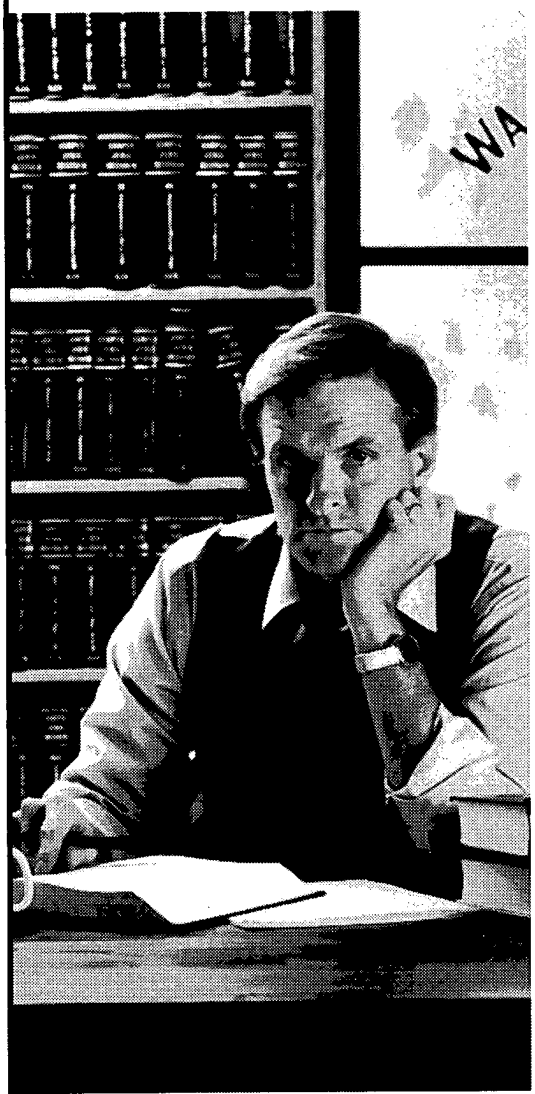
THE T. C. WILLIAMS SCHOOL OF LAW

UNIVERSITY OF

RICHMOND LAW REVIEW

VOLUME 21 WINTER 1987 NUMBER 2

The Master's Tools



Fine tools. In the hands of a master they can shape a quality instrument, bring life to a slab of stone or coax a new rose from a handful of earth.

You find masters in every profession. They're the ones at the top or on their way. They've mastered their craft and the tools they use.

For an attorney, those tools are on the shelves of his library.

That's where you'll find *Corpus Juris Secundum*. The last word in legal encyclopedias. The first place to look.

A contemporary statement of American law derived from reported cases and legislation, *Corpus Juris Secundum* is the authority recognized by every American judiciary.

Corpus Juris Secundum®
. . . for the masters.

You can't master your craft until you master the tools.

CJS Corpus Juris Secundum

West Publishing Company
P.O. Box 64526, Saint Paul,
Minnesota 55164–0526

JOHN L. DAVIS, J.D.
1603 Park Avenue
Richmond, VA 23220
Phone: 804/353–1152

JAMES B. WILTSE, ESQ.
P.O. Box 486
Herndon, VA 22070
Phone: 703/435–8059
1/800–523–0096

ARTICLES

FREEDOM OF INFORMATION AND THE CIA INFORMATION ACT

*Karen A. Winchester**
*James W. Zirkle***

---

* Former Assistant General Counsel for Legislation, Defense Intelligence Agency. From 1980-85 she was an attorney, more recently Deputy Chief, Legislative Division, Office of General Counsel, Central Intelligence Agency. B.A., 1975, University of Miami; J.D., 1978, Indiana University.

** Assistant General Counsel, Central Intelligence Agency. B.S., 1963, Carson-Newman College; J.D., 1972, University of Tennessee; LL.M., 1973, Yale Law School.

The authors express their appreciation to E. Page Moffett, Associate General Counsel, Central Intelligence Agency, for helpful suggestions and to Ms. Millie Arthur and The Institute of Bill of Rights Law, Marshall-Wythe School of Law, College of William and Mary, for assistance in the preparation of this manuscript.

I. INTRODUCTION

The original Freedom of Information Act (FOIA) was signed into law by President Lyndon B. Johnson on July 4, 1966.[1] In form it was an amendment of section three of the Administrative Procedure Act of 1946.[2] In substance it represented a sweeping expansion of the law of public access to government records.[3] FOIA was the culmination of more than a decade of efforts by various congressional committees. It provides that "any person" may seek disclosure of federal agency records, with a statutory presumption favoring disclosure. An agency may withhold the information only if it falls within one of nine specific exemptions contained within FOIA.[4] Further, FOIA gives federal district courts jurisdiction to

---

1. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982)).

2. Pub. L. No. 404, 60 Stat. 237.

3. The original section three of the Administrative Procedure Act of 1946 contained the first general statutory provision for public disclosure of executive agency records. Because of its vague language and broad loopholes it proved ineffective and in practice was often used as a basis for withholding information. In its original form, section three provided that information could be withheld whenever an agency believed that secrecy was required in the "public interest," and "any matter relating solely to the internal management of an agency" could be withheld.

4. 5 U.S.C. § 552 (b) states that § 552 does not apply to matters that 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) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel; (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 and geophysical information and data, including maps, concerning wells.

enjoin an agency's impermissible withholding of records. The immediate goal of FOIA was to make more government information available to the public, both as an end unto itself and as a means of promoting greater public oversight of the internal workings of government agencies.[5] The ultimate goal, as one writer observed, was the encouragement of administrative reform through increased public awareness of agency practices.[6]

A great deal of information has been routinely released since FOIA became effective on July 4, 1967. Also, more than 2,000 lawsuits to compel additional agency disclosure have been commenced during this time.[7] But from the beginning there was substantial disagreement between the executive and legislative branches concerning the degree of protection that should be afforded national security information under FOIA.[8]

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

Subsection (c) provides that these exemptions do not apply to Congress.

5. "The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

As President Johnson observed in his bill-signing statement:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. . . . I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

STAFFS OF SENATE COMM. ON THE JUDICIARY AND HOUSE COMM. ON GOVT. OPERATIONS, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (Pub. L. No. 93-502); SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 1 [hereinafter SOURCE BOOK].

6. *See* Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261 (1970).

7. *See, e.g.*, OFFICE OF INFORMATION AND PRIVACY, U. S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION CASE LIST (Sept. 1986). For an informative guide to litigation under FOIA, see LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT (A. Adler 11th ed. 1986) [hereinafter LITIGATION].

8. When the Senate issued the bill, S. 1160, 89th Cong., 2d Sess. (1966), which was to become the Freedom of Information Act, President Johnson threatened to veto it. The House Committee then entered into negotiations with the Department of Justice and eventually issued a report giving a broad interpretation to the proposed statutory exemption. The House, however, passed the Senate version, 112 CONG. REC. 13,640 (1966), which was signed into law. There is, therefore, a sharp distinction between the Senate and the House reports (S. REP. No. 813, 89th Cong., 1st Sess. (1965) and H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2418-29). The courts have generally held that the Senate report more accurately reflects the legislative intent. *See* Department of the Air Force v. Rose, 425 U.S. 352 (1976), and cases cited therein.

