FOIA FRUSTRATION: ACCESS TO GOVERNMENT RECORDS UNDER THE BUSH ADMINISTRATION

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"A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and mocks their loyalty."[1]

I. INTRODUCTION

The idea that an informed electorate is necessary to the proper functioning of a democracy is firmly rooted in our government.[2] Fundamental to the American public's awareness of its government's activities is free access to information about the government and the actions of elected officials.[3] Aside from giving Americans a basis for their decisions as to how to vote, government

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* J.D. candidate, University of Arizona College of Law, May 2005. The Author would like to thank his family, for their love and support; Scott McDonald, for his invaluable editing advice and contributions; Pat Mause, for his help in preparing this Note for publication; and Alyse Meislik, for her many hours of work on this Note. The Author would also like to thank the many great teachers he has had, from whom he has learned so much.

1. 110 CONG. REC. 17087 (1964) (statement of Senator Edward V. Long) (discussing the Freedom of Information Act).

2. *See* Anderson v. Celebrezze, 460 U.S. 780, 796 (1983) (holding that the legitimacy of a State's interest in "fostering informed and educated expressions of the popular will" is unquestionable); Newton N. Minow & Fred H. Cate, *Revisiting the Vast Wasteland*, 55 FED. COMM. L.J. 407, 428 (2003) (arguing that an informed electorate is necessary to a free society).

3. *See* Forsham v. Harris, 445 U.S. 169, 188 (1980) (quoting S. REP. NO. 89-813, at 3 (1965), explaining that the Freedom of Information Act was enacted to further assist in the creation of an informed electorate, so "vital to the proper operation of a democracy"); *see also* Associated Press v. United States, 326 U.S. 1, 20 (1945) (holding that the free dissemination of information from the widest possible variety of sources is essential to the public welfare).

transparency also acts as a check against potential government abuses.[4] Information disclosure is increasingly important in the face of executive, legislative, and judicial reactions to the terrorist attacks of September 11, which some commentators criticize as threatening Americans' most basic civil liberties.[5] In light of allegations of government abuse, courts and commentators alike have rejected the government's contention that increased secrecy is necessary to protect sensitive data from falling into the hands of terrorists, concluding instead that such secrecy only breeds distrust that the government is acting legitimately.[6]

While the communications media have for centuries been successful in educating the public about all manners of government affairs,[7] Americans are now more militant in their demand for unrestricted access not just to information about their government, but to any information in the government's control that is relevant to their welfare.[8] One such example is the proliferation of "right to know" laws.[9] The right to know movement started as a response to factory employees' growing awareness of their exposure to toxic chemicals at work, which posed the risk of serious health consequences.[10] The factory workers pushed for government-mandated disclosure of chemical risks.[11] Their effort resulted in the

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4. *See* Robert D. Richards & Clay Calvert, *Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU's Top Card-Carrying Member*, 13 GEO. MASON U. CIV. RTS. L.J. 185, 211 (2003) (discussing the need to open judicial proceedings to the public and press to prevent government abuses).

5. *See generally* Michael F. Linz & Sarah E. Meltzer, *Constitutional Issues After 9/11: Trading Liberty for Safety*, FED. LAW, Jan. 2003, at 30; Richards & Calvert, *supra* note 4.

6. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) (holding that the First Amendment's guarantee of the freedom of the press protects the public's right to know that their government is acting "fairly, lawfully, and accurately"); Rena Steinzor, *"Democracies Die Behind Closed Doors": The Homeland Security Act and Corporate Accountability*, 12 KAN. J.L. & PUB. POL'Y 641, 666–67 (arguing that open disclosure of corporate information is necessary to the preservation of a free market economy, and non-disclosure will result in corporate dishonesty and sabotage).

7. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976) (holding that the public's "increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech").

8. *See* James T. O'Reilly, *Access to Records Versus "Access to Evil:" Should Disclosure Laws Consider Motives as a Barrier to Records Release?*, 12 KAN. J.L. & PUB. POL'Y 559, 562–63 (2003). O'Reilly explains that over the last twenty-five years, the notion that the Government knows the best approach to handling sensitive information has been abandoned in favor of the public's "right to know." *Id.* at 563.

9. *Id.* at 562.

10. *Id.*

11. *Id.* at 563. O'Reilly asserts that the "right to know" movement began twenty-five years ago as the result of the development of an insecticide by a U.S. chemical company. Workers who handled the insecticide in its concentrated form at the factory experienced a higher rate of sterility than peers who worked elsewhere. This prompted the head of the chemical workers' union to issue a call to members of local unions to insist on their "right to know" of the health risks present at their work site. *Id.* at 562–63.

enactment of federal legislation that created a worker-specific right to know of chemical hazards for most private sector workers, as well as a public right to know of emergency response risks.[12] As the right to know movement took hold, the idea that the government should provide access to information that could affect the public welfare became more firmly established.[13]

One such mechanism for accessing information controlled by the government is the Freedom of Information Act (FOIA).[14] Enacted in 1966, FOIA permits anyone seeking information believed to be in the possession of a United States federal agency to submit a written request to the agency for disclosure of that information.[15] Unless the information is exempt from disclosure under one of FOIA's nine enumerated exceptions,[16] the agency must determine within twenty days of receiving the request whether to disclose the information sought and immediately notify the requester of its decision.[17] As Judge Patricia Wald observed, FOIA provides "a right which is virtually unprecedented anywhere else in the world: the right to obtain government documents just for the asking."[18]

As Judge Wald noted, however, the right is not absolute, but must be weighed against other values.[19] Following the terrorist attacks of September 11, many Americans expressed a willingness to relinquish some of their civil liberties in exchange for increased protection against terrorist attacks.[20] Reflecting this change in attitude, the government has stressed the need for tighter control of information when disclosure could adversely affect national security interests.[21] In

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12. *Id.* at 563.

13. *Id.*

14. 5 U.S.C. § 552 (1991 & Supp. 2003).

15. *Id.* § 552(a)(3) (1991 & Supp. 2003).

16. *See Id.* § 552(b) (1991).

17. *Id.* § 552(a)(6)(A)(i) (1991 & Supp. 2003).

18. Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 657 (1984). Other countries later followed the United States' example, and laws similar to FOIA now exist in over fifty other countries. More than half of those laws were passed in the last decade. *See* David Banisar, *The FreedomInfo.Org Global Survey: Freedom of Information and Access to Government Records Around the World* (Sept. 28, 2003), http://www.freedominfo.org/survey/survey2003.pdf.

19. Wald, *supra* note 18, at 657.

20. *See* National Public Radio, *Poll: Security Trumps Civil Liberties but Americans Watching How Things Go* (Nov. 30, 2001), *at* http://www.npr.org/news/specials/civillibertiespoll/011130.poll.html. The poll, conducted by NPR News, the Kaiser Family Foundation and Harvard University's Kennedy School of Government, shows that the majority of Americans support trials by military tribunal for non-citizens suspected of terrorism, free speech restrictions against those who express support for terrorists, and measures that would allow the government to listen in on conversations between suspected terrorists and their attorneys, among other things. *Id.*

21. *See, e.g.*, Memorandum from Andrew Card, Assistant to the President and Chief of Staff, to Heads of Executive Departments and Agencies; and Laura Kimberly, Acting Director, Information Security Oversight Office, Richard Huff and Daniel Metcalfe, Co-Directors, Office of Information and Privacy, Department of Justice, to Executive

addition, there are other situations where the value of keeping information secret outweighs the value of full disclosure. For example, FOIA permits non-disclosure where exposure of trade secrets, personal privacy, and the success of ongoing criminal investigations is threatened.[22] Thus, while the drafters of FOIA intended that requested information be disclosed under most circumstances, they also recognized that there are situations where disclosure is inappropriate. Congress crafted nine express FOIA exemptions to keep sensitive information secret under these circumstances.[23]

While FOIA provides a powerful tool for accessing information, many FOIA requests are currently unnecessary due to the spread of twenty-four-hour news networks and the expansion of the Internet, which allow the instantaneous transfer of information across state and national borders. The government itself has mooted the necessity for many FOIA requests by posting "[v]irtually all new documents released publicly . . . and many historic documents" on federal agency websites.[24] Additionally, the website www.firstgov.gov, created in late 2000, provides a single portal for accessing all federal agency databases.[25] However, while these electronic information disclosures create the appearance of transparency, the Bush administration imposed tighter restrictions on some of the most highly sought information.[26] Operators of government websites have selectively removed documents from the public's reach, and agencies are now

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Departments and Agencies (Mar. 19, 2002), http://www.usdoj.gov/oip/foiapost/2002 foiapost10.htm [hereinafter Card Memorandum] (explaining that Government agencies have an obligation to review and protect from disclosure any records that could potentially assist terrorists in developing weapons of mass destruction, and providing guidance as to how to classify such records); Memorandum from Chief Immigration Judge Michael Creppy, to Immigration Court Judges and Court Administrators (Sept. 21, 2001), http://archive.aclu.org/court/creppy_memo.pdf [hereinafter Creppy Memorandum] (directing immigration judges to close certain trials for which the Attorney General has implemented special security procedures to the public and the press); O'Reilly, *supra* note 8, at 567 (explaining that judges must balance the public's need for information against possibly unforeseeable consequences of disclosure).

