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## ***Center for National Security Studies v. United States Department of Justice: Keeping the USA PATRIOT Act in Check One Material Witness at a Time***

In response to the government's refusal to disclose information regarding its investigation into the terrorist attacks of September 11, 2001,<sup>1</sup> a coalition of nonprofit organizations attempted to pierce the veil of secrecy surrounding the people detained by the government. This coalition, led by the Center for National Security Studies at George Washington University,<sup>2</sup> requested information through the Freedom of Information Act ("FOIA").<sup>3</sup> When the government refused to release the requested information, the Center for National Security Studies filed suit, and the Federal District Court for the

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1. Following the September 11, 2001, terrorist attacks on the World Trade Center in New York and the Pentagon in Washington, D.C., the U.S. government launched a massive investigation that has led to the detention of over one thousand people. *See infra* notes 16–18 and accompanying text. Aside from the number of people detained, the government has disclosed only the broadest outline of its investigation, choosing instead to operate largely in secret. *See infra* notes 58–76 and accompanying text. The government's investigation has been described by an Assistant Attorney General at the Department of Justice as "an aggressive and systematic campaign that utilizes all available information, all authorized investigative techniques, and all legal authorities at our disposal. The overriding goal is to prevent and disrupt terrorist activity by questioning, investigating, and arresting those who violate the law and threaten our national security." Viet D. Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 401 (2002); *see also* Adam Clymer, *Government Openness at Issue As Bush Holds on To Records*, N.Y. TIMES, Jan. 3, 2003, at A1 (describing the Bush administration's deliberate policy of not releasing information to the public unless legally obligated, as compared to the Clinton administration's policy of releasing information whenever possible); *infra* note 78 (discussing the Bush Administration's policy of releasing as little information as possible).

2. For a list of the other organizations involved in the lawsuit, see Amended Complaint for Injunctive Relief, *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) (Civil Action No. 01-2500), *available at* <http://cnss.gwu.edu/~cnss/cnsscomplaint.pdf> (on file with the North Carolina Law Review).

3. 5 U.S.C. § 552 (2000); *see infra* notes 58–59 and accompanying text. For further discussion of FOIA, see *CIA v. Sims*, 471 U.S. 159, 182 (1985) (Marshall, J., concurring) (noting that in enacting FOIA, "Congress, it is clear, sought to assure that the Government would not operate behind a veil of secrecy, and it narrowly tailored the exceptions to the fundamental goal of disclosure"). Since the decision in *Center for National Security Studies v. United States Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), FOIA has been amended to prohibit agencies that are under the jurisdiction of the intelligence committee from making records available to foreign governments or their representatives. Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 312, 116 Stat. 2383, 2390–91 (amending 5 U.S.C. § 552(a)(3)). This amendment does not affect the decision in *Center for National Security Studies*. Nor does it affect the analysis of this Recent Development.

District of Columbia overruled the government's withholding of the names of the individuals detained.<sup>4</sup>

*Center for National Security Studies v. United States Department of Justice*<sup>5</sup> held that the government must release the names of those held on material witness warrants in connection with the September 11 terrorist attacks.<sup>6</sup> The district court's decision is consistent with the goals of FOIA in so far as it holds the government accountable to the public and limits the government's ability to arrest and detain unknown numbers of people secretly.<sup>7</sup> Individuals held on material witness warrants have neither been charged with nor convicted of a crime; their detention is permitted under certain circumstances in anticipation of testimony in a criminal proceeding.<sup>8</sup> Nevertheless, the government has two main arguments for denying plaintiff's FOIA requests. First, the government argues that disclosing the identities of the detainees would jeopardize its investigation and threaten the safety of the detainees.<sup>9</sup> Second, the government claims that, because the material witnesses are held pursuant to grand jury subpoenas, their identities are protected by Rule 6(e) of the Federal Rules of Criminal Procedure, which requires secrecy of grand jury proceedings.<sup>10</sup> In *Center for National Security Studies*, the district court held that the government could not rely on rules of grand jury secrecy as a basis for nondisclosure.<sup>11</sup> Considered in light of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") amendments to Rule 6(e),<sup>12</sup> which permit greater

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4. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 111 (D.D.C. 2002). *Center for National Securities Studies* deals with three different categories of detainees: those held on immigration charges; those held on federal criminal charges; and those held on material witness warrants. *Id.* at 98. This Recent Development focuses only on those detainees held on material witness warrants.

5. 215 F. Supp. 2d 94 (D.D.C. 2002).

6. *Id.* at 111.

7. See *infra* notes 77–80 and accompanying text (discussing FOIA's presumption that the government should disclose official information to the public).

8. See *infra* notes 81–85 and accompanying text (discussing the relationship between material witnesses and grand jury proceedings).

9. See *infra* notes 64–66 and accompanying text (discussing the government's reliance on FOIA exemptions which authorize nondisclosure of information collected for law enforcement purposes).

10. See *infra* notes 67–76 and accompanying text (discussing the government's argument that the rules of grand jury secrecy protect the names of detainees from disclosure).

11. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 106–07.

12. In order to assist the Justice Department in its terrorism investigation, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act") of 2001, Pub. L. No.

disclosure of grand jury information within the walls of the government, the district court's decision represents a careful balance between public accountability and protection of individual civil liberties on the one hand, and the government's ability to effectively investigate the terrorist attacks on the other hand.

Rule 6(e), as amended by the USA PATRIOT Act, allows the Justice Department to disclose a considerable amount of information obtained for and during grand jury proceedings to other government agencies, such as the CIA, without requiring even the traditional safeguard of prior judicial approval.<sup>13</sup> By ordering the disclosure of the detainees' names, the district court ensured, through oversight by interested organizations, such as the plaintiffs in this case, and the public, that the constitutional rights and general welfare of the detainees are protected.