Congress recognized that not all agency records should be available to the public as a matter of statutory right. Of the nine exemptions contained in FOIA,[9] (b)(1) and (b)(3) are the exemptions most directly involved in the protection of national security information. As Congress recently demonstrated in enacting the Central Intelligence Agency Information Act of 1984 (the "Act"),[10] the application of FOIA to an intelligence service such as the Central Intelligence Agency (CIA) raises policy questions as well as problems in application.

This article examines the circumstances that led to the enactment of the Act, which exempts, with certain exceptions, CIA operational files from the application of FOIA. Those portions of the legislative history that most likely will affect judicial interpretation will also be examined.

The central difficulty with FOIA in its application to national security information, especially information held by the CIA, lies in a failure on the part of Congress to fully recognize those organizational and functional characteristics of a secret intelligence service that distinguish it from other executive agencies. This failure appears to derive in part from a fundamental misperception that there exists under our Constitution a public "right" to obtain sensitive information pertaining to intelligence activities and the conduct of foreign affairs. The public's so-called "right to know," on which FOIA in part is premised, is founded more in the popular press and the writings of some commentators than in the Constitution. This is not to suggest that in a representative democracy there are not strong, even compelling reasons to discover or create a right of access on the part of the public to most government information. But there is no general "right to know" found in the Constitution. The most that can be said is that a limited right, in some circumstances, may be inferred from other rights. FOIA (and the functionally related Privacy Act) were enacted precisely because it was necessary to create enforceable rights not otherwise in existence to obtain government information.

Congress has provided in exemptions (b)(1) and (b)(3), respectively, that information properly classified in the interest of national security, or information otherwise specifically exempted from disclosure by statute, will not be subject to the disclosure re-

9. 5 U.S.C. § 552 (b).
10. Pub. L. No. 98-477, 98 Stat. 2209.

quirements of FOIA.[11] In the latter instance, there must be "particular criteria" established to define (and contain) agency discretion or, in the alternative, a reference to the particular types of matters that are to be withheld. Otherwise, statutory authority must provide that matters are to be withheld so as to leave an agency no discretion.[12] Congress clearly intended that executive branch decisions concerning the need for secrecy should be given great weight and that information properly withheld should not be subject to disclosure. But Congress failed to fully recognize the way in which the CIA is structured to carry out its principle tasks of gathering information ("collection"), assembling and analyzing it ("analysis"), and protecting sources and methods from penetration by foreign intelligence services ("counterintelligence"). There was also a failure to anticipate the effect that FOIA would have on the CIA in terms of the extraordinarily high cost of compliance and, perhaps more importantly, the effect on the perception of those foreign individuals and organizations with whom the CIA does business who might be inhibited by the fear, albeit unjustified, that the CIA might be ordered by a court to disclose its sources. These concerns ultimately led to the enactment of the Central Intelligence Agency Information Act of 1984.

In 1966, when the original FOIA was enacted, Congress failed to anticipate the judicial deference that would be afforded executive branch decisions to classify or otherwise limit access to national security information under the (b)(1) and (b)(3) exemptions.[13] This was promptly addressed, however, in the 1974 and 1976 amendments, which are discussed below. These amendments, of course, were intended only to impose limits on the executive branch's ability to withhold information under these FOIA exemptions. They obviously did nothing to address the other problems created for the CIA by FOIA. (In fact, the number of FOIA requests received by the CIA increased sharply after the 1974 amendments.) For example, in order to enhance security within

---

11. 5 U.S.C. § 552 (b)(1), (b)(3). It should also be noted that the Privacy Act provides a broad exemption from its coverage for the Central Intelligence Agency. *See* 5 U.S.C. § 552a(j)(l) (1982).

12. The National Security Act of 1947, as amended, 50 U.S.C. § 403 (d)(3), provides "[t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." It has been uniformly recognized that the provision qualifies as an exemption under (b)(3). Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981); Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir.), *vacated in part*, 607 F.2d 367 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

13. *See* FAA v. Robertson, 422 U.S. 255 (1975); EPA v. Mink, 410 U.S. 73 (1973).

the CIA, there is a compartmentalization of files and access to information is on a strict "need-to-know" basis. When an FOIA request is made, the CIA in effect is required to break down this system of compartmentation when assembling the requested information for review. This is a substantial security concern. Furthermore, the nature of the information contained in CIA files, particularly operational files, requires that reviewers be experienced enough to recognize the implications likely to follow from the release of a particular item that might, to the untrained eye, appear innocuous. This creates a substantial demand on limited resources, detracting from the CIA's principal responsibility to a much greater extent than an agency that is not burdened with the extensive security requirements of an intelligence service. Finally, most of the information contained in operational files is protected by the (b)(1) and (b)(3) exemptions. This has resulted in very little information being released while imposing a substantial burden on the CIA. There is an additional concern. The information that can be released, a word or phrase here and there in an otherwise blanked-out document, may lead the unwary to erroneous conclusions as a result of using the information out of context.

II. Exemption (b)(1)

In the original FOIA, Congress provided that information "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy" was not subject to disclosure.[14] In 1973, in *EPA v. Mink*,[15] the Supreme Court interpreted this exemption to afford the executive branch broad discretion to withhold information in the interest of national security. This case involved an action filed in 1971 by Congresswoman Patsy Mink and thirty-two of her colleagues in the House of Representatives to compel the release of recommendations contained in a report by a high-level interdepartmental committee that had investigated the advisability of underground nuclear testing. The government contended that the materials sought were within the (b)(1) and (b)(5) exemptions. At least eight of the ten requested documents were described as classified at the secret or top secret levels. They were also described as "restricted data" pursuant to the Atomic Energy Act of 1954.[16] The government did not choose to rely on (b)(3),

14. 5 U.S.C. § 552 (b)(1) (1967).
15. 410 U.S. 73 (1973).
16. 42 U.S.C. §§ 2014(y), 2161-2162 (1982).

although the Court made reference to that exemption in footnote four of its opinion. The Court held that the (b)(1) exemption did not permit the compelled disclosure of classified documents, nor did it permit in camera inspection of classified documents either to determine the legitimacy of the classifiation or to segregate for release any "non-secret components."[17] The Court noted that FOIA might have provided more stringent requirements for asserting the (b)(1) exemption, but concluded that the legislative intent was to defer to the executive branch regarding what should be withheld in the interest of national security.[18]

The majority opinion in *Mink* addressed issues of statutory interpretation. Because of the broad interpretation given to the statutory exemption, it was not necessary for the Court to examine the constitutional questions posed by the doctrine of separation of powers, the state secrets doctrine, or executive privilege.[19] These constitutional doctrines are not coextensive with the statutory exemptions.[20] In *Mink*, the Court suggested that Congress could have gone further than it did in opening government files to the public. However, the Court also made a pointed reference to the limita-

---

17. *Mink*, 410 U.S. at 78.