22. *See* 5 U.S.C. § 552(b)(4), (b)(6), (b)(7) (1991).

23. *See* Wald, *supra* note 18, at 656–57.

24. *See* James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J.L. & PUB. POL'Y 521, 527 (2003). Conrad attributes the growth of "free-standing" information dissemination by the Government to several factors. These include technological advances, the right-to-know concept, and the enactment of the Electronic FOIA Amendments of 1996, which require federal agencies to establish "electronic reading rooms" with online access to documents that would be likely to become the subject of FOIA requests. *Id. See also* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (codified at 5 U.S.C. § 552(a)(2) (Supp. 2003)).

25. *See* Conrad, *supra* note 24, at 527.

26. *See generally* Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, 12 KAN. J.L. & PUB. POL'Y 671 (2003) (arguing that the Bush Administration's approach to dissemination of Government information is one of secrecy, resistance to public accountability, and a belief in a "need-to-know" basis of disclosure).

reluctant to post any data that could provide potentially useful information to terrorist groups.[27] A new category of "sensitive but unclassified" information was created to limit access to government documents that do not meet the traditional classification standards, but which the government nonetheless wishes to keep secret.[28] Attorney General John Ashcroft pledged the support of the Department of Justice in defending all but the most egregiously improper agency denials of FOIA requests.[29] The trend toward unmitigated access to government records has been reversed. Information formerly "free" to the public is now restricted to a handful of high-level government executives.[30]

This Note argues that the Bush administration has improperly invoked the national security, law enforcement, and critical infrastructure information exceptions to the Freedom of Information Act to deny valid requests. Because those exceptions are to be "narrowly construed,"[31] homeland security concerns do not provide a justifiable basis for the administration's broad restrictions on information disclosure. The government's tight control of access to its records contravenes the spirit of openness and transparency that FOIA was intended to promote, and allows the government to operate "behind closed doors."[32] Therefore, the judiciary should utilize FOIA to place information about the government within the public domain (unless such information clearly fits one of the nine express FOIA exemptions) rather than allowing the government to withhold information on the basis of unfounded fears that disclosure will jeopardize national security.

II. HISTORY OF THE FREEDOM OF INFORMATION ACT

Although the judiciary can compel the government to grant access to a limited number of government records under the common law, the strength of the common law right pales in comparison to the power of FOIA. For example, in *Nixon v. Warner Communications, Inc.*, the Supreme Court cited case law dating as far back as 1894 for the conclusion that the federal common law grants citizens the right to "inspect and copy public records and documents, including judicial records and documents."[33] While the *Nixon* decision pertained to the right of access to judicial decisions, the right was later held to extend to the public records of all three branches of government.[34] The right of access was not absolute; the trial court had discretion to deny disclosure if the records were sought for an improper purpose, such as "to gratify private spite or promote public scandal," to

27. *See* O'Reilly, *supra* note 8, at 569–70.
28. *See* McDermott, *supra* note 26, at 675–76.
29. *Id.* at 679.
30. *Id.* at 688.
31. Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976).
32. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).
33. 435 U.S. 589, 597 & nn.7–8 (1978).
34. Wash. Legal Found. v. United States Sentencing Comm'n, 89 F.3d 897, 903–04 (D.C. Cir. 1996).

"serve as reservoirs of libelous statements," or for other malicious reasons.[35] However, the Court declined to define the contours of the common law right of access because it ruled that the common law right was displaced by the Presidential Recordings Act,[36] a statute that provided a scheme for public access to the records sought.[37]

The Supreme Court also held, in a line of cases that preceded FOIA's enactment, that there is a common law right of public access to trials.[38] In *Richmond Newspapers, Inc. v. Virginia*,[39] a case involving the right of access to a criminal trial, the Court built upon this tradition by holding that the First Amendment's guarantee of freedom of the press requires that the public be allowed access to government data when the information sought satisfies a two-pronged test.[40] First, there must be a "tradition of accessibility" to the information sought; second, public access to the information must be important to the democratic process.[41] Courts have interpreted this holding narrowly. Where plaintiffs have invoked *Richmond Newspapers* to obtain information that does not pertain to criminal trials, the First Amendment argument has proven unpersuasive.[42]

Congress enacted FOIA in 1966 to create a presumption of accessibility.[43] Rather than requiring the person seeking information from the government to establish his entitlement to the information, FOIA requires the government to prove that the person *is not* so entitled.[44] In 1974, Congress amended FOIA by making three fundamental changes. First, it required agencies

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35. *Nixon*, 435 U.S. at 598 (citations omitted).

36. Pub. L. No. 93–526, 88 Stat. 1695 (1974).

37. *Nixon*, 435 U.S. at 605–06.

38. *See, e.g.*, Maryland v. Balt. Radio Show, Inc., 338 U.S. 912, 920 (1950); Craig v. Harney, 331 U.S. 367, 374 (1947); Pennekamp v. Florida, 328 U.S. 331, 361 (1946).

39. 448 U.S. 555 (1980).

40. *Id.* at 589.

41. *Id.*

42. *See, e.g.*, Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 935 (D.C. Cir. 2003) ("Neither the Supreme Court nor this Court has applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings.").

43. *See* Wald, *supra* note 18, at 650 n.4. The history of FOIA spans ten years of debate and compromise. In 1957, Congressman John Moss initiated hearings on amendments to the Administrative Procedure Act, which previously allowed government agencies to withhold records "for good cause found." Moss held 173 hearings on the matter between 1955 and 1960. In 1964, a bill providing for increased public access to government records was passed by the Senate, under the sponsorship of Senator Edward Long. Represenative Moss and Senator Long reintroduced similar versions of the bill before the Eighty-Ninth Congress. The Senate passed the bill in 1965. The House passed the bill in 1966, after arriving at a compromise with the Department of Justice over many of the bill's provisions. *Id.* President Johnson signed the bill on July 4, 1966. *Id.* at 652.

44. *See* 5 U.S.C. § 552(a)(4)(B) (1991 & Supp. 2003).

to respond to written information requests within ten to thirty days.[45] Second, Congress gave courts the authority to review the propriety of document classification by in camera inspection.[46] Third, it narrowed the law enforcement exception to include only those cases in which disclosure of "investigatory records" would result in specific harms defined by the statute.[47] Congress passed these amendments over President Ford's veto.[48] Among those in Ford's administration who advised the President to veto the bill were his Chief of Staff Donald Rumsfeld and Deputy Chief of Staff Dick Cheney, who, according to one commentator, believed that the bill "took away too much presidential power."[49]

III. THE FREEDOM OF INFORMATION ACT TODAY

The Freedom of Information Act requires federal agencies to make several forms of information disclosure. First, agencies must publish in the Federal Register certain general information about their organization, such as rules of procedure and statements of general policy.[50] Second, agencies must "make available for public inspection and copying" the following: final opinions on adjudicatory matters that come before the agency, statements of policy and interpretation, administrative staff manuals, and records that have been released pursuant to written requests that are likely to become the subject of future requests.[51] Third, agencies must publish a general index of such records.[52] Finally, pursuant to the Electronic FOIA Amendments of 1996, the agency must publish all of the foregoing information on the Internet or otherwise make the information available by "other electronic means."[53]