This Recent Development will analyze the effect of the *Center for National Security Studies* decision on the expanded authority of government agencies to share grand jury information under the USA PATRIOT Act.<sup>14</sup> First, this Recent Development will discuss what little information is known about the detainees. It will then introduce the relevant provisions of the USA PATRIOT Act and the Federal Rules of Criminal Procedure governing grand jury proceedings.

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107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.A.). As discussed *infra* notes 45-55 and accompanying text, the USA PATRIOT Act included amendments to Rule 6(e) of the Federal Rules of Criminal Procedure; these amendments allow for greater disclosure of grand jury information among federal agencies without traditional judicial oversight. § 203(a)(1), 115 Stat. at 278-80.

13. See *infra* notes 45-55 and accompanying text.

14. In considering the effect of the district court's decision on the government's ongoing investigation, it may be important to ask a fundamental question: Are we at war against terrorism? The implications of this question are vast and are, therefore, beyond the scope of this Recent Development. But if we are at war, then this discussion of FOIA and rules of criminal procedure may be moot: if the detainees are not within the scope of the criminal justice system, then an entirely different set of rules apply. For example, the United States is currently holding Jose Padilla, a U.S. citizen, in a Navy brig in South Carolina without criminal charges. See *Padilla v. Bush*, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002). Padilla, who was initially detained on a material witness warrant, is now being held as an enemy combatant and is therefore afforded none of the legal rights generally ensured by the U.S. Constitution. *Id.* at 568-69. On the other hand, there is reason to believe that, even if we are at war, the people currently detained may be prosecuted criminally, or, as material witnesses, may assist in the prosecution of others. For example, the 1993 bombing of the World Trade Center resulted in criminal prosecutions, see *United States v. Salameh*, 152 F.3d 88, 105 (2d Cir. 1998) (per curiam), as did the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, see *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998), and not treatment of the perpetrators as war criminals. If even these individuals accused of actual bombings are treated within the justice system, certainly those held on material witness warrants should be afforded similar protections.

After considering the applicable statutes, this Recent Development will briefly review the district court's decision and will attempt to explain why the court's decision should be applauded for rejecting the government's attempt to keep all aspects of the terrorism investigations secret.<sup>15</sup>

In the months following the attacks on the World Trade Center and the Pentagon, the government's investigation led to the detention of over one thousand individuals.<sup>16</sup> According to the Department of Justice, these detainees fall into three general categories: those held on immigration charges; those held on federal criminal charges; and those held on material witness warrants.<sup>17</sup> Though very little information is known about any of the detainees, even less is known about those held on material witness warrants. On November 27, 2001, Attorney General John Ashcroft held a press conference at which he stated that, as of that date, 548 people were being held on immigration charges, 104 people had been charged with federal criminal violations, and that an unspecified number of "other individuals" were being held on material witness warrants.<sup>18</sup> A recent

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15. Many important issues are raised by the government's unwillingness to release information about the September 11 detainees, especially information regarding the large number of individuals held on immigration charges. See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (affirming the district court's finding that the government's "blanket closure of deportation hearings in 'special interest' cases [is] unconstitutional"). As mentioned *supra* in note 4, however, the scope of this Recent Development will be limited to a discussion of the detainees held on material witness warrants and the implications of this decision on grand jury secrecy in light of the USA PATRIOT Act.

16. On October 25, 2001, Attorney General John Ashcroft announced that the government had "arrested or detained nearly 1,000 individuals as part of the September 11 terrorism investigation." Attorney General John Ashcroft, Prepared Remarks for the US Mayors Conference (Oct. 25, 2001), [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm) (on file with the North Carolina Law Review); see also Dan Eggen & Susan Schmidt, *Count of Released Detainees Is Hard To Pin Down*, WASH. POST, Nov. 6, 2001, at A10 (reporting that the Department of Justice indicated that on November 5, 2001 the government held 1,182 individuals).

17. See Attorney General Ashcroft Provides Total Number of Federal Criminal Charges and INS Detainees (Nov. 27, 2001), [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11\\_27.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_27.htm) (on file with the North Carolina Law Review) [hereinafter Statement of Attorney General Ashcroft (Nov. 27, 2001)].

18. Statement of Attorney General Ashcroft (Nov. 27, 2001), *supra* note 17. Human Rights Watch has been able to identify thirty-five people held on material witness warrants. *United States, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, HUMAN RIGHTS WATCH (Human Rights Watch, New York, N.Y.), Aug. 2002, at 3, available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf> (on file with the North Carolina Law Review) [hereinafter Human Rights Watch].

report by Human Rights Watch<sup>19</sup> indicates that, as of August 2002, the government held the vast majority of the detainees—as many as 752—on immigration-related charges.<sup>20</sup> Updated information from the government regarding the number of detainees has not been forthcoming. The Justice Department reportedly prepared updated information about select detainees in January 2002, but that information has not been released to the public.<sup>21</sup> One theory regarding the lack of new information is that the government has stopped tracking the information itself to avoid being required to release it.<sup>22</sup>

Human Rights Watch reports that most of the individuals held on immigration charges are from Pakistan, Egypt, and Turkey.<sup>23</sup> The Justice Department has not released information about the nationalities of the detainees held on material witness warrants or charged with federal crimes.<sup>24</sup> The government has consistently claimed, as will be discussed below, that the release of any information about the detainees poses a threat to the government's investigation, as well as the privacy of those detained.<sup>25</sup> The government further contends that the detainees are free to identify themselves at any time.<sup>26</sup>

The contention that detainees can self-identify, however, is inconsistent with reports of the conditions in which the government holds many of the detainees. Many of these detainees reported that they were unable to communicate with their lawyers or family members for extended periods of time, and others indicated that the only form of communication permitted was via U.S. mail.<sup>27</sup> Human

19. Human Rights Watch is an international, nongovernmental watch-dog organization that investigates and reports on human rights violations around the world.