18. "Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored." *Id.* at 81.

19. Justice Stewart in his concurring opinion noted: "This case presents no constitutional claims, and no issues regarding the nature or scope of 'Executive privilege.'" *Id.* at 97 (Stewart, J., concurring). In reviewing claims of privilege under the state secrets doctrine, courts may in appropriate circumstances require in camera examination of the documents in question.

20. United States v. Reynolds, 345 U.S. 1 (1952) (general discussion of state secrets doctrine). *See generally* Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 144 (1981); United States v. Nixon, 418 U.S. 683, 703-16 (1974) (executive privilege); United States v. United States Dist. Ct., 407 U.S. 297, 321 (1972) (no inherent presidential authority to conduct warrantless electronic surveillance in domestic security cases); Totten v. United States, 92 U.S. 105 (1876); Salisbury v. United States, 690 F.2d 966, 975 (D.C. Cir. 1982); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268 (4th Cir.), *reh'g*, 30 Fed. R. Serv. 2d (Callaghan) 1274 (4th Cir. 1980); ACLU v. Brown, 609 F.2d 277, 280 (7th Cir. 1979), *reh'g*, 619 F.2d 1170 (7th Cir. 1980); *In re* Halken, 598 F.2d 176 (D.C. Cir. 1979); Halken v. Helms, 598 F.2d 1 (D.C. Cir. 1978); Fitzgerald v. Penthouse Int'l, 525 F. Supp. 585 (D. Md. 1981) (libel action where government intervened as a party and moved to dismiss on the ground that any trial of the libel action would reveal classified military secrets); *rev'd in part*, 691 F.2d 666 (4th Cir. 1982), *cert denied*, 460 U.S. 1024 (1983); United States v. Felt, 491 F. Supp. 179 (D.D.C. 1979); Simrick v. United States, 224 Ct. Cl. 724 (1980).

The Classified Information Procedure (Graymail) Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980), establishes procedures governing the discovery of classified information in criminal prosecutions. No similar statute exists for discovery in civil actions.

tions required by executive privilege.[21]

Congress moved quickly in the 1974 amendments to overrule these parts of *Mink* by providing specifically for in camera review and the release of segregable portions of otherwise non-disclosable documents, even where the document as a whole was properly classified.[22] Congress also provided that in (b)(1) cases the courts should determine de novo whether a document was properly classified according to the criteria and procedures established by the applicable Executive Order.[23] The legislative history indicates that Congress, in providing for de novo judicial review, intended that "substantial weight" be given to an agency's affidavit supporting the decision to classify.[24] This qualifying language in the conference report was apparently designed to address strong objections by the executive branch to the proposed amendments, particularly those relating to de novo review.[25] During the course of the joint conference committee deliberations, President Nixon resigned and was succeeded by President Ford, who expressed his reservations and proposed a less intrusive standard of review:

> I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security. Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis.[26]

---

21. *Mink*, 410 U.S. at 83. The Court noted: "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." *Id.*

22. *See* 5 U.S.C. § 552 (a)(4)(B) (1982).

23. *Id.*

24. The conference committee report notes that:

> the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552 (b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

S. REP. No. 93-1200, 93d Cong., 2d Sess. 12 (1974).

25. *See* Ray v. Turner, 587 F.2d 1187, 1206-15 n.28 (D.C. Cir. 1978) (Wright, C.J., concurring); *see also* Allen v. CIA, 636 F.2d 1287, 1294-97 (D.C. Cir. 1980).

26. Letter from President Gerald R. Ford to the Honorable William S. Moorhead (Aug. 20, 1974), *cited in Ray*, 587 F.2d at 1207, *reprinted in* SOURCE BOOK, *supra* note 5, at 380.

The conference committee rejected this compromise language, and the conference committee's version, ultimately passed by Congress, was vetoed by the President. In vetoing the bill, the President again offered a compromise proposal that would permit courts to review the classification of documents while requiring them to uphold the classification where there was a reasonable basis to support it. Under the President's proposal, in camera review would have been available only after consideration of all other evidence.[27] Instead, Congress overrode the veto.

As amended, the first exemption protects from disclosure matters that are "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive Order."[28] Executive Order No. 12,356[29] is the current authority for classifying, declassifying, and safeguarding national security information. It provides procedural and substantive criteria for classification and declassification and expressly prohibits the classifying of information to hide violations of law, bureaucratic inefficiency, administrative error, and embarrassment to a person or agency, or to prevent or delay the release of information that does not require classification to protect national security.[30]

The principal area of disagreement between the executive branch and Congress over the 1974 amendments dealt with de novo judicial review. The legislative history indicates that Congress was concerned with executive branch accountability to Congress and to the public. Congress insisted on an objective, independent judicial determination, believing that judges would be sensitive to the executive branch's responsibility to protect national security. In the debates on the amendment, Senator Sam Ervin perhaps put it most succinctly: "The court ought not to be required to find any-

---

27. I propose, therefore, that where classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an *in camera* examination of the document.

Ray, 587 F.2d at 1208-09 (Wright, C.J., concurring) (message from the President vetoing H.R. 12471, an act to amend the Freedom of Information Act, H.R. Doc. No. 983, 93d Cong., 2d Sess., *reprinted in* SOURCE BOOK, *supra* note 5, at 483-85).

28. 5 U.S.C. § 552 (b)(1).

29. 47 Fed. Reg. 14,874 (1982).

30. *See* Statement of President Reagan upon signing Exec. Order No. 12,356, concerning national security information, 1982 PUB. PAPERS 420 (Apr. 2, 1982).

thing except that the matter affects or does not affect national security. If a judge does not have enough sense to make that kind of decision, he ought not to be a judge . . . ."[31] As the District of Columbia Court of Appeals made clear in *Ray v. Turner*, Congress "emphasized that in reaching a de novo determination the judge would accord substantial weight to detailed agency affidavits and take into account that the executive had 'unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record'."[32] Senator Chiles observed:

> If, as the Senator from Mississippi said, there is a reason, why are judges going to be so unreasonable? We say that four-star generals or admirals will be reasonable but a Federal district judge is going to be unreasonable. I cannot buy that argument, especially when I see that general or that admiral has participated in covering up a mistake, and the Federal judge sits there without a bias one way or another. I want him to be able to decide without blinders or having to go in one direction.[33]

The courts are in general agreement concerning the standard of judicial review incorporated in FOIA.[34] The characteristics of de novo review are essentially the same in all national security cases, although the government's burdens under de novo review are somewhat different depending upon whether (b)(1) or (b)(3) is being invoked.[35] For (b)(1), the government must show a reasonable

---

31. *Ray*, 587 F.2d at 1194 n.18 (quoting 120 CONG. REC. 17,030 (1974)). The court also quoted Senator Muskie:

> As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.
>
> On the contrary, if we constrict the manner in which courts perform this vital review function, we make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.

