchen, 30 F.3d at 189 (when Congress has established a system for investigating misconduct, "[w]e owe deference to Congress's judgment that the scheme it has established is effective").

compelled disclosure and acknowledged that these concerns may outweigh the public interest in disclosure. Op. 26-27. Faced with the need to balance the interest in privacy against the interest in disclosure, the court could not categorically conclude that the public interest in disclosure was greater than the privacy interest to be protected.

In that circumstance, the court should have held that disclosure was barred by Exemption 7(C). Instead, it decided to compel disclosure absent a sworn statement from each individual detainee seeking to "opt out" from public disclosure. Op. 27. This ruling is legally unsound and practically unworkable.

Exemption 7(C) precludes compelled disclosures of information that could result in an unwarranted invasion of privacy, and 7(F) precludes compelled disclosure of information that could reasonably be expected to endanger the lives or safety of individuals. When these conditions obtain, as they do here, the statute provides no license for compelled disclosures and contains no authority for a court to devise alternative means that (in its view) would protect the interests identified by the statue. Under the district court's rule, Exemption 7(C) would no longer bar disclosures that would result in an unwarranted invasion of privacy: it would merely mandate an opt-out procedure in all such cases. Thus, for example, in Robbins Tire & Rubber, the Court would not have concluded that the names and addresses

of the witnesses were shielded from disclosure to union representatives. It would have required production of the information except in circumstances where the government produced a sworn declaration from an employee wishing to shield his personal information. That is not the law. To the contrary, the Supreme Court and this Court have read the exemption to operate with categorical rules and common sense assumptions. See Nation Magazine, 71 F.3d at 896 (portions of records in investigatory files that would reveal subjects, witnesses, and informants in law enforcement investigations are categorically exempt from disclosure); Reporters Committee, 489 U.S. at 776.

The district court's directive that the government obtain a signed statement from each detainee wishing to "opt out" of public disclosure is, to our knowledge, unprecedented under Exemption 7(C) and Exemption 7(F). Its application here is particularly unjustifiable. All detainees were and are free to identify themselves. Yet the great majority have chosen not to make their status public, thereby preserving their privacy interests. That choice should be respected. Those detainees who have been deported or released presumably expected that their privacy would continue to be preserved. The district court did not explain how the government could be expected to track down hundreds of persons no longer in its custody, many of them no longer in this country, to present them with an "opt-out"

declaration. As to these persons, the court's ruling would provide no protection at all from the unwarranted invasion of privacy or threat to personal safety resulting from its order.

In sum, because the interest in privacy outweighs the public interest in disclosure, the requested records are protected from disclosure by Exemption 7(C).

### B. Disclosure Could Reasonably Be Expected To Endanger The Safety Of The Public, Detainees, And Their Attorneys.

Exemption 7(F) protects from disclosure information that "could reasonably be expected to endanger the life or physical safety of . . . individual[s]."

1. Publicizing the detainees' identities could endanger the safety of the detainees themselves. All of the detainees were apprehended in connection with the investigation of the September 11 attacks. Detainees who are affiliated with terrorist groups could be perceived by those groups as potential informants for the United States, and may be killed to prevent them from cooperating with the investigation. Reynolds Dec. ¶ 37. In addition, their friends or family members could be threatened with violence in order to discourage cooperation or as retaliation for past cooperation with the investigation.

Disclosure also may endanger the safety of those detainees even if they are not themselves directly involved in any terrorist activity or associated with those who have engaged in

such activities. When detainees are publicly identified as having been arrested in connection with the September 11 investigation, some people may conclude that they must be associated with terrorism and some may seek to retaliate violently. The problem is particularly acute for those detainees still in custody, because it is not unusual for prisoners in a facility to attempt to harm or harass those they believe have been involved in especially heinous crimes. Reynolds Dec. ¶ 29.

This threat to the physical safety of the detainees applies as well to their attorneys, who also could face physical harm if their identities are revealed. Reynolds Dec. ¶ 38. Members of terrorist organizations may fear that detainees are supplying their attorneys with too much information; lacking the ability to communicate with the detainees while they are imprisoned, they may instead choose to harm their attorneys. Ibid. And, aside from terrorist organizations or their sympathizers, others might believe that the detainees' attorneys, even though professionally representing the interests of their clients, are working against the interests of the United States. Ibid. Unlike routine cases in which attorneys readily and openly represent clients, these lawyers are representing individuals who have been detained in connection with what has been described as an act of war against the United States and might be subject to retaliatory attacks. Id. ¶ 25.

The district court dismissed this concern with the observation that "lawyers are a hardy brand of professionals." Op. 35. To the extent that is true, lawyers are perfectly free to identify themselves. What is at issue here is whether the government should identify those lawyers who by their actions have shown that they would prefer that their names not be publicized. The district court also believed that the risk of harm is slight because citizens "understand the role of defense lawyers in the American system of justice." Op. 36. That may be true in general, but there undoubtedly are some cases in which it is not. And Exemption 7(F) does not require that harm be proven to a certainty, but only that "it could reasonably be expected." That standard is satisfied here.