20. Human Rights Watch, *supra* note 18, at 4.

21. *Id.* at 19.

22. DOJ Oversight: *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 85 (2001) [hereinafter *Hearing*] (statement of Kate Martin, Director, Center for National Security Studies).

23. Human Rights Watch, *supra* note 18, at 10.

24. *Id.* The Department of Justice has said, however, that the identities of all the detainees arrested on criminal charges have been made public. *Hearing, supra* note 22, at 10 (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice).

25. See, e.g., *Hearing, supra* note 22, at 10 (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice) (echoing other Justice Department officials in stating that the withholding of information is justified by concerns for detainee privacy and law-enforcement purposes).

26. *Id.*

27. Human Rights Watch, *supra* note 18, at 62–64. In addition, several of the material witnesses were strip-searched and cavity-searched on multiple occasions, and at least three

Rights Watch reports that, in the case of people detained on material witness warrants in particular, all of the detainees were held in federal prisons, many for several months, and often in conditions more restrictive than the conditions of the general criminal population.<sup>28</sup> Federal prison officials at the Metropolitan Correctional Center in New York, where many of the detainees are being or have been held, reportedly designated the September 11 detainees as “high security inmates.”<sup>29</sup> Prison officials also chose to keep the material witnesses segregated from the rest of the population and subjected them to “special precautions;” such precautions include videotaping their movements.<sup>30</sup> These measures had previously been used to supervise the activities of the men charged with bombing the American embassies in Africa in 1998.<sup>31</sup>

The government has assured the public that it is acting within constitutional limits and that the rights and privileges of the detainees are being respected at all times.<sup>32</sup> Evidence to the contrary emphasizes the need for the government to release, at a minimum, the detainees’ names so that the public can monitor and protect the rights of the detainees. As Senator Russell Feingold remarked, after noting cases similar to what Human Rights Watch has reported, “We simply cannot tell if those cases are aberrations or an indication of systemic problems, if the Justice Department will not release further

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men were held in solitary confinement for extended periods of time—one detainee reported that the lights were kept on in his cell twenty-four hours a day for two months. *Id.* at 61–63.

28. *Id.* at 60–67.

29. *Id.* at 67.

30. *Id.* Similar findings regarding conditions of detainment have been reported by Amnesty International. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: AMNESTY INTERNATIONAL’S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA 15–23, 27–38 (2002), available at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/AMR510442002ENGLISH/\\$File/AMR5104402.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510442002ENGLISH/$File/AMR5104402.pdf) (on file with the North Carolina Law Review).

31. Human Rights Watch, *supra* note 18, at 68.

32. See *Hearing*, *supra* note 22, at 206 (statement of Viet D. Dinh, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice). Assistant Attorney General Viet D. Dinh assured the public that

[e]very one of these detentions is fully consistent with established constitutional and statutory authority. . . . Every one of these individuals has a right to access to counsel. . . . Every person detained, whether on criminal or immigration charges or as a material witness, has the right to make phone calls to family members and attorneys. No one is being denied their right to talk to their attorneys.

*Id.*

information about those being held in custody.”<sup>33</sup> Furthermore, even if the cases of detainees being denied fundamental rights are aberrations, no detainee’s fundamental rights should be denied, and the most effective way to protect these rights is to make details of the detentions public. Failure to release information about the detainees may have the additional effect of undermining public confidence in the government’s investigation.

In order to understand the impact of the district court’s decision on the detainees held on material witness warrants, it is necessary to understand first how the USA PATRIOT Act altered the rules of grand jury secrecy. Rule 6(e) of the Federal Rules of Criminal Procedure states as a general rule that all “matters occurring before the grand jury” will not be disclosed except under a few limited circumstances.<sup>34</sup> The rationales for grand jury secrecy are firmly established<sup>35</sup> and have been justified as contributing to the success of grand jury investigations and the protection of grand jury witnesses.<sup>36</sup> Traditionally, disclosure of grand jury material has been carefully controlled by Rule 6(e)<sup>37</sup> and by district courts that, under limited

33. *Hearing, supra* note 22, at 201 (statement of Russell D. Feingold, Member, Senate Comm. on the Judiciary).

34. FED. R. CRIM. P. 6(e)(2). Exceptions to the general rule of nondisclosure are stated in Rule 6(e)(3) and allow for disclosure to “an attorney for the government for use in the performance of such attorney’s duty; and . . . such government personnel . . . as are deemed necessary by an attorney for the government to assist . . . in the performance of such attorney’s duty to enforce federal criminal law.” FED. R. CRIM. P. 6(e)(3)(A)(i)–(ii). Rule 6(e)(3) further states that any disclosure made under the rule must be used only for assisting the government attorney, and that the government attorney

shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligations of secrecy under this rule.

FED. R. CRIM. P. 6(e)(3)(B). The government also relies on Rule 6(e)(6) which states that “[r]ecords, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.” FED. R. CRIM. P. 6(e)(6).

35. *See* *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.10 (1979); *In re Craig*, 131 F.3d 99, 101–02 (2d Cir. 1997); *SEC v. Dresser Indus.*, 628 F.2d 1368, 1382 n.36 (D.C. Cir. 1980) (en banc).

36. *Craig*, 131 F.3d at 101–02.