Id. (quoting 120 CONG. REC. 36,870 (1974)).

32. *Id.* at 1194 (citing S. REP. No. 1200, 93d Cong., 2d Sess. 12, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6290).

33. 120 CONG. REC. 17028 (1974), *cited in Ray*, 587 F.2d at 1194 n.18.

34. *But see* LITIGATION, *supra* note 7, at 29 (suggesting that two somewhat different standards for judicial review have been employed, with the court in *Ray* and *Allen* suggesting that a determination that information is properly classified is required while later decisions require only that there be a "reasonable basis" for finding potential harm).

35. [I]n reaching a de novo determination [a] judge [should] accord substantial weight to detailed agency affidavits and take into account that the executive had 'unique insights into what adverse affects [sic] might occur as a result of public disclosure of a

basis for its belief that disclosure may result in damage to national security and that the information is classifiable under the current Executive Order. By contrast, (b)(3) requires only that the information be protected by a statute that qualifies under that exemption. There is no requirement under (b)(3) that the government demonstrate danger to national security. The government, however, always bears the burden of establishing that information sought to be withheld falls within one of the statutory exemptions.[36]

An exemption is usually asserted by filing an unclassified affidavit with the court, indicating the specific reasons for invoking the exemption. Since the burden is on the government to show why

---

particular classified record.'

The salient characteristics of de novo review in the national security context can be summarized as follows: (1) The government has the burden of establishing an exemption. (2) The court must make a de novo determination. (3) In doing this, it must first 'accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.' (4) Whether and how to conduct an *in camera* examination of the documents rests in the sound discretion of the court, in national security cases as in all other cases. To these observations should be added an excerpt from our opinion in *Weissman* (as revised): 'If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated.'

In part, the foregoing considerations were developed for Exemption 1. They also apply to Exemption 3 when the statute providing criteria for withholding is in furtherance of national security interests.

Ray, 587 F.2d at 1194-95 (citations omitted).

Under (b)(3) an agency must only "show specifically and clearly that the requested materials fall into the category of the exemption." Hayden v. NSA, 608 F.2d 1381, 1390 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *see also* Founding Church of Scientology v. NSA, 610 F.2d 824, 830 (D.C. Cir. 1979).

It should be noted that in a (b)(3) case, the third part of the above process will involve a determination of whether the information in question falls within the scope of a qualifying statute rather than a review of the details of classification. Although classification is not a requirement under (b)(3), it is often the case that a determination of what is an intelligence source or method will involve information that is classified.

36. *Ray*, 587 F.2d at 1194. Congress in the FOIA did not limit an agency's discretion to disclose. The decision whether to invoke an exemption is within the discretion of the agency. *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979). By comparison, in a "reverse FOIA" suit, a plaintiff seeks to enjoin an agency's release of information. In these cases, the judicial review is limited to a finding that the agency has not acted arbitrarily. *See generally* Worthington Compressors, Inc. v. Gorsuch, 668 F.2d 1371 (D.C. Cir. 1981).

In the normal reverse-FOIA case the ultimate issue is whether an agency violates the APA [Administrative Procedure Act] when it seeks to disclose submitted information which is exempt under FOIA. In that case the agency has some discretion to act, and the issue properly is limited to whether the record indicates that it has done so reasonably.

Id. at 1373.

information is sensitive and would, if released, be injurious to national security under (b)(1) or is protected by statute under (b)(3), it is often necessary for the government to bring this information to the attention of the court by filing ex parte in camera a classified affidavit. This would be in addition to the filing of an open affidavit notifying the court and the parties that the government is invoking one or more of the national security exemptions. To prevail in an FOIA action, an agency must prove that each document requested has either been produced, is unidentifiable, or is wholly exempt.[37]

An agency's affidavits must be sufficiently detailed to demonstrate to the court that the documents sought fall within one of the statutory exemptions. The standard that the district court must apply in making this de novo review is whether the government's affidavits or showings are reasonably specific and demonstrate that the documents are properly exempt.[38] A conclusory affidavit that merely states that compliance with an FOIA request would reveal information protected by one of the exemptions, without producing information sufficient to demonstrate that the information sought is protected, is not sufficient to support dismissal or summary judgment.[39] It is within the discretion of the district court, after reviewing the government's affidavits, to require an in camera inspection of the documents to determine whether they are properly exempt.[40]

> If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without any *in camera* review of the documents.[41]

---

37. *Founding Church of Scientology*, 610 F.2d at 836.

38. *Id.*

39. *Founding Church of Scientology*, 610 F.2d 824.

40. *Ray*, 587 F.2d at 1195.

41. Hayden v. National Sec. Agency/Central Sec. Serv., 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980), *cited with approval* in Allen v. CIA, 636 F.2d 1287, 1291 (D.C. Cir. 1980). The *Allen* opinion provides a good discussion of when in camera inspection is appropriate. The opinion also describes what the court found to be inadequate affidavits filed in support of Exemptions 1 and 3.

> The affidavits' reliance on such expansive phrases as 'intelligence sources and methods,' 'sequence of events,' and 'process' falls far short of providing the 'reasonable specificity' that this court has held is required for summary judgment without *in camera* inspection. Indeed, the statement does not adequately demonstrate that the substantive standard for classification . . . has been met. . . . The affidavits also offer

Conversely, in camera inspection of the requested documents does not imply bad faith on the part of the government. It is merely a determination by the court that, under the circumstances, in camera review is appropriate in order for the court to make a de novo determination.[42]

In deciding whether to require in camera inspection, a court is required to give "substantial weight" to an agency's affidavits.[43] Although it is within the court's discretion to require in camera inspection, such inspection should not be ordered unless the court finds that the agency's affidavits are not sufficiently specific, or are otherwise unpersuasive in demonstrating the applicability of the statutory exemptions. This issue was addressed in the conference committee's report on the 1974 amendments: "Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the government under this law."[44] As Judge Wright notes in his concurring opinion in *Ray*:

> [T]hen, without shifting the burden of proof or weakening the requirement of *de novo* review or curtailing the propriety of *in camera* examination, the Conference Report added the following qualification with respect to judicial review in cases involving national de-

---

> no basis for a conclusion that all 'reasonably segregable' non exempt portions of the document have been released. They do not even contain an assertion to that effect.

Allen, 636 F.2d at 1292-93 (citations omitted).

> With respect to those portions of the document withheld under Exemption 3, the affidavits fail to demonstrate that the portions are clearly exempt. . . . The CIA's affidavits do little more than parrot the language of Section 403(d)(3) by stating that 'intelligence sources and methods' will be compromised if the document is disclosed. But as this court's opinion in *Sims v. CIA* . . . demonstrates, the phrase . . . is susceptible to varying interpretations, some of which are unacceptably broad.

Id. at 1294 (citations omitted).

