

[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 18, 2002]

No. 02-5300

(Consolidated with No. 02-5254)

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

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

v.

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

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

**BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND
THE JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS AS
AMICI CURIAE IN SUPPORT OF CROSS-APPELLEE
URGING PARTIAL AFFIRMANCE**

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GLOSSARY

CNSS	Center for National Security Studies
Exemption 4	5 U.S.C. § 552(b)(4)
Exemption 6	5 U.S.C. § 552(b)(6)
Exemption 7(C)	5 U.S.C. § 552(b)(7)(C)
FOIA	Freedom of Information Act

INTERESTS OF AMICI CURIAE

The identities and the interests of amici curiae Washington Legal Foundation (WLF) and the Jewish Institute for National Security Affairs (JINSA) are more fully described in their motion for leave to file an amici curiae brief in this cross-appeal, and in their amici brief filed on September 27, 2002, with consent of all the parties, in support of the government's appeal in No. 02-5254. WLF Br. 1-3.

In this cross-appeal, the Center for National Security Studies, et al., (hereinafter CNSS) argue that in addition to the Freedom of Information Act (FOIA), the documents they requested seeking the identities of those aliens detained since the terrorist attack on the United States on September 11, 2001, and the dates and locations of their detentions or arrests, are also subject to disclosure under the First Amendment and the common law.

Having reviewed the brief recently filed on November 4, 2002, by the Department of Justice as cross-appellee, amici support the government's arguments that neither the First Amendment nor the common law entitle CNSS to obtain the information or documents requested. Brief for Cross-Appellee, 24-29. In the interests of judicial economy, amici's brief will focus only on the common law

issue raised in this cross-appeal.

SUMMARY OF ARGUMENT

While the common law doctrine of access to public records may apply to the federal judicial and legislative branches of our government, documents belonging to agencies in the federal executive branch are governed solely by the Freedom of Information Act. Consequently, the district court's judgment that the agency documents requested in this case are not disclosable under the common law should be affirmed, but on grounds that FOIA displaces the common law, rather than for the reasons stated by the district court, namely, that the documents, assuming they are public records subject to the common law, are nevertheless not releasable because the government's asserted interest in withholding the records outweighs the public interest in obtaining them.

Center for National Security Studies v. DOJ, 215 F. Supp.2d 94, 112-15 (D.D.C. 2002).

ARGUMENT

I. THE COMMON LAW RIGHT OF ACCESS TO PUBLIC RECORDS IN THE EXECUTIVE BRANCH HAS BEEN

DISPLACED BY FOIA.

While it is true, as the cross-appellants state (CNSS Br. 36), that the Supreme Court has stated that "the courts of this country recognize a general right to inspect and copy public records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978), the "courts" referred to were state courts, which in turn had recognized the common law doctrine of access to public records applies to state judicial records and state agencies. Accordingly, "[a]t least as it applies to the federal government, the reach of this common law right is far from clear." Washington Legal Foundation v. U.S. Sentencing Comm'n, 89 F.3d 897, 898 (D.C. Cir. 1996) (WLF II).¹

While both Nixon and WLF II dealt with putative public records located within the federal judicial branch, the primary question raised by the cross-appellants in this case is whether there is a federal common law right of access to federal executive agency records that are subject to FOIA. While the Supreme Court has never directly answered this question, amici submit that a careful analysis of the issue warrants the conclusion that FOIA displaces the federal common law with respect to agency records.

A. **The Relationship Between The Common Law and Statutory Right-to-Know Laws**

While the common law of some states have a very narrow view of what is a "public record," limiting them only to those records required by law to be kept, the definition of public record in other states, such as New Jersey, is very broad. See, e.g., Loigman v. Kimmelman, 505 A.2d 958, 961 (N.J. 1986); City Council of Santa Monica v. Superior Court of Los Angeles County, 21 Cal. Rptr. 896, 899 (1962) (deeming a public record to be "[a]ny record . . . which [an officer] keeps as necessary or convenient to

¹ As even the Nixon Court cautioned, "It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate." 435 U.S. at 598-99.

the discharge of his official duties") (emphasis added). See WLF II, 89 F.3d at 904-05 (canvassing jurisdictions); see also Project: Government Information and Rights of Citizens, 73 Mich. L. Rev. 971 (1975).

Regardless of the scope of the definition of "public record," in order to determine whether a document is disclosable under the common law, whether under state common law or federal common law, the courts employ a two-step process: first, the court determines whether the document in question is a "public record," and second, whether the interests advanced by the requester for the document's disclosure outweigh the government's interest in keeping it secret. See Washington Legal Foundation v. U.S. Sentencing Comm'n., 17 F.3d 1446, 1452 (D.C. Cir. 1994) (WLF I). As one court summarized the process, "[e]ven if a document can be considered a public record . . . the public does not automatically have a right of access to it. Instead, after determining that a document is a public record, a court must then proceed to balance the government's interest in keeping the document secret against the public's interest in disclosure." Pentagon Technologies Int'l Ltd v. Committee on Appropriations of the U.S. House of Reps., 20 F. Supp. 2d 41 (D.D.C. 1998) (quoting WLF II at 899 and WLF I at 1452). Thus, a common law "public record" is not automatically disclosable, but can be released only when the interests in its disclosure and keeping it secret are properly balanced by the court using its sound discretion.