FOIA also allows any person to make a written request to the agency for any other records. Provided that the request "reasonably describes such records and . . . is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, [the agency] shall make the records promptly available to any person."[54] Upon receipt of such a request, the agency has twenty business days to decide what action to take, "and shall immediately notify the person making such request of its decision, and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination."[55] If the agency decides to withhold the requested records, the

45. *See* Wald, *supra* note 18, at 659.
46. *Id.*
47. *Id.* Some commentators describe the changes as a reaction to the Executive Branch's loss of credibility stemming from the Watergate scandals. *See id.*; *see also* McDermott, *supra* note 26, at 679.
48. McDermott, *supra* note 26, at 679.
49. *Id.*
50. *See* 5 U.S.C. § 552(a)(1) (1991 & Supp. 2003).
51. *Id.* § 552(a)(2).
52. *Id.*
53. Pub. L. No. 104-231, 110 Stat. 3048 (codified at 5 U.S.C. § 552(a)(2) (Supp. 2003)).
54. *See* 5 U.S.C. § 552(a)(3)(A) (1991 & Supp. 2003).
55. *Id.* § 552(a)(6)(A)(i).

person making the request may bring an action in federal district court to compel disclosure.[56] In such cases, the burden is on the agency to prove that withholding the records is warranted.[57] The court must review the agency's decision to withhold de novo and may examine the requested records in camera to determine if they were properly withheld.[58]

There are nine types of records specifically exempted from FOIA's disclosure requirements. Agencies need not disclose any information that relates to: (1) matters that are properly classified pursuant to Executive Order for the purpose of protecting national security and foreign relations; (2) matters related solely to the agency's internal personnel rules and practices; (3) matters specifically protected from disclosure under another statute; (4) trade secrets, commercial, and financial information that is privileged or confidential; (5) inter or intra agency communications that would not be available by law to a party other than an agency in litigation with the agency; (6) personnel, medical, and similar files whose disclosure would constitute a clearly unwarranted invasion of personal privacy; (7) records kept for law enforcement purposes; (8) information dealing with regulation or supervision of a financial institution; or (9) geological and geophysical data concerning wells.[59] Exemption 7 applies only to those records that (a) could reasonably be expected to interfere with enforcement proceedings; (b) would deprive a person of the right to a fair trial; (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (d) could reasonably be expected to reveal the identity of a confidential source; (e) might reveal secret law enforcement strategies and procedures that would provide others with information that could be used to circumvent the law; or (f) could reasonably be expected to endanger a person's safety.[60] However, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," and the exceptions "must be narrowly construed."[61]

In the wake of the September 11 terrorist attacks, Congress passed several substantive amendments to FOIA. First, the amendments bar any federal agency that is part of the "intelligence community" (as defined by Section 3(4) of the National Security Act of 1947[62]) from releasing information to foreign government entities or their representatives.[63] Second, under the Critical Infrastructure Information Act of 2002 (CIIA), Congress gave private corporations the power to designate certain information voluntarily submitted to federal

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56. *Id.* § 552(a)(4)(B).
57. *Id.*
58. *Id.*
59. *Id.* § 552(b)(1)–(9) (1991).
60. *See Id.* § 552(b)(7)(a)–(f) (1991).
61. Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976). *But see* John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (holding that the exemptions "are intended to have meaningful reach and application").
62. 50 U.S.C. § 401a(4) (1991).
63. *See* Pub. L. No. 107-306, § 312(2), 116 Stat. 2383, 2390 (codified as 5 U.S.C. § 552(a)(3)(E) (Supp. 2003)).

government agencies "critical infrastructure information."[64] The CIIA may drastically reduce the amount of information "voluntarily submitted" by private firms that the federal government formally shared with the public.[65]

IV. THE BUSH ADMINISTRATION: SECRETS AND CLOSED DOORS

Following the attacks of September 11, 2001, the Bush Administration began shielding government actions from public scrutiny. These measures included secret arrests, closed-door criminal proceedings, the removal of information from government websites, and denial of FOIA requests.[66] In response to some of these actions, one district court observed that "[d]ifficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law."[67] However, these times also require the government to strike a balance between protecting the nation's security and giving citizens sufficient information to assure them that their government is operating "within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."[68] By withholding more information than necessary under the pretense of protecting national security, the Bush Administration fails to strike the proper balance.

One example of the Government's policy of operating in secrecy arose in connection with the investigation of the September 11 terrorist attacks. In the wake of the attacks, thousands of immigrants were questioned and detained by the FBI and INS.[69] They were either charged with violations of immigration laws and other federal crimes or held as material witnesses.[70] Ignoring the demands of various members of Congress, civil liberties groups, and media organizations, the Department of Justice refused to disclose basic information about the detainees.[71] Specifically, the Government kept secret "the number of people arrested, their names, their lawyers, the reasons for their detention, and other information relating to their whereabouts and circumstances."[72] While the interest of the Government in arresting criminals and those likely to have knowledge helpful to investigations of terrorism is substantial, the need to shield all such Government activities from public view is questionable. This is particularly true where even a limited amount

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64. *See generally* Critical Infrastructure Information Act of 2002, Pub. L. 107-296 §§ 211–215, 116 Stat. 2150–55. The CIIA is a subsection of the Homeland Security Act.

65. *See* discussion *infra*, Section IV.

66. *See generally* Linz & Meltzer, *supra* note 5; McDermott, *supra* note 26.

67. Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 215 F. Supp. 2d 94, 96 (D.D.C. 2002), *rev'd*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

68. *Id.*

69. *Id.*

70. *Id.* at 98.

71. *Id.* at 96.

72. *Id.*

of disclosure could allay public fears that the Government has systematically violated the detainees' civil rights.[73]

More alarming than the secrecy surrounding the arrests, however, is the secrecy that surrounded the detainees' trials. On September 21, 2001, Chief Immigration Judge Michael Creppy sent a Memorandum to all U.S. immigration judges requiring them to close to the public all proceedings designated by the Attorney General as requiring "additional security procedures."[74] Under Creppy's directive, neither the press nor members of the defendants' family may attend such proceedings, nor may the court discuss the proceedings with anyone outside the Immigration Court.[75] Courts are prohibited from "confirming or denying whether such a case is on the docket or scheduled for a hearing."[76] The Creppy Memorandum applied to over 600 "special interest" immigration cases.[77] The closed-door hearings spawned litigation in several jurisdictions, with the Third and Sixth Circuits reaching opposite conclusions about the constitutionality of the closed trials.[78] Currently, the Administration continues to maintain a veil of secrecy over terrorism-related trials and proceedings, "even though no terrorism charges have been formally lodged against any of the post-September 11 domestic detainees and many of those held in Guantanamo Bay have also been found to have no terrorism relation."[79]

The Administration has kept a tight grip on information held by other executive agencies as well. On October 12, 2001, Attorney General John Ashcroft issued a memorandum to the heads of all federal agencies describing the Department of Justice's policy on defending agencies against FOIA suits.[80] The Memorandum provides the assurance that "[w]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis."[81] This FOIA policy supercedes the one promulgated by former Attorney General Janet Reno in October 1993, which provided that the Department of Justice would only defend agencies whose denials of FOIA requests prevented "foreseeable harm."[82] The Bush Administration's FOIA policy directly opposes that of the Clinton Administration. While the former policy

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73. *See* Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 937–38 (Tatel, J., dissenting).

74. *See* Creppy Memorandum, *supra* note 21.

75. *Id.*

76. *Id.*

77. McDermott, *supra* note 26, at 672.

78. *See id.*

79. *Id.* at 673.

80. Memorandum from John Ashcroft, Attorney General, to Heads of all Federal Departments and Agencies (Oct. 12, 2001), *at* http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm [hereinafter Ashcroft Memorandum].