42. The ultimate criterion is simply this: Whether the district judge believes that *in camera* inspection is needed in order to make a responsible *de novo* determination on the claimed exemption. . . . *In camera* inspection does not depend on a finding or even tentative finding of bad faith. A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a *de novo* determination. Government officials who would not stoop to misrepresentation may reflect an inherent tendency to resist disclosure, and judges may take this natural inclination into account.

Ray, 587 F.2d at 1195.

43. Lesar v. United States Dep't of Justice, 636 F.2d 472, 481 n.48 (D.C. Cir. 1980).

44. *Ray*, 587 F.2d at 1208 (Wright, C.J., concurring) (quoting S. REP. No. 1200, 93d Cong., 2d Sess. 9 (1974)).

fense and foreign policy matters:

> However, the conferees recognized that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552 (b)(1) cases under the Freedom of Information Law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.[45]

By comparison, the Supreme Court, in considering the question of in camera examination in the context of the state secrets doctrine, held in *United States v. Reynolds*[46] that a district court may not automatically insist upon such an examination of classified documents that the government claims are protected from discovery under Federal Rules of Civil Procedure because of their relation to national security. When the government's affidavits adequately demonstrate that the information should be protected, a district court is to respect the security considerations and not order in camera review.[47]When a district court is in doubt, it may

---

45. *Ray*, 587 F.2d at 1208 (Wright, C.J., concurring). A good summary of the weight to be given agency affidavits in de novo judicial review is found in Gardels v. CIA, 689 F.2d 1100 (D.C. Cir. 1982):

> Once satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith. Conversely, summary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith. The test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role.

Id. at 1104-05 (citations omitted).

46. 345 U.S. 1 (1953).

47. As Chief Justice Vinson observes in the opinion of the Court:

> Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

Id. at 10.

require that the documents be made available to the court for ex parte in camera review.[48]

A. *Which Executive Order?*

When documents have been classified under a previous Executive Order, the courts have held that the Executive Order in effect at the time the most recent classification decision was made will control.[49] The question may arise when a new Executive Order is promulgated after documents are classified, but before an FOIA request is made for their release. Since an agency is required to justify the continuing need for classification in asserting a (b)(1) exemption in accordance with substantive and procedural criteria established by the then-current Executive Order, it seems clear that the Executive Order in effect at that time should control, and the courts that have considered the question have so held.[50] A less likely occurrence would be the promulgation of a new and less restrictive Executive Order during the pendency of an appeal after agency consideration and de novo review under the criteria established by the previous Executive Order. In such a case, the appellate court should probably remand to the district court for a determination of whether or not the material fits within the less restrictive criteria established by the new Executive Order.[51] If a new and more restrictive Executive Order is promulgated while the

---

In *Reynolds*, the Court also defines the procedures which the executive must follow in invoking the state secrets privilege. The head of the executive department which has control over the matter, usually a cabinet officer, or in the case of the Department of Defense, the service secretary, must make a formal claim of privilege by affidavit in which the officer demonstrates with sufficient specificity the circumstances which make the claim of privilege appropriate. The officer claiming the privilege must have personally considered the matter and the affidavit must so state. *See id.* at 7-8.

48. *Cf.* United States v. Nixon, 418 U.S. 683 (1974) (concerning the power of the President to protect the confidentiality of communications among senior executive officials).

49. *See* Allen v. CIA, 636 F.2d 1287, 1291 (D.C. Cir. 1980); *see also* Lesar v. United States Dep't of Justice, 636 F.2d 472, 480-84 (D.C. Cir. 1980).

50. "Exemption 1 requires that the most recent classification of a requested document be in conformity with both the procedural and substantive criteria of the then applicable Executive Order." *Allen*, 636 F.2d at 1291 (citing *Lesar*, 636 F.2d at 483).

As the court in *Lesar* noted: "*The general principle espoused here, then, is that a reviewing court should assess classification under the Executive Order in force at the time the responsible official finally acts.*" 636 F.2d at 480 (emphasis in original).

The point, however, is not without some confusion. The court in *Lesar* noted earlier that a reviewing court should apply the executive order in effect at the time classification took place. *See id.* But the actual holdings make clear that the executive order in effect at the time the agency last reviews the matter controls.

51. *See generally Lesar*, 636 F.2d at 484-85.

case is on appeal, the new Executive Order will be applied on remand where the original classification was found to be defective.[52]

In reviewing classified documents pursuant to an FOIA request to determine if classification is still warranted, an agency may reclassify at a higher level due to a change in circumstances between the time of original classification and the request for release, or where information was not originally classified, due either to inadvertence[53] or a change in circumstances that would require classification.[54]

B. *The "Vaughn Index"*

In *Vaughn v. Rosen*,[55] the court of appeals addressed the courts' problem created by the necessity of de novo judicial review where the government seeks to withhold large quantities of information. The court in *Vaughn* defined a two-part problem. First, the in camera review of agency affidavits is ex parte, thereby depriving a district judge of the benefit of the views of the opposing party that would be present in a true adversarial proceeding. Since many FOIA requests involve a review of hundreds and sometimes

---

52. Afshar v. Department of State, 702 F.2d 1125, 1135-37 (D.C. Cir. 1983).

53. *See* Halperin v. Department of State, 565 F.2d 699, 706 (D.C. Cir. 1977).

54. *See* Baez v. Department of Justice, 647 F.2d 1328, 1334 (D.C. Cir. 1980). Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982), is the current authority for classification. Section 1.6 provides that:

> (d) Information may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act or the Privacy Act of 1974, or the mandatory review provisions of this Order, if such classification meets the requirements of this Order and is accomplished personally and on a document-by-document basis by the agency head, the deputy agency head, the senior agency official designated under Section 5.3(a)(1), or an official with original Top Secret classification authority.

Section 1.3 of the Executive Order defines the categories of information which may be classified:

> (a) Information shall be considered for classification if it concerns: (1) military plans, weapons, or operations; (2) the vulnerabilities and capabilities of systems, installations, projects, or plans relating to the national security; (3) foreign government information; (4) intelligence activities (including special activities), or intelligence sources or methods; (5) foreign relations or foreign activities of the United States; (6) scientific, technological, or economic matters relating to the national security; (7) United States Government programs for safeguarding nuclear materials or facilities; (8) cryptology; (9) a confidential source; or (10) other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President.

55. 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

thousands of pages of documentation, the court of appeals found that it is "unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case."[56] Second, the problem is made more difficult by the fact that an entire document may not be withheld where the sensitive information is segregable and may be excised, permitting release of the non-sensitive portions. Thus a judge, in making a de novo determination, is required to examine every executive justification in some detail.

The "Vaughn Index" was the court's answer to these problems. Agencies are required to submit a "relatively detailed analysis [of the material being withheld] in manageable segments."[57] Conclusory and generalized allegations of exemptions will not suffice. Further, an agency is required to provide "an indexing system [that] would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification."[58] Finally, the court requires that a Vaughn Index be made available to opposing counsel to enhance the adversarial testing of the government's claimed exemptions.[59]

It should be noted that the administrative burden to which the court referred in *Vaughn* is also of concern to agencies that are required to search and respond to what are sometimes extensive requests for materials involving sensitive national security information. It is true that an agency has at its disposal more resources than a federal district judge, but the demands on an agency are also much greater because every request must be responded to and every identifiable file must be reviewed. This would seem to raise a substantial question whether this is a wise allocation of relatively scarce resources. One should recall that a principle goal of FOIA is oversight of agency activities.[60] In the case of the intelligence agencies, Congress has provided for designated committees of the House and Senate to fully oversee their operation.[61]

---

56. *Id.* at 825.