37. *See supra* note 34. In addition, Rule 6(e)(2) of the Federal Rules of Criminal Procedure states:

General rule of secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.



circumstances, can release information to a defendant, another grand jury, or state law enforcement officials.<sup>38</sup> In *United States v. Sells Engineering*,<sup>39</sup> the Supreme Court recognized the risks inherent in permitting disclosure of grand jury material for any purpose beyond a criminal investigation.<sup>40</sup> The Court noted that the release of grand jury information for use in civil cases would create a risk of grand jury manipulation by prosecutors, and an additional risk that prosecutors might convene grand juries on the pretext of criminal investigations, only to then use the information gathered in civil cases.<sup>41</sup> The risks associated with disclosure of grand jury material for use in other, even related, criminal investigations, such as the investigation into the terrorist attacks, are just as real as the risks for use in civil cases described by the Court in *Sells Engineering*. Any rule that allows grand jury information to be disclosed for purposes other than criminal prosecution for which that grand jury was convened threatens “the integrity of the grand jury itself.”<sup>42</sup>

Despite such risks, in support of the government’s investigation into the terrorist attacks, on October 26, 2001, Congress enacted the USA PATRIOT Act.<sup>43</sup> The Justice Department hailed the act as an invaluable tool in its fight against terrorism.<sup>44</sup> The Justice Department has been especially enthusiastic about section 203 of the

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FED. R. CRIM. P. 6(e)(2).

38. FED. R. CRIM. P. 6(e)(3)(C)(ii)–(iv).

39. 463 U.S. 418 (1983).

40. *Id.* at 432–34.

41. *Id.* at 432.

42. *Id.* Recognizing this, the Court noted in *Sells Engineering* that use of grand jury materials by Government agencies in civil or administrative settings threatens to subvert the limitations applied outside the grand jury context on the Government’s powers of discovery and investigation. While there are some limits on the investigative powers of the grand jury, there are few if any other forums in which a governmental body has such relatively unregulated power to compel other persons to divulge information or produce evidence. Other agencies, both within and without the Justice Department, operate under specific and detailed statutes, rules, or regulations conferring only limited authority to require citizens to testify or produce evidence. . . . To allow these agencies to circumvent their usual methods of discovery would not only subvert the limitations and procedural requirements built into those methods, but also would grant to the Government a virtual *ex parte* form of discovery.

*Id.* at 433–34.

43. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

44. *Hearing, supra* note 22, at 8 (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice) (“[W]e owe a debt of gratitude to Congress for passing the USA PATRIOT Act which makes [law-enforcement] work more efficient.”).

USA PATRIOT Act.<sup>45</sup> Section 203 amended Rule 6(e) by adding the following to section (3)(C)(i), which allows for exceptions to the general rule of nondisclosure of grand jury information:

(V) when the matters involve foreign intelligence or counterintelligence . . . , or foreign intelligence (as defined in clause (iv) of this subparagraph), [disclosure of such information may be made] to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving the information in the performance of his official duties.<sup>46</sup>

This section represents a “subtle but important change” to the rules of federal grand jury secrecy, resulting in increased communication between and information sharing among law enforcement, national security, and defense agencies.<sup>47</sup> This change authorizes disclosure of grand jury material to a number of federal agencies without court authorization and for purposes unrelated to the grand jury’s investigation.<sup>48</sup>

Considering the importance of maintaining the secrecy of grand jury material (especially regarding the terrorism investigation), the changes made by the USA PATRIOT Act are indeed worrisome. Under the amended Rule 6(e), the Justice Department is permitted to share information collected by a grand jury that is related to foreign intelligence and counterintelligence with a wide range of government agencies. These agencies include all federal law enforcement agencies,<sup>49</sup> as well as intelligence agencies (including those within the Department of Defense and the several branches of the armed services), the Departments of Treasury and Energy, the Immigration and Naturalization Service, and the Office of Homeland Security.<sup>50</sup>

45. See *Hearing, supra* note 22, at 311 (statement of John Ashcroft, Attorney General, U.S. Department of Justice) (“Within hours of the passage of the USA PATRIOT Act, we made use of its provisions to begin enhanced information sharing between the law enforcement and intelligence communities.”).

46. USA PATRIOT Act, § 203(a)(1), 115 Stat. at 279–80.

47. Sara Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL’Y 699, 699 (2002).

48. USA PATRIOT Act, § 203(a)(1)(C), 115 Stat. at 279; Beale & Felman, *supra* note 47, at 707–10.

49. Federal law enforcement agencies include the Federal Bureau of Investigation, Drug Enforcement Agency, Secret Service, Postal Inspection Service, U.S. Marshall Service, Customs Service, the Internal Revenue Service, and the Bureau of Alcohol Tobacco, and Firearms. See Beale & Felman, *supra* note 47, at 709 & n.51.

50. *Id.* at 709–10.

In the context of the terrorist attacks and in the interest of bringing to justice those responsible, this expanded ability to share information is understandable. For example, if a U.S. Attorney were to learn, through a grand jury investigation, that a credible terrorist plan threatened the United States, the importance of the government's ability to share such information with the FBI would be obvious.

The USA PATRIOT Act amendments to Rule 6(e), however, allow for such disclosure without requiring prior judicial authorization.<sup>51</sup> In other words, the decision as to what foreign intelligence or counterintelligence information should be disclosed is left to individual federal prosecutors. These prosecutors are only required to notify the court of the disclosure within a reasonable time after the disclosure has been made.<sup>52</sup> This procedure differs significantly from the procedure required for disclosure of information unrelated to foreign intelligence and counterintelligence, in which case a petition for disclosure must be made to and approved by a district court judge *prior* to the disclosure.<sup>53</sup> The requirement of prior judicial approval has been a traditional safeguard of grand jury secrecy, and, as noted above, Congress and the Supreme Court have been hesitant to allow any disclosure beyond what may be required

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51. The following subsection (iii) was added to Rule 6(e)(3)(C) by the USA PATRIOT Act:

Any federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

USA PATRIOT Act, § 203(a)(1), 115 Stat. at 279–80.