81. *Id.*

82. *Id.*

created a presumption that FOIA requested documents should be disclosed, the new policy creates the presumption that such documents should be withheld.[83]

On March 19, 2002, White House Chief of Staff Andrew Card issued another Memorandum providing guidance on FOIA matters.[84] The Memorandum directs federal agencies to safeguard and protect from inappropriate disclosure all records regarding weapons of mass destruction and to review whether the records were properly classified in accordance with the new guidelines.[85] These guidelines, written by the Information Security Oversight Office and the Department of Justice Office of Information Privacy, direct agencies to consider the need for safeguarding those records both "on an ongoing basis" and upon receipt of a FOIA request for the information.[86] The Memorandum states that "the appropriate steps for safeguarding such information will vary according to the sensitivity of the information involved."[87] Three levels of sensitivity are indicated: classified information, previously unclassified or declassified information, and sensitive but unclassified information.[88]

While the Government's concern about releasing information about weapons of mass destruction is certainly justifiable, the Memorandum "has caused a wave of concern."[89] Much of that concern relates to uncertainty over the meaning of the phrase "sensitive but unclassified," which the Memorandum fails to define.[90] This vague language has sparked fears that the concept will be used expansively, to the "great consternation" of civil libertarians.[91]

At a meeting of federal FOIA officers held after the Memorandum was issued, some of those present questioned whether they should restrict access to information on their agencies' websites.[92] In response, one of the Memorandum's authors indicated that the Government is clearly concerned about sensitive information appearing on the Internet.[93] To those present at the meeting, the message was that "agencies should be very careful about affirmative disclosure (dissemination without waiting for a FOIA request) and it was clear that disclosure even with a FOIA request was not encouraged."[94] Operators of government Internet sites are now purging sensitive information from their webpages, and the number of new postings is shrinking.[95]

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83. *See* O'Reilly, *supra* note 8, at 569.
84. *See* Card Memorandum, *supra* note 21.
85. *See id.*; McDermott, *supra* note 26, at 674.
86. Card Memorandum, *supra* note 21.
87. *Id.*
88. *Id.*
89. McDermott, *supra* note 26, at 674.
90. *Id.* at 675–76.
91. *Id.* at 676.
92. *Id.*
93. *Id.*
94. *Id.*
95. *See* O'Reilly, *supra* note 8, at 569.

Finally, the 107th Congress passed the Homeland Security Act into law under intense pressure from President Bush and his Cabinet.[96] Barely discussed during the debate over the 500-page bill was a section known as the Critical Information Infrastructure Act.[97] While the White House described the CIIA as a measure that "encourages the sharing of information with the Department of Homeland Security by the private sector,"[98] the CIIA may close the door on public access to thousands of records "voluntarily" shared with the federal government.[99] According to Professor Steinzor's interpretation of the CIIA, "virtually any information about physical or cyber infrastructure that could prove useful to terrorists" may be designated "critical infrastructure information,"[100] and then become exempt from disclosure under FOIA. Additionally, the information may not be used in any civil proceeding without express written permission from the company that submitted the records.[101] The CIIA imposes criminal penalties—including fines and imprisonment for up to one year—on government officials who improperly disclose such records.[102] Steinzor opines that "the message sent by the inclusion of criminal penalties [in the CIIA], especially in the context of other Bush Administration policies strongly favoring secrecy, is that bureaucrats act at their peril if they disclose information in controversial cases."[103]

The Act's proponents argue that corporations would be reluctant to share information about vulnerabilities in their critical infrastructure systems with the government if it could lead to civil liability or bad public relations.[104] Since government intervention is necessary in many cases to address these vulnerabilities, proponents argue that the Government must provide corporations with an incentive to share the information by protecting it from disclosure.[105] More importantly, proponents argue, disclosure protections are necessary to keep information from falling into the hands of terrorists, who could use it to exploit vulnerabilities in the United States' infrastructure.[106]

In Steinzor's view, the CIIA is harmful because it shields corporate America from accountability and limits citizens' access to information they may need to protect themselves from danger.[107] Indeed, the CIIA may even worsen the

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96. Pub. L. No. 107-296, 116 Stat. 2145 (2002). *See also* Steinzor, *supra* note 6, at 642.

97. Steinzor, *supra* note 6, at 642.

98. The White House, *Analysis for the Homeland Security Act of 2002: Title II*, http://www.whitehouse.gov/deptofhomeland/analysis/title2.html (last visited Nov. 16, 2004).

99. *See* Steinzor, *supra* note 6, at 642–43.

100. *Id.* at 664.

101. Homeland Security Act § 214(a)(1(A)–(C), 16 Stat. 2152.

102. *Id.* § 214(e)(2)(f), 116 Stat. 2154.

103. Steinzor, *supra* note 6, at 650. Steinzor notes that no prosecution has ever been brought by the federal government under other statutes barring disclosure. *Id.*

104. *Id.* at 663.

105. *Id.* at 663–64.

106. *See id.* at 664.

107. *Id.* at 664–65.

national security concerns it was intended to remedy by making people "less safe, not more."[108] Disclosure leads to accountability, and accountability leads to action. In the absence of this incentive, "institutional inertia" may result in a corporation's failure to address vulnerabilities in its infrastructure.[109] Corporate managers, concerned with cost controls, "may fail to remedy problems that could prove catastrophic in the event of criminal attack."[110] Information suppressed from the public might be necessary to protect against or respond to unexpected emergencies.[111] For example, in the absence of disclosure, local officials and emergency crews may not have the information needed to respond to an attack on a manufacturing facility in their area.[112]

The CIIA, the Ashcroft Memorandum, and the Creppy directive demonstrate a trend toward secrecy in the Bush Administration. This secrecy is contrary to the ideals of openness and transparency inherent in the Freedom of Information Act. Worse than the Executive's suppression of information that rightfully belongs to the public, however, is the recent judicial approval of such actions. To paraphrase Justice Jackson's dissent in *Korematsu v. United States*, "[the Executive] may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes . . . doctrine."[113]

V. JUDICIAL REACTIONS TO INFORMATION SUPPRESSION

A. D.C. Circuit's Refusal to Compel Disclosure of Names of Those Arrested in Terrorism Security Sweep: Center for National Security Studies v. United States Department of Justice

In *Center for National Security Studies v. United States Department of Justice*,[114] the D.C. Circuit ruled on civil rights groups' requests for information on the hundreds of immigrants detained during the Government's investigation of the September 11 terrorist attacks.[115] The plaintiffs requested four main categories of information: (1) the identities of the detainees and the circumstances of their arrest, including names and citizenship, dates and locations of arrests, and the nature of charges filed against the detainees; (2) the identities of the detainees' attorneys; (3) the identities of any courts directed to seal proceedings against the detainees; and (4) any official guidance directed to public officers regarding the

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108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 664–65.
112. *Id.*
113. 323 U.S. 214, 246 (1944).
114. 215 F. Supp. 2d 94 (D.D.C. 2002).
115. *Id.* at 97. The plaintiffs comprised twenty-two separate civil rights groups, including the Center for National Security Studies, ACLU, Amnesty International USA, American-Arab Anti-Discrimination Committee, Human Rights Watch, and Reporters Committee for Freedom of the Press. *Id.* at 95 n.1. The plaintiffs directed their letters to the Office of Information Privacy, the FBI, and the INS. *Id.* at 97.

making of public statements about the detainees.[116] The Government withheld the information pursuant to FOIA exemptions 7(A) and 7(C).[117] Plaintiffs then sought judicial review of the Government's decision in the United States District Court for the District of Columbia, relying on FOIA, the First Amendment, and the common law as the basis for their petition to compel disclosure.[118]

After reviewing Exemption 7 case law, the district court rejected the Government's argument that Exemption 7 justified withholding the detainees' identities. The Government argued that Exemption 7(A) applied because disclosure could hamper the investigation of terrorism. Specifically, the Government claimed that (a) terrorist groups might cut off communication with members of their group whom they knew were captured or threaten them, thus "eliminat[ing] valuable sources of information," (b) "releasing the names of detainees who may be associated with terrorism . . . would reveal the direction and progress of the investigations by identifying where DOJ is focusing its efforts," and (c) the public release of names could create a risk that terrorist groups could mislead investigators by creating false evidence.[119] The Government also argued that Exemption 7(C) applied because release of the detainees' names would constitute a substantial invasion of their privacy by connecting them to the September 11 terrorist attacks.[120] This association would cause them "embarrassment, humiliation, risk of retaliation, harassment and possibly even physical harm."[121] The district court rejected all of these arguments.

The district court first held that the Government failed to support its concern that revealing the detainees' identities would hamper its investigative efforts.[122] The court held that disclosure would not cause terrorist groups to cut off communications with these members, because there was no reason to believe that terrorist organizations did not already know about their captured members' detention.[123] The Government's rationale was undercut by its own admission that detainees were free to inform anyone their arrest, and the fact that by the time the court issued its opinion, ten months had passed since September 11.[124] Additionally, the Government's logic was contradicted by its own selective disclosure of the names of certain detainees, including twenty-six held on material

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116. *Id.*

117. *Id.* at 98. At trial, the Government also invoked Exemption 7(F). *Id.* at 100. Exemption 7 protects records "compiled for law enforcement purposes" where disclosure: "(A) could reasonably be expected to interfere with enforcement proceedings, . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, . . . or (F) could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(A), (C), (F) (1991).

118. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 100.

119. *Id.* at 101 (citations omitted).

120. *Id.* at 105.

121. *Id.* (citation omitted).

122. *Id.* at 101–03.

123. *Id.* at 101.

124. *Id.*

witness warrants.[125] The court pointed out that "[t]he Government does not explain why its concerns about cooperation apply with respect to some detainees, but not to other detainees whose identities have been disclosed."[126] Finally, the Government failed to provide even general evidence that those detained actually had links to terrorism.[127] Therefore, the Government failed to establish a "rational link between the harms alleged and disclosure," and its "concern that disclosure would deter cooperation and impair its investigation is pure speculation."[128]

The district court also rejected the Government's "mosaic theory" argument that bits and pieces of seemingly innocuous information, though harmless in isolation, could be assembled by terrorist groups to generate a picture of the Government's investigation and hamper attempts to investigate and prevent terrorism.[129] Although some courts previously found the mosaic theory to be a valid justification for withholding information, the district court ruled that the theory is inapplicable where the Government's case is based on Exemption 7.[130] Further, the court found that "application of the mosaic theory would essentially turn 7A into an exemption dragnet, as it would permit the Government 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."[131] This result, the court found, is not warranted by precedent.[132]

Finally, the district court rejected the Government's Exemption 7C and 7F arguments regarding the detainees' identities. As to the 7C argument, the court found that there is a substantial privacy interest in not being connected to a

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125. *Id.* at 101–02.

126. *Id.* at 102.

127. *Id.*

128. *Id.* at 102–03.

129. *Id.* at 103–04.

130. *Id.* In cases where the "mosaic theory" was successfully asserted, the Government's case for nondisclosure rested on Exemption 1. *See, e.g.*, Abbotts v. Nuclear Regulatory Comm'n, 766 F.2d 604 (D.C. Cir. 1985). Exemption 1 seeks to protect the interest of national security by exempting from disclosure documents properly classified by Executive Order as secret. *See* 5 U.S.C. § 552(b)(1) (1991). *Abbotts* concerned a FOIA request for a redacted page of a report on the safeguarding of the nation's nuclear power facilities against terrorist attack. 766 F.2d at 606. The redacted page contained information on the number of attackers (or "baseline threat level (BTL)") that security systems at nuclear facilities should be designed to protect against. *Id.* Although finding that similar information on BTLs was already in the public domain, the court found that "Exemption 1 . . . bars the court from prying loose from the government even the smallest bit of information that is properly classified." *Id.* at 607–08 (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1982)). For a deeper explanation of the mosaic theory, *see* United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972) (holding 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").

131. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d, at 103–04.

132. *Id.* at 104.

criminal investigation.[133] However, that does not justify a blanket withholding of *all* information implicating a person's privacy interest; the invasion of privacy must be *unwarranted*,[134] which depends on balancing the "public interest in disclosure against the privacy interests implicated."[135] In the present case, the court determined that the public's grave concerns about the Government's alleged abuse of its power to arrest and detain outweighed the detainees' privacy interests.[136] The court did acknowledge the validity of the Government's concern that revealing the detainees' names could threaten their physical safety.[137] However, the court offered a solution to both the privacy and safety concerns cited by the Government: those detainees who wished not to have their names revealed could "opt out" of public disclosure.[138] As to all other detainees, the court held that "Exemptions 7C and 7F do not justify the Government's withholding of names."[139] The court also held that the Government's nondisclosure of the names of the detainees' attorneys, who have no expectation of anonymity, was unjustifiable under Exemptions 7C or 7F.[140]

The Government also asserted that the Justice Department properly withheld the names of arrestees held as material witnesses under Exemption 3—which protects disclosure of any documents specifically exempted from FOIA under another federal statute[141]—because Federal Rules of Criminal Procedure 6(e)(2) and (e)(6) mandated secrecy in grand jury proceedings.[142] Again, the court was unmoved, holding that "[t]he Government's reliance on grand jury secrecy rules to justify withholding the identities of material witnesses is fundamentally wrong as a matter of law."[143] First, because the mere identities of grand jury witnesses are not barred from disclosure per se by Rule 6(e)'s requirements of secrecy as to "matters occurring before the grand jury," nothing on the face of the Federal Rules of Criminal Procedure supports the Government's argument.[144] Second, because the material witness statute refers to criminal proceedings in general, the fact that some detainees were held on material witness warrants reveals nothing about their status as grand jury witnesses. In fact, there was no

133. *Id.* at 105.
134. *Id.*
135. *Id.* (internal quotation marks omitted).
136. *Id.* at 105–06.
137. *Id.* at 106.
138. *Id.*
139. *Id.*
140. *Id.* at 109.
141. 5 U.S.C. § 552(b)(3) (1991).
142. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 106. Federal Rules of Criminal Procedure 6(e)(2) provides that certain people may not disclose matters occurring before a grand jury and includes, among others, grand jurors, court reporters, and government attorneys. Federal Rules of Criminal Prodedure 6(e)(6) provides that "Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."
143. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 106.
144. *Id.*

evidence that "the material witnesses have testified before a grand jury, are scheduled to testify before a grand jury, or have been subpoenaed or otherwise ordered to testify."[145] Thus, the court held that the Government failed to meet its burden of proving that disclosure of the names of the material witness detainees would reveal secret aspects of grand jury proceedings in violation of the Federal Rules of Criminal Procedure.[146]

The court did agree, however, with the Government that disclosure of the dates and locations of arrest, detention, and release could harm national security, as this information could plausibly be used by terrorists to track the Government's investigation of terrorist activities and to evade capture.[147] Additionally, the court rejected plaintiffs' claims that they were entitled to the information requested under the First Amendment and the common law.

Although the court's decision refused to satisfy all of the plaintiffs' demands, civil rights advocates viewed the opinion as a crucial advance in the fight to restore government transparency. An editorial in the *Washington Post* called the decision "a welcome rebuke to the obnoxious secrecy with which the federal government has surrounded the [domestic terrorism] probe."[148] Members of Congress who were frustrated over the Executive's denial of their own requests for information also supported the decision. For example, Senate Judiciary Committee Chairman Patrick Leahy said, "The Justice Department has largely ignored repeated congressional requests for the same information, with appropriate safeguards . . . . The decision tells the Justice Department that it has to follow the law."[149] Unfortunately, the victory was short-lived. The district court stayed its order requiring the Justice Department to disclose the detainees' names pending resolution of the Government's appeal.[150] In June 2003, a divided three-judge panel of the District of Columbia Circuit Court of Appeals reversed the trial court's order.[151]

The circuit court based its rejection of the plaintiffs' FOIA claim entirely on Exemption 7(A) grounds.[152] The court relied heavily on the principle of

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145. *Id.* at 107.

146. *Id.*

147. *See id.* at 108.

148. *More Civics Lessons for Justice*, WASH. POST, Aug. 7, 2002, at A20.

149. Jess Bravin, *Judge Orders Justice Department to Release Names of Detainees*, WALL ST. J., Aug. 5, 2002, at A4.

150. Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 217 F. Supp. 2d 58, 58–59 (D.D.C. 2002).

151. *See* Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 932 (D.C. Cir. 2003). The D.C. Circuit affirmed the part of Judge Kessler's decision refusing to compel disclosure of other information requested by plaintiffs (including the dates and locations of arrests), as well as the portion of the decision rejecting the plaintiffs' claims that they were entitled to the requested information on First Amendment and common law grounds. *Id.* at 933–37.