2. More fundamentally, in applying Exemption 7(F), the court erred in ignoring the significant harm to the public safety created by releasing a composite of persons questioned in connection with the ongoing terrorism investigation. In a typical law enforcement context, disclosures that would reveal the path of an investigation threaten damage chiefly to prospective prosecutions and to witnesses. As discussed above, such damage is plainly threatened here.

In the typical investigation, the harm to the public safety posed by such disclosures is far less substantial than the threat to prospective prosecutions. The present investigation, of

course, is anything but typical. It seeks not only to bring criminals to justice but to protect the public from future acts of terrorism. As detailed above, by revealing the information requested here, the court would offer terrorists a guide to those persons who are or have been questioned in relation to the terrorism investigation, thereby allowing terrorists to alter their own future behavior in ways that will endanger the public safety, while impairing the usefulness of potential informants and chilling the cooperation of potential witnesses. The harm to this investigation may be measured not only by failed prosecutions but by possible loss of life, perhaps on a massive scale.

## III. THE IDENTITIES OF THE DETAINEES HELD AS MATERIAL WITNESSES ARE PROTECTED BY FOIA EXEMPTION 3.

As discussed above, the identities of the detainees who are held on material witness warrants are protected from disclosure by Exemption 7(A). Disclosure of their identities is also independently prohibited by Exemption 3 of the FOIA, § 552(b)(3).

Exemption 3 exempts matters that are "specifically exempted from disclosure by statute . . . provided that such statute . . . requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." In this case, information about the identities of material witnesses is exempted from disclosure under Fed. R. Crim. P. 6(e)(2), which prohibits the government from disclosing "matters occurring

before the grand jury." See Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d 856, 867-68 (D.C. Cir. 1981) (Fed. R. Crim. P. 6(e) is a "statute" that bars disclosure without allowing for the exercise of discretion, and that it therefore falls within Exemption 3).

Rule 6(e) creates a broad rule of secrecy covering all proceedings before the grand jury. Cf. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979) (courts "consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings"). The rule covers the substance of testimony, as well as information that would reveal the scope, focus and direction of the grand jury proceedings. "Witness names are clearly covered." Fund for Constitutional Gov't, 656 F.2d at 869; accord Washington Post Co. v. Department of Justice, 863 F.2d 96, 100 (D.C. Cir. 1988); Church of Scientology Int'l v. Department of Justice, 30 F.3d 224, 235 (1st Cir. 1994); Silets v. Department of Justice, 945 F.2d 227, 230 (7th Cir. 1991).

The district court observed that the government cannot "immunize" material otherwise subject to disclosure simply by publicizing its connection to a grand jury investigation. Op. 29 n.18. But plaintiffs' request specifically asked for material witnesses warrants as well as the grounds on which the witnesses were being held. Hodes Dec. Exh. A at 1; Reynolds Dec. ¶ 6.

Moreover, even if the government simply released a list names of all those in custody who have been questioned in connection with the September 11 investigation, onlookers could infer the identities of at least some of the grand jury witnesses. For example, it would be possible for anyone to determine that a detainee who is a citizen (and therefore cannot be an INS detainee), and who has not previously been identified as a criminal defendant, must be held as a material witness and must therefore be a grand jury witness.

The district court also believed that the exemption did not apply because it was possible that not all of the material witnesses were actually grand jury witnesses. Op. 29. This reasoning overlooks that all of the warrants to detain material witnesses in this case were "issued to procure a witness's testimony before a grand jury." Reynolds Second Supp. Dec. ¶ 4. The fact that the witnesses were expected to testify before the grand jury, whether or not they actually did testify or were scheduled to testify, is a "matter occurring before a grand jury." See In Re Application of the United States for a Material Witness Warrant, ___ F. Supp. 2d ___, 2002 WL 1592739, at n.1 (S.D.N.Y. July 11, 2002) (where witness was taken into custody pursuant to a warrant issued in aid of a grand jury subpoena, and the proceeding had been sealed as ancillary to grand jury proceedings, neither the witness's name nor any identifying facts

about him or the matter would be revealed); In re Grand Jury Subpoena, 103 F.3d 234, 238 (2d Cir. 1996) (upholding a sealing order to prevent a "significant risk of disclosing" a proceeding that "has occurred or which may occur before the grand jury") (emphasis added).

In sum, disclosure of the identities of the detainees who were material witnesses is prohibited by Exemption 3.

**CONCLUSION**

For the foregoing reasons, the judgment of the district court compelling disclosure of information should be reversed.

Respectfully submitted,

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

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a)(2), that the foregoing brief is not proportionally spaced, has a typeface of 12 points and contains 12,190 words (which does not exceed the applicable 14,000 word limit).

_____
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**CERTIFICATE OF SERVICE**

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