57. *Id.* at 826; *see also* Ray v. Turner, 587 F.2d 1187, 1191 (D.C. Cir 1978).

58. *Vaughn*, 484 F.2d at 827; *see also Ray*, 587 F.2d at 1191.

59. *Vaughn*, 484 F.2d at 828; *see also Ray*, 587 F.2d at 1192. In the 1974 amendments to FOIA, the Senate Committee reviewed and specifically approved the approach adopted in *Vaughn*. *See* S. REP. No. 854, 93d Cong., 2d Sess. 15 (1974), *cited in Ray*, 587 F.2d at 1192.

60. *See supra* note 5 and accompanying text.

61. National Security Act of 1947, 50 U.S.C. § 413 (1982) (accountability for intelligence activities); *see* S. RES. 400, 94th Cong., 2d Sess. (1976) (establishing Senate Select Committee on Intelligence); *see also* XLVIII RULES OF HOUSE OF REP. (establishing Permanent Se-

III. The Glomar Response

A relatively small number of FOIA requests to the CIA seek information concerning alleged intelligence activities. When the CIA receives such a request, a determination must first be made whether the fact of the existence or nonexistence of the alleged special activity is properly classifiable pursuant to the applicable Executive Order. If it is, the CIA will reply that it can neither confirm nor deny the fact of the existence or nonexistence of records responsive to the request, for to do so would indicate the existence or nonexistence of particular intelligence activities. This is the so-called "Glomar response." The Glomar response was first utilized in a FOIA action concerning the CIA's Glomar Explorer Project, which was undertaken, according to press reports, to raise a sunken Russian submarine believed to have been carrying nuclear weapons from the floor of the Pacific Ocean at an undisclosed location northwest of Hawaii.[62] In May of 1977, following disclosures in the press, the government acknowledged that the CIA, operating through a contractual arrangement with Howard Hughes's SUMMA Corporation, was responsible for the project, and acknowledged the existence of 154 documents pertaining to a FOIA request initiated by a correspondent for *Rolling Stone* magazine. At that time, sixteen documents were released without deletions, 134 were released with deletions, and four were withheld in their entirety. In withholding the information, the CIA invoked the (b)(1) and (b)(3) exemptions. In the ensuing litigation, the CIA's action was upheld, based on the (b)(3) exemption and the agency's statutory requirement to protect intelligence sources and methods.[63]

A 1982 decision upholding the Glomar response is illustrative of the problem the CIA faces in responding to FOIA requests seeking information concerning operational activities. In *Gardels v. CIA*,[64] the CIA refused "to confirm or deny the existence of records pertaining to covert contacts for foreign intelligence puposes between the Agency and individuals at a specific university in the United States."[65] Gardels, a student at the University of California at Los

---

lect Committee on Intelligence).

62. Military Audit Project v. Casey, 656 F.2d 724, 727-30 (D.C. Cir. 1981).

63. *See* Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976), *aff'd*, 655 F.2d 1325 (D.C. Cir. 1981); *see also Military Audit Project*, 656 F.2d 724.

64. 689 F.2d 1100 (D.C. Cir. 1982).

65. *Id.* at 1102.

Angeles, had sought disclosure of past and present relationships between the CIA and individuals at the eleven campuses of that university. As the court's opinion points out, for the CIA to acknowledge that such records existed would be to assist foreign intelligence services in identifying individuals cooperating with the United States government.[66] To deny covert contacts with the University of California would also compromise intelligence sources and methods in the same way. The CIA had received more than 125 similar FOIA requests seeking information on contacts with American colleges covering approximately one hundred schools. To indicate which schools had not been involved in covert contact would be to make the work of intelligence services much easier. They could concentrate their efforts on the remaining college campuses where their foreign nationals were located.[67] The court in *Gardels* notes, in reviewing the CIA's assessment of the risk to intelligence sources and methods resulting from disclosure, that

> [t]he test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role.[68]

The court goes on to quote an earlier opinion in another case: "[T]he purpose of national security exemptions to the FOIA is to protect intelligence sources before they are compromised and harmed, not after."[69]

The Glomar response must be used in a consistent manner to be effective. In other words, the CIA must use this response when the

---

66. *Id.* at 1104.

> The foreign intelligence entity could and probably would examine and take measures against those of its citizens who had studied at the university, could and would prevent its nationals from attending the university, and could and would curtail access and availability to academics from California (and other American schools) traveling abroad or seeking contact with foreign sources.

Id.

67. *Id.*

68. *Id.* at 1105 (citations omitted).

69. *Id.* at 1106 (quoting Halpern v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980)). "Nor should we reject the Agency's refusal to answer because it cannot prove conclusively that, if it responded, some intelligence source or method would in fact be compromised or jeopardized. This is necessarily a region for forecasts in which informed judgment as to potential future harm should be respected." *Id.*

alleged intelligence activity does not exist, as well as when it does, or the response would be equivalent to admitting that responsive records do in fact exist. The Glomar-type response is recognized in section 3.4 (f)(1) of Executive Order No. 12,356, which requires an agency to "refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under this Order."[70] When the CIA uses this response it does not initiate a search of its records systems, since the CIA is refusing either to confirm or deny the existence of responsive records. Therefore, in cases invoking the Glomar response, a Vaughn Index is not required.[71]

IV. EXEMPTION (b)(3)

Under the (b)(3) exemption, an agency's discretion to release information may be limited by other statutes.[72] The (b)(3) exemption now excludes from coverage information that is:

> 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.[73]

Two statutes that have been held to be qualifying statutes under the (b)(3) exemption are section 102 of the National Security Act of 1947, which requires the Director of Central Intelligence to pro-

---

70. 47 Fed. Reg. 14,880 (1982).

71. *Phillippi*, 546 F.2d at 1013. For a good discussion of those cases where *Vaughn* does not require a detailed affidavit but only "as complete a public record as possible" under the circumstances, see Hayden v. National Sec. Agency/Cent. Sec. Serv., 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). In *Hayden*, the court also addressed the question of whether opposing counsel have a right to be present at an in camera proceeding and holds that they have no such right. *See* Agee v. CIA, 517 F. Supp. 1335 (D.D.C.), *reh'g denied*, 524 F. Supp. 1290 (D.D.C. 1981) (CIA not required to supply additional information when to do so would force them to breach the exemption).