152. *Id.* at 925 ("Finding the names protected under 7(A), we need not address the other exemptions invoked by the government and reserve judgment on whether they too would support withholding the names.").

deference to the Executive Branch on matters of national security, stating that "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area . . . ."[153] Among the principle cases cited as precedent for the court's decision was *CIA v. Sims*,[154] a 1985 Supreme Court case that involved a request for information from the Central Intelligence Agency (CIA) regarding a project code-named "MKULTRA."[155] The plaintiffs in *Sims* made a FOIA request for the names of the approximately eighty institutions and 185 individuals involved in the MKULTRA research.[156] Although the CIA disclosed some names, it invoked FOIA Exemption 3,[157] rather than Exemption 7, to withhold the names of all individual researchers and twenty-one institutions.[158] The Agency relied on a statute that stated "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."[159] In deferring to the CIA's judgment that the MKULTRA researchers were "intelligence sources" within the meaning of the statute, the Court held that "[t]he decisions of the Director, who must of course be familiar with the whole picture, as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake."[160] The majority in *Center for National Security Studies* cited this language approvingly, and ruled that decisions of the Justice Department officials in charge of the terrorism investigation are entitled to the same deference.[161]

Sims, however, differs from *Center for National Security Studies* in two material respects: first, in the FOIA exemption relied upon to justify non-disclosure, and second, in the degree of detail given by the Government agency's affidavit as to how disclosure could harm national security. In *Sims*, the Government based its withholding of the requested information on the National Security Act of 1947, an Exemption 3 statute.[162] By contrast, the court in *Center for National Security Studies* ruled that the Government could justify its

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153. *Id.* at 928.

154. 471 U.S. 159 (1985).

155. *Id.* at 161. The MKULTRA project was concerned with testing the effects of various chemical, biological, and radiological materials on human behavior, and "was established to counter perceived Soviet and Chinese advances in brainwashing and interrogation techniques." *Id.* at 162. Controversy over the project arose when the public learned that several MKULTRA experiments involved testing the effects of dangerous drugs such as LSD on unwitting human subjects. *Id.* At least two people died as a result of the experiments, and others may have suffered severe health consequences. *Id.* at 162 n.2.

156. *Id.* at 162–63.

157. Exemption 3 provides in part that an agency need not disclose "matters that are . . . specifically exempted from disclosure by statute . . . provided that such statute . . . refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (1991).

158. *Sims*, 471 U.S. at 163.

159. *Id.* at 164. The statute was § 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 402(d)(3) (amended 1996).

160. *Sims*, 471 U.S. at 179 (internal quotation marks omitted).

161. Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 927 (D.C. Cir. 2003).

162. *Sims*, 471 U.S. at 164.

withholding on the basis of Exemption 7(A), the law enforcement exemption.[163] This is not, as the majority ruled, a distinction without difference.[164] While both case law and legislative history recognize that deference is appropriate when the Executive withholds classified information or information protected by the National Security Act of 1947, no such precedent exists for the proposition that this heightened deference should also extend to Exemption 7(A) cases.[165]

Additionally, the affidavits of the FBI officials on record with the *Center for National Security Studies* court—explaining how release of the detainees' names would threaten national security—lack the precision and specificity that the Government presented to the court in *Sims*. The *Sims* court, in holding that the MKULTRA researchers were "intelligence sources" whose identities were entitled to protection, relied on CIA Director Stansfield Turner's affidavit, which carefully explained how the release of the institutions' names would permit an observer to deduce the names of the individual researchers involved.[166] In addition, releasing the names of the institutions would pose "a threat of damage to existing intelligence-related arrangements with the institutions or exposure of past relationships with the institution."[167] Thus, the Court concluded on the basis of a Government official's specific and detailed information that disclosure was not permitted under the circumstances.[168]

The two affidavits submitted by the Government in *Center for National Security Studies*, however, spoke in general and categorical terms. Both affidavits, submitted by Dale Watson[169] and James Reynolds,[170] stated that releasing the names of the detainees would impede the progress of the terrorism investigation, because revealing which terrorists had been captured would compromise the detainees' value as intelligence sources.[171] Additionally, it might subject the detainees to physical harm and would reveal to terrorist groups the direction of the investigation.[172] The major flaw of these declarations, as Judge Tatel points out in his dissent, is that they treat all detainees the same, regardless of whether they have any links to terrorism.[173] In fact, out of nearly 1200 people initially detained by the Government in connection with the September 11 terrorist attacks, only one

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163. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 925.

164. *See id.* at 928 ("Plaintiffs provide no valid reason why the general principle of deference to the executive on national security issues should apply under FOIA Exemption 3, as in Sims and Halperin, and Exemption 1, as in our earlier cases, but not under Exemption 7(A).").

165. *Id.* at 939 (Tatel, J., dissenting).

166. *Id.* at 933.

167. *Sims*, 471 U.S. at 180 n.23.

168. *Id.* at 180.

169. Dale Watson was the FBI Executive Assistant Director for Counterterrorism. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 923.

170. James Reynolds was the Director of the Terrorism and Violent Crime Section of the Department of Justice. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 941–42 (Tatel, J., dissenting).

had been charged with an act of terrorism and 108 had been held for violating federal laws at the time of the *Center for National Security Studies* decision.[174] The Watson and Reynolds affidavits fail to explain how the names of people unknown to terrorist groups could reasonably be expected to be useful to those groups.[175] Additionally, Watson's declaration was prepared for entirely different litigation involving the closure of deportation hearings.[176] Therefore, the Watson declaration "speaks not to the harm that would flow from disclosing detainees' names or other information, but instead to the harm that would flow from publicly airing evidence about particular detainees at such a hearing."[177] Under established FOIA case law, the court's reliance on such vague and unsubstantiated evidence as the Watson and Reynolds declarations is misplaced.

Even where heightened deference to the Executive is appropriate in FOIA cases, courts have stressed that "deference is not equivalent to acquiescence."[178] In *Campbell v. United States Department of Justice*, for example, the D.C. Circuit Court of Appeals refused to rely on the declaration of a Government agent that contained merely conclusory assertions that the release of certain information would adversely affect national security.[179] James Campbell, the plaintiff, was an author writing a biography of civil rights activist James Baldwin.[180] Campbell requested a copy of the FBI's file on Baldwin, asserting his right to the information under FOIA.[181] Although the FBI did release some records in its possession, it invoked Exemption 1 to withhold several documents and redact portions of others, claiming that the information was classified.[182] The sole justification for the bureau's classification decision was the declaration of FBI agent Pitts, attesting to the sensitivity of the information and the need to protect it in the name of national security.[183] The court refused to endorse the FBI's decision to withhold the records based on the Pitts declaration.[184] The proper standard for relying on such a declaration, the court held, is that the declaration be sufficient "to afford the FOIA requester a meaningful opportunity to contest, and the district

174. *Id.* at 941.

175. *Id.* at 943 (Tatel, J., dissenting). For example, Judge Tatel points out that "if the government tells us that it detained men named Mohammed Mubeen, Osama Elfar, Ghassan Dahduli, Fathi Mustafa, Nacer Fathi Mustafa, and Hady Omar, Jr., none of whom has any connection to terrorist organizations, what could that information possibly tell terrorists about the government's investigation?" *Id.* (internal citation omitted).

176. North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 208–09 (3d Cir. 2002). *See infra* Section V(B).

177. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 941 (Tatel, J., dissenting).

178. Campbell v. United States Dep't of Justice, 164 F.3d 20, 30 (D.C. Cir. 1998).

179. *Id.* at 30–31.

180. *Id.* at 26.

181. *Id.*

182. *Id.* at 26, 29.

183. *Id.* at 29.

184. *Id.* at 30.

court a meaningful opportunity to review, the soundness of the withholding."[185] In holding that the Pitts declaration failed to meet this standard, the court listed several factors that serve to make a declaration insufficient, including: lack of detail and specificity, bad faith, and failure to account for contrary record evidence.[186] It is exactly these factors that should have rendered the Government's declarations in *Center for National Security Studies* fatal.

The decision of the D.C. Circuit Court of Appeals also appears out of line with its own precedent in Exemption 7 cases. In *Bevis v. United States Department of State*, the D.C. Circuit held that agencies that invoke Exemption 7 to withhold records do not need to make a document-by-document showing that the records sought would interfere with a law enforcement investigation.[187] Rather, they may group the documents into categories and show the court how each category satisfies Exemption 7.[188] The categories, however, must be functional. They must "allow[] the court to trace a rational link between the nature of the document and the alleged likely interference."[189] This functionality is missing in *Center for National Security Studies* because the FBI places the names of all detainees in a single category of withheld records, regardless of the detainees' connection to terrorism.[190] Since there is no rational link between the names of those detainees without terrorist ties and the harms that the Government asserts will flow from disclosure, the Government's Exemption 7 argument should fail the *Bevis* functionality test.