52. In addition, the USA PATRIOT Act's (and hence amended Rule 6(e)'s) definition of foreign intelligence is fairly broad, stating that:

"foreign intelligence information" means—

(I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

(aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

(aa) the national defense or the security of the United States; or

(bb) the conduct of the foreign affairs of the United States.

*Id.*

53. FED. R. CRIM. P. 6(e)(3)(D).

for criminal prosecution.<sup>54</sup> Although Congress has made changes to grand jury secrecy rules in the past, virtually all of the changes have left intact the requirement of judicial oversight, assuring that courts would continue to control the release of grand jury information.<sup>55</sup>

The effect of the USA PATRIOT Act amendments on grand jury practice is unclear, in part because the changes are recent, and in part because there were exceptions to the general rule of grand jury secrecy prior to the USA PATRIOT Act. It is clear, however, that the government is attempting, by relying on the USA PATRIOT Act, to manipulate grand jury secrecy to its own advantage, at the expense of the material witness detainees. The primary justification for grand jury secrecy is that grand jury witnesses may fear retribution from the people or organizations about whom they have information; as a result of this fear, they may not be willing to testify.<sup>56</sup> Any hesitancy to testify of course is significantly less of a problem when the government detains witnesses, therefore, the possibility that fear may affect a witness's willingness to testify may encourage increased detention by the government in anticipation of grand jury testimony. This possibility clearly relates to one of the government's arguments against disclosing the names of those detained: if the witnesses are identified, they will be in danger.<sup>57</sup> But the government's argument ignores the fact that the USA PATRIOT Act currently permits disclosure within and among government agencies. The government is in effect trying to use the secrecy of grand juries as a sword as well as a shield. On the one hand, the government can use its expanded power to further its investigation, which will likely lead to additional arrests and detentions. On the other hand, the government argues that releasing the names will endanger witnesses, and therefore grand jury secrecy should shield those names from disclosure. Thus, regardless of the USA PATRIOT Act's effect on grand juries in general, the new disclosure rules have already had an impact on the terrorist investigation and the lives of the people currently detained by furthering the government's desire for the detentions to remain secret.

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54. See *supra* notes 34–42 and accompanying text.

55. Beale & Felman, *supra* note 47, at 705–07.

56. *Id.* at 710.

57. This is the government's argument for withholding the names under FOIA Exemption 7F, see *infra* note 65, as well as the government's argument that the names are protected by Rule 6(e). *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 105–06 (D.D.C. 2002).

In response to the secrecy surrounding the detainees, the Center for National Security Studies submitted FOIA requests to the Department of Justice.<sup>58</sup> The FOIA requests sought the following information: the name of each detainee and his or her citizenship status; the dates and location of each arrest or detention; the current location of each detainee; the dates any charges were filed; the dates of release, if any; and, finally, the reason for each detention or arrest and the status of the charges.<sup>59</sup> The government denied the FOIA requests, citing several exemptions to FOIA.<sup>60</sup> Following the government's denial, the Center for National Security Studies brought suit against the Department of Justice, seeking release of the requested information.<sup>61</sup> *Center for National Security Studies v. United States Department of Justice* overruled, in part, the government's refusal to disclose the information.<sup>62</sup> Specifically, the District Court for the District of Columbia held that the government must release the names of everyone detained in connection with the September 11 terrorist attack.<sup>63</sup>

The Department of Justice, which bears the burden of establishing why the information should not be disclosed,<sup>64</sup> relied primarily on FOIA Exemptions 7A, 7C, and 7F. These exemptions permit withholding of information collected for law enforcement purposes when disclosure may interfere with such proceedings or may be a threat to personal privacy or individual safety.<sup>65</sup> The court

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58. On October 29, 2001, FOIA requests were sent to three offices at the Department of Justice: the Federal Bureau of Investigation, the Immigration and Naturalization Service, and the Office of Information Privacy. For more information about the FOIA requests, see Amended Complaint for Injunctive Relief, *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) (Civil Action No. 01-2500), available at <http://cnss.gwu.edu/~cnss/cnsscomplaint.pdf> (on file with the North Carolina Law Review).

59. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 97. In addition to the information listed above, the Center for National Security Studies also sought the release of the identities of lawyers representing the detainees, the identities of courts involved in any related proceedings, and any and all policy directives "issued to officials about making public statements or disclosures about these individuals or about the sealing of judicial or immigration proceedings." *Id.*

60. *Id.* at 98, 100.

61. Following the denial of a FOIA request, the district court reviews the government's decision de novo. 5 U.S.C. § 552(a)(4)(B) (2000).

62. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 96-97.

63. *Id.* at 111.

64. 5 U.S.C. § 552(a)(4)(B).