72. As originally enacted, (b)(3) applied only to matters statutorily exempted from disclosure. The Supreme Court, however, upheld a broad grant of discretion to the executive branch to withhold information in Federal Aviation Admin. v. Robertson, 442 U.S. 255 (1975). Congress believed that the Supreme Court's interpretation of the original language gave agency officials too much discretion to withhold information, and in response to the *Robertson* decision, amended FOIA to narrow the scope of this exemption. A good summary of the legislative history of the amendments is found in Allen v. CIA, 636 F.2d 1287, 1294-97 (D.C. Cir. 1980).

73. 5 U.S.C. § 552(b)(3) (1982).

tect "intelligence sources and methods from unauthorized disclosure,"[74] and section 6 of the CIA Act of 1949, which protects the nature of the CIA's functions.[75] The same procedural requirements associated with de novo judicial review that pertain to exemption (b)(1), such as the usual requirement of a Vaughn Index, specific and detailed affidavits, and the basic requirement that the government bear the burden of justifying an exemption, also pertain to exemption (b)(3).[76]

Finally, we would make a general observation concerning de novo judicial review. It seems clear from the legislative history of FOIA, the cases interpreting that legislation, and the debates in Congress leading up to the new CIA Information Act, that what is meant by this phrase is not very different, as it turns out, from that which President Ford wanted in lieu of the 1974 amendments that he vetoed. Congress has specifically provided in the legislative history that executive branch determinations of the need for secrecy are to be accorded substantial weight when considered by courts in the review process. As the Seventh Circuit observed in the *Stein* case:

> The court is limited to determining that the documents are the kinds of documents described in the government affidavit, that they have been classified in fact, and that there is a logical nexus between the information at issue and the claimed exemption. The court is in no position to second guess either the agency's determination of the need for classification or the agency's prediction of harm should release be permitted.[77]

---

74. 50 U.S.C. § 403(d)(3) (1982).

75. In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of . . . any . . . law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.

50 U.S.C. 403g (1982). For cases holding that § 403(d)(3) and § 403(a) are statutes qualifying as (b)(3) exemptions, see Gardels v. CIA, 689 F.2d 1100 (D.C. Cir. 1982); Allen v. CIA, 636 F.2d 1287 (D.C. Cir. 1980); Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980); Goland v. CIA, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976).

76. *See* Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978); *see also Allen*, 636 F.2d at 1294; Baker v. CIA, 580 F.2d 664, 668-69 (D.C. Cir. 1978); *Phillippi*, 546 F.2d at 1015-16 n.14.

77. Stein v. Department of Justice, 662 F.2d 1245, 1254 (7th Cir. 1981); *see also Gardels*, 689 F.2d at 1105. The *Gardels* court noted:

The Supreme Court has never specifically addressed the extent to which the Constitution requires that deference, in a FOIA case, be afforded to an executive branch decision to withhold information in the interest of national security, but it seems clear that the Constitution would require such deference notwithstanding the statutory requirement.[78] Only on four occasions has the CIA been ordered by a court to release documents that the agency maintained were protected from disclosure under the FOIA.[79] In *Holy Spirit Association for the Unification of World Christianity v. CIA*,[80] the plaintiff withdrew the document request after the Supreme Court granted certiorari, thereby mooting the constitutional question. In *CIA v. Sims*,[81] the Supreme Court, in a sweeping opinion, upheld the statutory authority of the Director of Central Intelligence to determine what is an intelligence source and method under the (b)(3) exemption.

In its opinion in *Sims*, the District of Columbia Court of Appeals had underestimated the importance of providing intelligence sources with an assurance of confidentiality that is as absolute as possible. Under the court's approach, the CIA would have been forced to disclose a source whenever a court determined, after the fact, that the CIA could have obtained the kind of information supplied without promising confidentiality. Such a forced disclosure of the identities of its intelligence sources could have had a serious impact on the CIA's ability to carry out its mission.

With the Supreme Court's decision in *Sims*, a potential intelligence source will not be faced with the prospect that judges, who have little or no background in the delicate business of intelligence gathering, might order his identity revealed only after examining

---

> The test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather the issue is whether on the whole record the agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role.

Id. (citation omitted).

78. *See generally* United States v. Nixon, 418 U.S. 683 (1974); United States v. Reynolds, 345 U.S. 1 (1952) and its progeny, *supra* note 18.

79. *See* Sims v. CIA, 709 F.2d 95 (D.C. Cir. 1983), *aff'd in part, rev'd in part*, 105 S. Ct. 1881 (1985); Holy Spirit Ass'n for the Unification of World Christianity v. CIA, 636 F.2d 838 (D.C. Cir. 1980), *vacated in part*, 455 U.S. 997 (1982); Peterzell v. Department of State, Civil No. 82-2853 (D.D.C. April 3, 1984) (unreported decision); Fitzgibbon v. CIA, 578 F. Supp. 704 (D.D.C. 1983).

80. 636 F.2d 838 (D.C. Cir. 1980), *vacated in part*, 455 U.S. 997 (1982).

81. 105 S. Ct. at 1881.

the facts of the case to determine whether the CIA, in hindsight, needed to promise confidentiality in order to obtain the information.[82]

Finally, after reviewing the requirements of de novo judicial review under FOIA, it seems apparent that Congress provided a standard of review that is de novo only in the sense that agencies are required to come forward with a reasonable basis for their belief that the information is properly classified and should not be divulged. As one court put it, citing the legislative history of the 1974 amendments:

> It appears that Congress did not intend the courts would make a true de novo review of classified documents, that is, a fresh determination of the legitimacy of the classification status of each classified document. Rather, Congress intended that the courts would review the sufficiency of the agency's affidavits and would require the agency to come forward with more information or with the documents themselves if the affidavits proved insufficient.[83]

One may reasonably ask whether President Ford did not achieve essentially the same standard of review that he advocated in vetoing the 1974 amendments. In our view, Congress constitutionally could not have prescribed a standard of review that would fail to accord a measure of deference to executive decisions concerning foreign affairs and national security. To do otherwise would be to raise serious separation of powers problems.[84]

V. The Central Intelligence Agency Information Act of 1984

On 15 October 1984, President Reagan signed into law H.R. 5164, the Central Intelligence Agency Information Act ("Act").[85] The Act is the culmination of years of effort by the CIA to achieve relief from the requirements of the Freedom of Information Act.[86] The Act does not amend FOIA, but rather adds a new title to the

---

82. *Sims*, 105 S. Ct. at 1891; *see also* McGehee v. CIA, 697 F.2d 1095, 1112 n.78, *vacated in part*, 711 F.2d 1076 (D.C. Cir. 1983); *Holy Spirit*, 636 F.2d at 844.

83. *Stein*, 662 F.2d at 1253.

84. *See Nixon*, 418 U.S. 683; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the steel seizure case); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

85. Pub. L. No. 98-477, 98 Stat. 2209 (1984).

86. 5 U.S.C. § 552 (1982).

National Security Act of 1947[87] to exempt certain operational files of the CIA from the search, review, publication, and disclosure requirements of FOIA.