Additionally, the D.C. Circuit Court of Appeals previously applied a balancing test where the Government invoked Exemption 7 to withhold information. In *Nation Magazine, Washington Bureau v. United States Customs Service*, the publishers of a magazine made a FOIA request to the U.S. Customs Service for all documents pertaining to H. Ross Perot's offer to help fund the agency's drug interdiction efforts, following Perot's unsuccessful run for President in 1992.[191] The Customs Service refused to confirm or deny the existence of any such records, invoking Exemption 7(C), which allows a law enforcement agency to withhold records on an individual if their release "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[192] The agency argued that "disclosure of the mere fact that an individual is mentioned in an agency's law enforcement files carries a stigmatizing connotation."[193] The court rejected this argument, holding that in order to successfully invoke Exemption 7(C), the

185. *Id.* (quoting King v. United States Dep't of Justice, 830 F.2d 210, 218 (D.C. Cir. 1987)).

186. *Id.*

187. 801 F.2d 1386, 1389 (D.C. Cir. 1986).

188. *Id.*

189. *Id.*

190. Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 941 (D.C. Cir. 2003) (Tatel, J., dissenting).

191. 71 F.3d 885, 888, 894 n.8 (D.C. Cir. 1995).

192. 5 U.S.C. § 552(b)(7)(C) (1991); *Nation Magazine*, 71 F.3d at 893.

193. *Nation Magazine*, 71 F.3d at 888.

potential harms of disclosure upon the individual must outweigh the public's interest in obtaining the records.[194] Because the public interest in a presidential candidate's offer to privately fund drug interdiction efforts was high and the intrusiveness on Perot's privacy was minimal, Exemption 7(C) did not justify the withholding.[195]

Although the court in *Center for National Security Studies* reserved judgment on the Government's Exemption 7(C) argument, finding the names of detainees properly withheld under Exemption 7(A),[196] the *Nation Magazine* balancing test still merits consideration. In Judge Tatel's dissent, he concedes that the September 11 terrorist attacks highlight the Government's strongly compelling interest in defending the country against further acts of terrorism.[197] However, he goes on to say:

> [A]lthough this court overlooks it, there is another compelling interest at stake in this case: the public's interest in knowing whether the government, in responding to the attacks, is violating the constitutional rights of the hundreds of persons whom it has detained in connection with its terrorism investigation . . . . Just as the government has a compelling interest in ensuring citizens' safety, so do citizens have a compelling interest in ensuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail.[198]

Anxiety over the detainees' treatment was not unfounded. In a June 2003 report, the Department of Justice's Office of Inspector General released a report revealing "significant problems" in the detention of immigrants arrested during the terrorism probe.[199] Problems ranged from "excessive delays in the release of suspects to a 'pattern of physical and verbal abuse' by some federal correctional officers."[200] Given the public's justifiable concern, the public interest balancing test should at least have been a factor in the majority's opinion. Additionally, public scrutiny could have helped prevent some of these abuses, which is, after all, one of the purposes of FOIA.

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194. *Id.* at 893.

195. *Id.* at 895.

196. Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003).

197. *Id.* at 937 (Tatel, J., dissenting).

198. *Id.* at 937–38 (Tatel, J., dissenting).

199. Richard B. Schmitt & Richard A. Serrano, *U.S. Finds Abuses of 9/11 Detainees; Justice Dept. Inquiry Reveals Many Violations of Immigrants' Rights. Report Shows Officials Early on Feared People Were Being Held Unjustly*, L.A. TIMES, June 3, 2003, at A1 (internal quotations omitted).

200. *Id.*

B. Other Examples of the Judiciary's Acquiescence to the Bush Administration's Secrecy Policy

Other recent decisions further illustrate the judiciary's willingness to acquiesce to the Bush Administration's policy of secrecy. In June 2004, for example, the Supreme Court reversed a D.C. Circuit Court holding that would have required the Administration to release information on its development of national energy policy.[201] The case arose as a result of the formation of the National Energy Policy Development Group (NEPDG) created by President Bush in January 2001.[202] The advisory group consisted of Vice President Cheney, acting as chairman, along with members of the Cabinet, the heads of various federal agencies, and several White House aides.[203]

NEPDG became the subject of media attention as the public began demanding information about the energy policy development process.[204] Publicity intensified when allegations surfaced that former Enron CEO Ken Lay had contacts with the group.[205] Judicial Watch and the Sierra Club sued under the Federal Advisory Committee Act (FACA) seeking copies of NEPDG meeting minutes and other documents.[206] FACA requires advisory committees to make all reports or documents used by the committee available to the public, except in cases where the committee is "composed wholly of full-time officers or employees of the Federal Government."[207] Judicial Watch alleged that this exception did not apply because private individuals participated in NEPDG meetings.[208] The Government moved to dismiss, arguing that applying FACA to NEPDG would interfere with "the President's constitutionally protected ability to receive confidential advice from his advisors, even when those advisors include private individuals."[209] The court, however, deferred its ruling on this constitutional question until the conclusion of discovery.[210] After discovery, the court explained, the Government might be able to prevail on statutory grounds without requiring the court to pass on any constitutional questions.[211]

In response, the Government petitioned the D.C. Circuit Court of Appeals for a writ of mandamus to vacate the discovery order.[212] The court dismissed the petition, holding that the Government "failed to satisfy the heavy burden required

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201. Cheney v. United States Dist. Court for the D.C., 124 S. Ct. 2576 (2004).
202. *Id.* at 2582–83.
203. *Id.*
204. *See* Judicial Watch v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 25 (D.D.C. 2002), *vacated and remanded by* 124 S. Ct. 2576 (2004).
205. *Id.*
206. *Id.* at 25–26.
207. 5 U.S.C. App. 2 § 3(2)(C)(i) (1991).
208. *Judicial Watch*, 219 F. Supp. 2d at 25.
209. *Id.* at 44.
210. *See id.* at 44–45.
211. *See id.* at 54–55.
212. *In re* Cheney, 334 F.3d 1096, 1101 (D.C. Cir 2003).

to justify the extraordinary remedy of mandamus."[213] The Supreme Court reversed, ordering the D.C. Circuit to reconsider issuing the writ, keeping in mind that "[s]pecial considerations control when the Executive's interests in maintaining its autonomy and safeguarding its communications' confidentiality are implicated."[214] While this decision leaves open the possibility that the White House will be compelled to open the curtain on NEPDG's policy-making process, it also makes it more difficult for the public to investigate evidence of "compromised advice to the president [sic] to profit business pals."[215]

Another area in which the Government has maintained secrecy is in its implementation of new powers under the USA PATRIOT Act ("Patriot Act").[216] The Patriot Act dramatically expands the Government's power to conduct surveillance on U.S. citizens, while reducing or eliminating procedural safeguards such as judicial oversight.[217] In early 2003, civil liberties groups commenced a FOIA lawsuit in the United States District Court for the District of Columbia, seeking to compel the Department of Justice to release aggregate statistical information on its use of these surveillance methods.[218] Specifically, the plaintiffs sought documents that would "describe the frequency or manner of use of specific techniques authorized under [Patriot Act amendments to the Foreign Intelligence Surveillance Act] for use against clandestine intelligence and terrorist activities."[219] The Government refused to comply, invoking FOIA Exemption 1.[220] The Government argued that release of information regarding its allocation of resources and relative frequency of use of specific surveillance techniques could prove useful to terrorists.[221] While finding that "plaintiffs' arguments in favor of disclosure are not without force,"[222] the court ultimately sided with the Government.[223] Thus, the Government is free to spy on citizens, while those citizens are barred from conducting even the most superficial monitoring of the Government's expansive new powers under the Patriot Act.

Finally, in another area that has generated considerable controversy, two United States appellate courts have reached opposing conclusions about the

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213. *Id.* at 1098.

214. Cheney v. United States Dist. Court for the D.C., 124 S. Ct. 2576, 2581 (2004).

215. Bruce Fein, *Pyrrhic Secrecy Victory*, WASH. TIMES, June 29, 2004, at A17.

216. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act"), Pub. L. No. 107–56, 115 Stat. 272.