65. *Id.* § 552(b)(7)(A), (C), (F). Specifically, Exemptions 7A, 7C, and 7F protect from disclosure information "compiled for law enforcement purposes" when such information "(A) could reasonably be expected to interfere with enforcement proceedings, . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal

rejected each of the government's arguments with respect to withholding the names of the detainees based on these exemptions.<sup>66</sup>

The court then turned to the government's reliance on FOIA Exemption 3, which prohibits disclosure of information that is protected by a federal statute.<sup>67</sup> The government relied on Rule 6(e), which has been held to be a statute for the purposes of FOIA Exemption 3.<sup>68</sup> The government argued, in so far as the requested information does not fall under one of the exceptions to the general rule of grand jury secrecy,<sup>69</sup> any information pertaining to a grand jury is protected from disclosure under Rule 6(e). The government contended, specifically, that the identities of those held on material witness warrants should not be disclosed because the warrants were issued in anticipation of grand jury proceedings and the release of any information about the witnesses would compromise grand jury investigations.<sup>70</sup> In response, the court observed that "the

privacy, . . . or (F) could reasonably be expected to endanger the life or physical safety of any individual." *Id.*

66. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 101–07. Specifically, the court found that the government's reliance on Exemption 7A, premised on the expectation "that disclosure will deter cooperation because terrorist groups will intimidate or cut off contact with the detainees . . . is unpersuasive for several reasons." *Id.* at 101. Similarly, the court concluded that the government's reliance on Exemptions 7C and 7F was misplaced. While recognizing that "there is a substantial privacy interest in not being associated with alleged criminal activity," the court also noted that "Exemption 7C does not provide blanket protection to all information that could invade personal privacy. Indeed, if privacy concerns alone were sufficient, the Government could arrest and jail any person accused of a heinous crime and refuse to reveal his or her name to the public." *Id.* at 105. The court concluded that "the public's interest in learning the identities of those arrested and detained is essential to verifying whether the Government is operating within the bounds of the law." *Id.* at 106.

67. 5 U.S.C. § 552(b)(3). Exemption 3 states:

This section does not apply to matters that are . . . (3) specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .

*Id.*

68. *See Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 867 (D.C. Cir. 1981) (finding that "by any definition Fed. R. Crim. P. 6(e) is a statute").

69. *Id.* at 868–70 (offering a good example of the inquiry required when considering the application of Rule 6(e) to FOIA Exemption 3).

70. *See Decl. of James Reynolds at ¶¶ 33–35, Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) (Civil Action No. 01-2500), available at <http://www.cnss.gwu.edu/~cnss/dojreynoldsdeclaration.htm> (on file with the North Carolina Law Review) (arguing that to disclose any information about material witnesses would reveal the strategy of the investigation, and noting that "these justifications are particularly compelling for the material witnesses, as they are believed to have evidence directly relevant to acts of terrorism").

Government's treatment of material witness information is deeply troubling."<sup>71</sup> The court was troubled by the tenuous links the government made between FOIA Exemption 3 and the material witness warrant statute,<sup>72</sup> and concluded that the Government failed to meet its burden of establishing that release of the names of those held on material witness warrants would in fact jeopardize the grand jury investigations.<sup>73</sup> As a result, the court held that, through Exemption 3, Rule 6(e) could not justify the government's failure to release the names.<sup>74</sup> Concluding that the government must release the names of the detainees, the court also held that the government must both make public the identities of the detainees' attorneys<sup>75</sup> and conduct a more thorough search for documents related to the government's position on the disclosure of information.<sup>76</sup>

The effect of this decision on the detainees *should* be evident from the reports of their confinement described above, namely, that requiring the government to inform the public who is being detained ensures that the detainees are provided adequate assistance of counsel. This requirement also ensures that the government will hold detainees in conditions suitable to their status as witnesses with information potentially valuable to the government's investigation, rather than as convicted terrorists.

FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."<sup>77</sup> Thus, in order to withhold

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71. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 106. The court went on to note that A person apprehended as a material witness is *not* accused of any crime but, instead, has been arrested because it is believed that his or her "testimony is material in a criminal proceeding." . . . Nevertheless, the Government has kept secret virtually everything about these individuals, including the number of people arrested and detained, as well as their identities. The public has no idea whether there are 40, 400, or possibly more people in detention on material witness warrants.

*Id.* (quoting 18 U.S.C. § 3144 (2000)).

72. *See* 18 U.S.C. § 3144 (2000).

73. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 107.

74. *Id.* The court further noted that to the extent any court orders prohibit the release of names, the government may submit further evidence of such sealing orders for the purpose of withholding those names. *Id.* at 107-08.

75. *Id.* at 109.

76. *Id.* at 109-11. The court did find that the government properly withheld information about the dates and locations of arrests, detentions, and releases under FOIA Exemptions 7A and 7F. *Id.* at 108.

77. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)).

information about the detainees, the government must overcome FOIA's strong presumption that such information should be disclosed.<sup>78</sup> Because the government will often, and frequently for good reason, need to keep official information secret, there are nine exemptions to the FOIA's general rule of disclosure.<sup>79</sup> Nevertheless,

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78. Despite the FOIA's presumption that information should be released, the Bush Administration issued a revised policy regarding release of information under FOIA in October 2001. See Office of the Attorney General, Memorandum for Heads of All Federal Departments and Agencies (Oct. 12, 2001), <http://www.usdoj.gov/04foia/011012.htm> (on file with the North Carolina Law Review). This policy, establishing a "sound legal basis" standard under which the Department of Justice will defend decisions not to release information if there is any legal basis to do so, is directly contrary to the policy of the Clinton Administration. *Id.* The previous policy encouraged the release of information, and directed federal agencies to release, on a discretionary basis, exempt information so long as there was no "foreseeable harm" resulting from the disclosure. See *Attorney General Reiterates FOIA Policy*, FOIA Update, Spring 1997, [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XVIII\\_2/page1.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_2/page1.htm) (on file with the North Carolina Law Review); see also *Hearing, supra* note 22, at 87-88 (statement of Kate Martin, Director, Center for National Security Studies) (describing the Bush Administration's new policy); Clymer, *supra* note 1 (same).

79. 5 U.S.C. § 552(b) (2000). The nine exemptions are:

- (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) 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, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;



these exemptions do not change FOIA's overriding policy that "disclosure, not secrecy, is the dominant objective of the Act."<sup>80</sup> Therefore, the burden rests on the government to establish that the information requested falls under one of the exemptions.