Most states have codified their common law by enacting various Right-to-Know laws, or have gone further by statutorily expanding the common law definition of what constitutes a "public record." See Nixon, 435 U.S. at 598, n.7. But the legislatures of other states, like New Jersey, have chosen to narrow their broad common law definition of public record in their Right-to-Know statute, but have not otherwise revoked or abrogated the broader definition of public record in the common law. See, e.g., Higg-A-Rella, Inc. v. County of Essex, 647 A.2d 862, 864 (N.J. App. Div. 1994). In those states, a requester has the option of requesting a document by invoking either the common law or statute, or both. See id. at 864-65 (while the document requested is not a public record subject to automatic disclosure under New Jersey's Right-to-Know law, it is a public record subject to disclosure under New Jersey common law). The trade-off by invoking a Right-to-Know statute for documents rather than invoking the common law, is that the requester's interest in obtaining the document, and the nature or subject matter of the statutorily defined "public record," are totally irrelevant. As a general rule, a court need not weigh the competing interests on a case-by-case basis to determine whether a document should be released under a Right-to-Know law. Thus, the identity and interest of a requester under state Right-to-Know laws as well as the federal FOIA, are of no concern.²

² Thus, even though the purpose of FOIA is to advance the "citizens' right to be informed about what their government is up to," DOJ v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989), idle curiosity is a sufficient interest to request an agency document under FOIA. "[T]he identity of the requesting party has no bearing on the merits of his or her FOIA request." Id. at 794. Thus, FOIA may be invoked by foreign nationals and aliens (and,

The key question is the extent to which the federal common law is applicable to branches of the federal government other than the judicial branch. In Schwartz v. Dep't of Justice, 435 F. Supp. 1203 (D.D.C. 1977), aff'd, 595 F.2d 888 (Table) (D.C. Cir. 1979), the district court denied a motion by then-Congressman Peter Rodino, Chairman of the House Judiciary Committee, to dismiss a common law claim to inspect a document in his possession. In doing so, the court observed that "all three branches of government * * * are subject to the common law right," and that the Freedom of Information Act, which by its own terms does not apply to the Congress (nor to the courts of the United States), is not in conflict with the common law right in that regard. Id. See also Mayo v. U.S. Gov't Printing Office, 9 F.3d 1450 (9th Cir. 1993) (GPO, while exempt from FOIA because it is an arm of Congress, is subject to common law right, but document requested is not a public record); Pentagen Technologies Int'l, Ltd. v. Committee on Appropriations of the U.S. House of Reps., 20 F. Supp. 2d 41 (D.D.C. 1998) (congressional committee is subject to common law, but record sought is investigative in nature rather than a recording of official action taken, and thus, not a "public record" under WLF II).

Thus, while this Court in Schwartz opined that as a "general rule," the common law right of access to documents covers all three branches of government, including the executive branch, it was clearly referring to the general rule of state common law rather than federal common law. Schwartz did not consider, let alone hold, that the common law applies to federal executive branch agencies. See Schwartz, 435 F.Supp. 1203 (citing state cases).

B. FOIA Supplants Any Federal Common Law Right of Access To Records of Federal Executive Branch Agencies

In 1966, Congress enacted the federal FOIA as a broad and comprehensive statute to govern the release of documents within the executive branch agencies. 5 U.S.C. §§ 552, et seq. To the extent that there had been a federal common law right to any such documents, FOIA can be viewed as not only codifying the common law, but going further by broadly defining an agency record to include documents that are more than just records of official actions or that are required by law to be made.

In addition, the FOIA requester need not make any showing of need for the document. To be sure, certain exemptions from disclosure in FOIA codify to some extent the balancing of interests process that a court must undertake in determining whether a public record should be disclosed. FOIA accomplishes this by either categorically exempting the document from disclosure regardless of the interest or needs of the requester, (such as FOIA Exemption 4 prohibiting disclosure of trade secrets), or by requiring that competing interests of disclosure versus non-disclosure be weighed by the agency and subsequently, by a reviewing court (such as FOIA Exemptions 6 and 7(C) in determining what constitutes an "unwarranted" invasion of personal privacy).