217. *See* Am. Civil Liberties Union, *Surveillance Under the USA Patriot Act*, *at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12263&c=206 (last visited Oct. 15, 2004).

218. Am. Civil Liberties Union v. United States Dep't of Justice, 265 F. Supp. 2d 20 (2003).

219. *Id.* at 28.

220. *Id.* at 21.

221. *Id.* at 28–29.

222. *Id.* at 30.

223. *Id.* at 31.

public's right to attend "special interest" deportation hearings.[224] These include all hearings for which the Attorney General has ordered "special security precautions" that include secret dockets and closure of the courtroom to all non-parties, including family and friends.[225] In both of these cases, the courts invoked the *Richmond Newspapers* "experience and logic" test to determine whether the First Amendment guarantees a right of access to court proceedings.[226] Under the *Richmond Newspapers* test, the right of access exists if such proceedings have historically been open to the public (the experience prong) and public access "plays a significant positive role in the functioning of the particular process in question" (the logic prong).[227] Although the Third and Sixth Circuits agreed on the proper test to apply, their opinions on the application of that test to the "special interest" deportation proceedings directly conflict.

In *Detroit Free Press v. Ashcroft*, the Sixth Circuit found the deportation hearings satisfied the experience prong of the *Richmond Newspapers* because deportation hearings have generally been open despite some limited exceptions.[228] The logic prong was satisfied because numerous benefits flow from opening deportation proceedings to the press and public.[229] Among the benefits of public access are a check on Executive power by ensuring fair proceedings; reduction in the amount of procedural errors; cathartic relief through the provision of an outlet for "community concern, hostility, and emotions"; enhancement of the perception of government integrity; and ensuring the participation of private citizens in governmental affairs.[230] While the court recognized the Government's compelling interest in protecting sensitive aspects of its terrorism investigation from public disclosure, it found the Government's blanket closure of all special interest cases impermissibly broad.[231] A better approach, the court concluded, would be to allow immigration judges to make case-by-case determinations as to whether to close proceedings.[232] In particularly colorful language, Judge Keith spoke of the danger of shielding too much of the government's inner workings from public view: "The Executive Branch seeks to uproot people's lives, outside the public eye, and

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224. *Compare* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (holding that there is no First Amendment right of access to special interest deportation hearings), *with* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (holding that there is a right of access to special interest deportation hearings under the First Amendment).

225. *See* Creppy Memorandum, *supra* note 21.

226. *See North Jersey Media Group*, 308 F.3d at 208–09 ("*Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings, including removal."); *Detroit Free Press*, 303 F.3d at 695–96 (holding that *Richmond Newspapers* applies to administrative hearings as well as judicial hearings).

227. *North Jersey Media Co.*, 308 F.3d at 206 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986)).

228. *Detroit Free Press*, 303 F.3d at 701.

229. *Id.* at 704–05.

230. *Id.* (quoting Richmond Newspapers, 448 U.S. at 571).

231. *Id.* at 705.

232. *Id.* at 692–93.

behind a closed door. Democracies die behind closed doors . . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."[233] Unfortunately, Judge Keith's sentiment did not find favor with the Third Circuit.

In the Third Circuit's two-to-one decision in *North Jersey Media Group, Inc. v. Ashcroft*, the court declined to hold that there is a significant history of openness in deportation proceedings.[234] Noting instances in which deportation hearings have been held in private institutions such as homes and hospitals, where there is no general right of public access, the court held that the tradition of open access to deportation hearings is "too recent and inconsistent" to satisfy the experience prong of the *Richmond Newspapers* test.[235] Second, the court held that the logic prong of the *Richmond Newspapers* test must focus on both the positive and negative consequences of open trials.[236] In this case, because the Government produced evidence that open trials might threaten national security (for example, by revealing weaknesses in the Government's terrorism investigation and law enforcement techniques), the logic prong is not met.[237]

The Third Circuit reached its conclusion about the security issues that could arise from open trials on reliance upon an affidavit by Dale Watson[238]—the same affidavit, in fact, that the Government presented to the court in *Center for National Security Studies*.[239] The Watson affidavit, however, suffers from the same weakness as it did in *Center for National Security Studies* because it treats all deportation hearings the same, regardless of their connection to the terrorism investigation. Judge Scirica, dissenting in *North Jersey Media Group*, joined the court in recognizing the appropriateness of deference to the Executive in matters of national security.[240] "On the other hand," he argued, "deference is not a basis for abdicating our responsibilities under the First Amendment."[241] Judge Scirica apparently found some merit in the Government's mosaic argument that pieces of seemingly innocuous information, when compiled by terrorists, could provide insight into the terrorism investigation that would threaten national security.[242] "Nevertheless," Scirica concluded, "the government could make the same argument to an Immigration Judge, who could determine, with substantial deference, that the apparently innocuous information provides appropriate grounds

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233. *Id.* at 683.

234. *See* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 211–12 (3d Cir. 2002).

235. *Id.*

236. *See id.* at 217.

237. *See id.*

238. *See id.* at 218–19.

239. *See* Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 941 (D.C. Cir. 2003) (Tatel, J., dissenting).

240. *North Jersey Media Group*, 308 F.3d at 226 (Scirica, J., dissenting).

241. *Id.*

242. *Id.* at 227 (Scirica, J., dissenting).

for closure."[243] In this case, as in previous cases, the Government appears to justify its secrecy in only the most general of terms.

VI. SIGNS OF CHANGE

Although government actions in the wake of the September 11 terror attacks seem to have followed a trend of extremely limited public disclosure, there are some indications that the tide is turning once again in favor of more government transparency. While President George W. Bush's Administration has been characterized by some as "one of the most secret administrations in American history,"[244] recent legislative proposals may serve to put more information back in the public domain. Among the most recent proposals are two bills co-sponsored by Senator Patrick Leahy.

The first bill, titled The Restoration of Freedom of Information Act ("Restore FOIA"),[245] would amend the CIIA,[246] in several ways. Most significantly, it would: exempt from FOIA only those records voluntarily submitted to the Homeland Security Office that actually pertain to critical infrastructure safety; protect whistleblowers, rather than provide criminal penalties for inappropriate disclosure of critical infrastructure information; and remove civil immunity for companies that voluntarily submit information.[247] The second bill, titled the Domestic Surveillance Oversight Act of 2003,[248] would impose specific reporting requirements on the Attorney General regarding the Government's usage of its surveillance powers under the Patriot Act.[249] Together, these bills would reduce the power of federal government agencies to shield their operations from public scrutiny, and help restore the beneficial flow of information from the government to the people.

VII. CONCLUSION

James Madison once wrote that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."[250] Since Madison's death, the United States has seen

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243. *Id.* at 227–28 (Scirica, J., dissenting).

244. *Face the Nation* (CBS television broadcast, May 11, 2003), transcript *available at* http://www.bankofknowledge.net/2004/archives/2003_05.html (quoting a statement of Senator Bob Graham).

245. S. 609, 108th Cong. (2003). The bill is co-sponsored by Senators Leahy, Levin, Lieberman, Jeffords, and Byrd. A similar bill was introduced in the House of Representatives. *See* H.R. 2526, 108th Cong. (2003).

246. *See supra* notes 96–113 (discussing CIIA).

247. 149 Cong. Rec. S3631-35 (daily ed. March 12, 2003).

248. S. 436, 108th Cong. (2003). The bill is co-sponsored by Senators Leahy, Grassley, and Specter.

249. *See* 149 Cong. Rec. S2704 (daily ed. Feb. 25, 2003) (statement of Sen. Leahy).

250. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

tremendous strides in citizens' ability to acquire information about their government, from *Richmond Newspapers*, to the passage of FOIA, to government websites. The short span between the attacks of September 11 and the present, however, have seen a drastic withdrawal of information about the government from the public domain. Is the United States therefore destined to witness a tragedy or a farce, as Madison predicted? Or is the government's tight control of information necessary to prevent another tragedy? The scars from September 11 are still fresh, and certainly the public would be irate if more American casualties were attributed to a loose-lipped government official. But the current cutbacks on information disclosure may simply be an overreaction or a product of war paranoia, and may perhaps even hide serious government abuses. As the country continues to develop an appropriate response to the threat of global terrorism, the government may keep its citizens blind to certain information in its control, but the public must keep its eyes open to any abuses of its civil liberties, so that they too do not become victims in America's war on terror.