Section 3144 of Title 18 of the United States Code governs the detention of material witnesses.<sup>81</sup> The government argued that this statute authorizes detention of grand jury material witnesses, and that, through FOIA Exemption 3, Rule 6(e) protects the identities of the material witness detainees from disclosure. The government's argument, however, is tenuous.<sup>82</sup> Rule 6(e) does not explicitly prohibit disclosure of the identities of material witnesses.<sup>83</sup> Prior attempts to invoke Rule 6(e) as a protection against FOIA requests, although not dealing explicitly with material witnesses, have prompted courts to note that the mere fact that information is associated with grand jury proceedings is not enough to immunize such information from disclosure.<sup>84</sup> In addition, the rule governing

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- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or  
(9) geological or geophysical information and data, including maps, concerning wells.

*Id.*

80. *Rose*, 425 U.S. at 361.

81. Section 3144 states in relevant part:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person . . .

18 U.S.C. § 3144 (2000).

82. The district court went further and stated explicitly that "[t]he Government's reliance on grand jury secrecy rules to justify withholding of the identities of material witnesses is *fundamentally wrong as a matter of law*." *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 106 (D.D.C. 2002) (emphasis added).

83. FED. R. CRIM. P. 6(e).

84. *See, e.g., Wash. Post Co. v. United States Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) (noting that "[t]he relevant inquiry is whether the [information requested] would reveal the inner workings of the grand jury"); *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 584 (D.C. Cir. 1987) (requiring "some affirmative demonstration of a nexus between disclosure and revelation of a protected aspect of the grand jury's investigation"); *SEC v. Dresser Indus.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (en banc) (noting that Rule 6(e) "does not require . . . that a veil of secrecy be drawn over all matters occurring in the world that happen to be investigated by a grand jury"). *But see Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 869-70 (D.C. Cir. 1981) ("Witness names are clearly covered. . . . Potential witnesses and potential documentary exhibits, while less clearly within the rule, if disclosed would reveal the direction and strategy of the investigation.").

detention of material witnesses refers to criminal proceedings in general, not to grand jury proceedings specifically.<sup>85</sup>

Without elaboration, the district court recognized that there may be some connection between § 3144 and grand jury proceedings.<sup>86</sup> The court concluded, however, that where these laws overlap, the names of the material witnesses can be disclosed without identifying them as material witnesses, thereby eliminating any risk that the grand jury investigations will be compromised.<sup>87</sup> As discussed above, it is estimated that over one thousand people have been or are currently being detained as a result of post-September 11 investigations. The government has stated that that the majority of the detainees are held in connection with immigration violations.<sup>88</sup> By requiring the government to release only the detainees' names, the district court allowed the government to withhold information about why each detainee is in custody. Therefore, no sensitive information about the inner workings of the grand jury will be revealed.

The government's reliance on FOIA Exemption 3 rests on the assumption that § 3144 applies to grand jury proceedings—that is, the identities of those detained on material witness warrants are protected by grand jury secrecy under Rule 6(e) and thus exempt from FOIA disclosure. Precedent supports this general assumption.<sup>89</sup> But the government can rely on Exemption 3 only by establishing that the material witnesses are being held pursuant to grand jury appearances.<sup>90</sup> The district court found that in this case the

85. 18 U.S.C. § 3144; see *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 106. There is currently a split within the Southern District of New York on the very question of whether § 3144 applies to grand jury material witnesses. Compare *United States v. Awadallah*, 202 F. Supp. 2d 55, 64 (S.D.N.Y. 2002) (“Applying section 3144 to a grand jury proceeding is an attempt to fit a square peg into a round hole.”), with *In re Material Witness Warrant for John Doe*, 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002) (declining to follow the holding in *Awadallah* and instead finding that § 3144 does include grand jury proceedings). For more information about the government's use of material witness detention in the aftermath of the terrorist attacks, see Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1221–25 (2002).

86. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 106.

87. *Id.*

88. See *supra* notes 17–20 and accompanying text.

89. See, e.g., *Bacon v. United States*, 449 F.2d 933, 939–41 (9th Cir. 1971) (concluding that because grand jury proceedings are included in the Federal Rules of Criminal Procedure, § 3149 [the precursor to § 3144] should be read that way as well); *In re Material Witness Warrant for John Doe*, 213 F. Supp. 2d at 289–97 (noting that there is ample authority for the proposition that § 3144 includes grand jury proceedings).

90. In a second supplemental declaration, James Reynolds, Chief of the Terrorism and Violent Crimes Section in the Criminal Division of the Department of Justice, stated:

government failed to demonstrate that those held on material witness warrants are in fact waiting to testify before a grand jury.<sup>91</sup>

The *Center for National Security Studies* decision requiring the government to disclose the names of material witness detainees is consistent with the goals of FOIA because the decision limits the government's ability to arrest and detain unknown numbers of people in secret.<sup>92</sup> Disclosure of the names will force the government to comply with constitutional requirements, such as assuring that detainees are in fact being held because they have information valuable enough to the government's investigation that they will be called to testify before a grand jury.

The district court's decision in *Center for National Security Studies* does not mention the USA PATRIOT Act, nor does it discuss its holding within the broader context of the post-September 11 terrorist investigation. Instead, Judge Kessler found as a matter of law that the government cannot rely on FOIA Exemption 3 to withhold the names of the detainees.<sup>93</sup> Nonetheless, the decision has significant implications for the government's ongoing investigation under the authority of the USA PATRIOT Act.