Thus, as a practical matter, it would be wholly unnecessary to invoke the common law with respect to documents in the hands of federal agencies, assuming such a right exists, because FOIA greatly expands upon the common law definition of "public record," and generally eliminates the balancing process used by a court to determine whether the document should be released. But aside from these practical reasons for opting to use FOIA rather than the common law, as a matter of law, Congress has displaced or supplanted the common law with FOIA as the governing body of law with respect to disclosure of executive branch records. This is true even though Congress failed to expressly refer to or abrogate any common law right to such records in enacting FOIA.

The legal standard that applies in determining whether Congress has abrogated federal common law is more lenient than the standard that Congress must meet to express its intention to preempt state law. As the Supreme Court stated:

Unlike the determination of whether federal law preempts state law which requires evidence of a clear and manifest congressional purpose to pre-empt state law, the determination of whether federal statutory or federal common law governs starts with the assumption that it is for Congress, not federal courts, to articulate

theoretically, even by members of a terrorist group or their proxies) to learn what our government is up to. Cf. Al-Fayed v. CIA, 254 F.3d 300 (D.C. Cir. 2001) (FOIA request filed by foreign national and foreign publication relating to CIA involvement in death of Princess Diana).

appropriate standards to be applied as a matter of federal law.

Milwaukee v. Illinois, 451 U.S. 304 (1981); id. at 312-17. For example, even where Congress has addressed an issue, such as enacting general maritime law, but has never "enacted a comprehensive maritime code" dealing with all aspects of the award of damages for injuries suffered on the High Seas, the federal statute, however limited in scope, nevertheless "announces Congress' considered judgment" on the issue and "speaks directly to a question" which cannot be supplemented by the courts by invoking federal common law. Id. at 315 (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

As the Supreme Court emphasized, "Our `commitment to the separation of powers is too fundamental' to continue to rely on federal common law `by judicially decreeing what accords with `common sense and the public weal' when Congress has addressed the problem.'" 451 U.S. at 315 (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)). There can be no doubt that Congress "spoke directly" and quite comprehensively to the issue of how requests for agency documents should be handled when it enacted the FOIA.³

Accordingly, CNSS has no federal common law right of access to any of the agency records requested, regardless of whether those documents also constitute a judicial record. Because CNSS has no federal common law right of access to records in the hands of the Justice Department identifying the detainees, or the dates or places of their arrest or detention, it is wholly unnecessary for this Court to decide whether 1) the records requested constitute a "public record" for purposes of the common law, and 2) that even if they were public records, to decide whether they should be disclosed after balancing the interests of the government with the interests of the requester.⁴

³ Even where the common law right of access to public records indisputably exists, namely, with respect to judicial records, the courts have nevertheless resorted to relevant statutory law as the rule to govern the release of a requested document or record. Thus, in Nixon v. Warner Communications Corp., the Supreme Court ruled that the law governing the disclosure of the tapes would be the Presidential Recordings Act rather than the common law. 435 U.S. at 606. Similarly, in United States v. Gonzales, 150 F.3d 1246 (10th Cir. 1998), the court held that access to documents regarding payments made under Criminal Justice Act (CJA), even if they were judicial documents or records, would be governed by the CJA and implementing regulations, because they "occupy this field and would supercede the common law right even if one existed." Id. at 1263.

⁴ While amici recognize that certain criminal arrest records have been regarded in many jurisdictions as public records subject to disclosure, unless compelling reasons counsel otherwise, the aliens detained solely for immigration

CONCLUSION

For the foregoing reasons, and those stated in the government's cross-appeal brief, the district court's judgment dismissing CNSS's claims under the First Amendment and the common law should be affirmed.

Respectfully submitted,

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violations are not being criminally arrested nor subjected to criminal proceedings. As the Supreme Court noted in Carlson v. Landon, 342 U.S. 524 (1952), "Deportation is not a criminal proceeding and has never been held to be punishment * * * * Detention is necessarily a part of this deportation proceeding. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings." Id. at 537-38. And as for agency practice with respect to releasing the names of detained aliens and related information, the policy of the Department of Justice and Immigration and Naturalization Service is such that requests for information for noncitizens who are not lawfully admitted for permanent residence "ordinarily should be withheld." Richard L. Huff, Memorandum for the Attorney General, May 10, 1996. That policy has now been codified by the Justice Department in 8 C.F.R. § 236.6.

**CERTIFICATE OF COMPLIANCE WITH
TYPE VOLUME LIMITATION**

I hereby certify that this brief complies with the type volume limitation set forth in Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a), that the brief has a typeface of 14 points, and that it contains 2,712 words. When combined with the word count of 4,204 in amici curiae's brief filed on September 27, 2002, in the consolidated appeal No. 02-5254, the word count of both briefs totals 6,916 words.

PAUL D. KAMENAR

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Amici Curiae the Washington Legal Foundation, et al., Supporting Cross-Appellee were served on this 6th day of November, 2002, by first-class mail, postage pre-paid, to the following counsel, and by facsimile and e-mail to lead counsel as noted:

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