FOIA and section 203 of the USA PATRIOT Act exist in parallel: both statutes address disclosure of information, both have the interest of democracy as their driving force. FOIA encourages agency disclosure of information in order to allow public access to and oversight of government action.<sup>94</sup> Congress created the USA PATRIOT Act to provide the government with a wide variety of

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"I want to make explicit that each of these warrants [to secure detention of material witnesses] was issued to procure a witness's testimony before a grand jury." Second Supplemental Decl. of James Reynolds at ¶ 4, *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d 94 (D.D.C. 2002) (Civil Action No. 01-2500), available at <http://cnss.gwu.edu/~cnss/reynoldssupplemental2.pdf> (on file with the North Carolina Law Review). This declaration apparently did not sway Judge Kessler.

91. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 106–07. The court noted that the Center for National Security Studies did not ask for the names of grand jury witnesses, just the names of those held as material witnesses. *Id.* at 106. The court found that the "affidavits do not establish that those held as material witnesses are in fact grand jury witnesses. . . . In fact, it is publicly known that at least eight, possibly more, material witnesses who were apprehended as potential grand jury witnesses were released and never testified before a grand jury." *Id.* at 107. Human Rights Watch also reported that many of the people detained as material witnesses never testified before a grand jury, and that their anticipated appearance before a grand jury was in fact only a pretext for their detention because the government lacked sufficient evidence that would otherwise justify their detention. Human Rights Watch, *supra* note 18, at 60–66.

92. See *supra* notes 77–80 and accompanying text.

93. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 106.

94. See *supra* notes 77–80 and accompanying text.

tools with which to combat terrorism. One tool in particular is section 203, the amendment of Rule 6(e) of the Federal Rules of Criminal Procedure to allow the government to disclose to other agencies exactly the type of information sought by the Center for National Security Studies. The rationale for section 203 is that the government should be able to share information collected by a grand jury investigation with other government officials, even if the information would not be shared with the public, if it is, for example, vital to national security.<sup>95</sup> Such disclosure furthers the nation's security interest. But at what cost?<sup>96</sup>

The government's attempt to keep the names of the detainees secret from the public, combined with its new ability to share information from grand juries with other federal agencies, is potentially dangerous. The government can now hold people anonymously and indefinitely without filing criminal charges, while at the same time gather, and share with other agencies, information about those people detained and others who may be the target of criminal investigations. In the words of the Center for National Security Studies, this activity "raise[s] serious questions about deprivation of fundamental due process, including imprisonment without probable cause, [and] interference with the right to counsel."<sup>97</sup> The Fourth Amendment of the U.S. Constitution protects the people from unreasonable searches and seizures.<sup>98</sup> The Fifth Amendment ensures the right to due process of law.<sup>99</sup> And the Sixth Amendment guarantees the right to counsel.<sup>100</sup> People held on material witness warrants have not been charged with any crime, yet they are denied their fundamental right of freedom, right to an attorney, and right to be heard. The government is permitted to detain people under the material witness statute, but it should not be allowed to hold people without accountability. The effect of the *Center for National Security Studies* decision is to ensure some level of

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95. See Beale & Felman, *supra* note 47, at 712-13.

96. Note that the USA PATRIOT Act contains a sunset provision making the Act ineffective as of December 31, 2005. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 224(a), 115 Stat. 272, 295 (2001). But section 203(a) which amends Rule 6(e) is exempt from the sunset provision. *Id.*

97. Letter from Kate Martin, Director, Center for National Security Studies et al., to Melanie Ann Pustay, Deputy Director, Office of Information and Privacy, U.S. Department of Justice (Oct. 29, 2001), <http://cnss.gwu.edu/~cnss/arrests/dojfoia.htm> (on file with the North Carolina Law Review) (requesting information pursuant to the FOIA).

98. U.S. CONST. amend. IV.

99. U.S. CONST. amend. V.

100. U.S. CONST. amend. VI.

accountability: public scrutiny will help protect the civil liberties of the detainees.

Because the USA PATRIOT Act gives the government significant discretion in deciding what information to share with other agencies, it must be considered within the broader context of what the public has a right to know and what the public ought to know in order to support the government's efforts to fight terrorism. In a democratic society dedicated to openness, the government cannot be permitted a free hand to prosecute hundreds of people in secret. Thus *Center for National Security Studies* may have its greatest effect by reminding the government that it cannot maintain a wall of silence toward the public while at the same time break down that silence within its own walls. To the extent the USA PATRIOT Act increases disclosure within the government, there must be some corresponding disclosure by the government to the public to assure that the government is not unconstitutionally encroaching on individual rights and access to information.

As far as the detainees are concerned, release of their names as required by the district court will allow their detention to be monitored. Interested organizations can contact lawyers and family members of the detainees to ensure that the detainees have received adequate treatment and access to information. The safety of the detainees should not be a concern, as they are being held in federal prisons. Nevertheless, the district court explicitly noted that any detainee who did not want his or her identity to be released could submit such a request to the government.<sup>101</sup>

It has been almost two years since the terrorist attacks on Washington, D.C. and New York, and the public still does not know how many individuals are being held as material witnesses, who they are, or if they will ever appear before a grand jury.<sup>102</sup> In the meantime, the government has continued its investigation and may be adding to the number of people detained.

By requiring the government to release at least the names of the detainees, the district court ensured some measure of transparency and accountability with respect to the criminal investigations. The effect of the court's decision is to limit the USA PATRIOT Act's

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101. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 113 (D.D.C. 2002).

102. Following the district court's decision, the government sought and obtained a motion for a stay pending appeal. *Ctr. for Nat'l Sec. Studies*, 217 F. Supp. 2d at 58–59. The Court of Appeals for the D.C. Circuit heard oral arguments in November 2002, and a decision is expected soon.

potentially dangerous infringements on individual freedom and disclosure of information, while maintaining the government's ability to investigate the terrorist attacks.

RACHEL V. STEVENS