We turn now to a review of the purpose and legislative history of the Act and an examination of the major provisions in the Act. In order to confine the length of this article to manageable limits, we will rely, to the extent possible, on frequent citations to printed Congressional committee hearings and reports that form the legislative history of the Act.[88]

A. *Purposes of The Act*

The statutory exemption for operational files is intended to benefit both the CIA and the public.[89] The benefit to the CIA is relief from the requirement to search and review its operational files, as defined in the Act, in response to a FOIA request. For security reasons, CIA records systems are decentralized and strictly compartmentalized. A search for records responsive to a FOIA request can require the search of numerous records systems and the pulling together of responsive documents. This process defeats the purpose of compartmentalization. In addition, the review of responsive documents must be done by skilled intelligence officers, thus diverting them from their intelligence duties. Years of experience had shown that the inevitable result of these efforts was the release of very little, if any, significant information from these files

87. 50 U.S.C. §§ 401-26 (1982).

88. *See Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency: Hearing before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 98th Cong., 2d Sess. (1984) [hereinafter *House Intelligence Comm. Hearing*]; *CIA Information Act: Hearing on H.R. 5164 before the Government Information, Justice, and Agriculture Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. (1984) [hereinafter *Government Operations Hearing*]; *An Amendment to the National Security Act of 1947: Hearings on S. 1324 before the Senate Select Comm. on Intelligence*, 98th Cong., 1st Sess. (1983) [hereinafter *Senate Intelligence Comm. Hearing*]; H.R. REP. No. 726, pt. 1, 98th Cong., 2d Sess. (1984) (report to accompany H.R. 5164) [hereinafter *House Intelligence Comm. Report*]; H.R. REP. No. 726, pt. 2, 98th Cong., 2d Sess. (1984) (report to accompany H.R. 5164) [hereinafter *Government Operations Report*]; S. REP. No. 305, 98th Cong., 1st Sess. (1983) [hereinafter *Senate Intelligence Comm. Report*].

89. The original and earliest version of the bill in the 98th Cong., S. 1324, contained a "Findings and Purposes" section which was deleted in the later House versions. *See Senate Intelligence Comm. Report supra* note 88, at 1-2; 129 CONG. REC. S16742 (daily ed. Nov. 17, 1983). For committee statements as to the purpose and benefits of the legislation, see *Senate Intelligence Comm. Report, supra* note 88, at 10-17; *House Intelligence Comm. Report, supra* note 88, at 4-6; *Government Operations Report, supra* note 88, at 4, 5-8.

since the material was usually exempt under (b)(1) or (b)(3), and occasionally under other exemptions. The definition of operational files makes it clear that the purpose is not to provide a total exclusion for the CIA; furthermore, there are important exceptions to the exemption for operational files.[90] The Act is also intended to provide a basis for the CIA to extend further assurances to its sources that the United States government is committed to and capable of protecting their identities and the confidentiality of their relationships.[91]

The public is meant to benefit from the Act through improved processing of FOIA requests by the CIA. By eliminating unproductive search and review of operational files, the Act seeks to reduce the current two to three year FOIA backlog at the CIA to bring about the speedier processing and release of responsive information that does not fall within one of the nine withholding exemptions of the FOIA.[92]

B. *Legislative History*[93]

Efforts by the CIA to achieve relief from FOIA began in the 96th Congress. During 1979 and 1980, several bills were introduced that contained provisions for partial relief for the intelligence agencies or for the CIA. The House and Senate Intelligence Committees and a subcommittee of the House Government Operations Committee held hearings on the bills.[94] At these hearings, the CIA testified in support of an amendment to section 6 of the Central Intelligence Agency Act of 1949[95] giving the Director of Central

90. *See infra* notes 139-72 and accompanying text.

91. The authors view this protection of source identities as a separate and distinct issue from the question of the definition of a source, considered by the United States Supreme Court in *Sims II*. *See supra* notes 81-82 and accompanying text.

92. *See* 5 U.S.C. § 552(b) (1982).

93. For a more detailed account of the legislative history, see *Senate Intelligence Comm. Report*, *supra* note 88, at 5-10, and *House Intelligence Comm. Report*, *supra* note 88, at 6-8.

94. *See Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities: Hearing before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. (1979) [hereinafter *FOIA Impact Hearing*]; *The Freedom of Information Act: Central Intelligence Agency Exemptions, Hearings before the Subcomm. on Government Information and Individual Rights of the House Government Operations Comm.*, 96th Cong., 2d Sess. (1980); *National Intelligence Act of 1980: Hearing before the Senate Select Comm. on Intelligence*, 96th Cong., 2d Sess. (1980); *The National Intelligence Act of 1980: Hearings on H.R. 6588 before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 2d Sess. (1980).

95. 50 U.S.C. § 403g (1982).

Intelligence (DCI) the authority to exempt from search, review, and disclosure all information contained in certain designated files of United States intelligence agencies. The concept of partial FOIA relief through the DCI's designation of specific files was one that appeared in various legislative forms in the 96th and 97th Congresses and ultimately formed the basis of the legislation enacted in the 98th Congress.

The CIA-proposed amendment to section 6 was included in S. 2216, the "Intelligence Reform Act of 1980," but was dropped from the bill as reported by the Senate Intelligence Committee.[96] A similar proposal, limited to CIA files, was included in S. 2284, the National Intelligence Act of 1980. In the House, H.R. 6588, the National Intelligence Act of 1980, contained a proposal similar to the CIA's, and H.R. 5129 used the same approach but limited the designation to CIA and National Security Agency (NSA) files. Following hearings by these three committees, no further action was taken during the 96th Congress.

In the 97th Congress, the only congressional consideration of FOIA relief for the CIA took place in the Senate. Early in the first session S. 1273, the "Intelligence Reform Act of 1981," was introduced. It embodied the same provisions as section three of S. 2216 in the 96th Congress. The original CIA proposal, which included other intelligence agencies or components, was again the subject of a hearing by the Senate Intelligence Committee.[97] In testifying for the CIA, Deputy Director Bobby Inman stated that while S. 1273 was "a more promising approach" than attempting to strengthen the withholding exemptions in FOIA, the best legislative remedy for the problems posed by FOIA would be to exclude totally the CIA and the NSA from the requirements of FOIA.[98]

The desire for a total exclusion from FOIA was voiced again several weeks later by Director of Central Intelligence William J. Casey in his testimony before a subcommittee of the Senate Judiciary Committee.[99] The subcommittee had before it several bills seeking to amend FOIA,[100] including S. 1235,[101] which sought to

---

96. S. REP. No. 896, 96th Cong., 2d Sess. (1980) (report to accompany S. 2216).

97. *See Intelligence Reform Act of 1981: Hearing before the Senate Select Comm. on Intelligence*, 97th Cong., 1st Sess. (1981).

98. *Id.* at 12, 16-17.

99. *See Freedom of Information Act: Hearings before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. (1981) [hereinafter *FOIA Hearing*].

100. *See id.* at 4-13, 19-29, 30-52, 53-70 (reprinting text of S. 587, S. 1247, S. 1730, and S.

provide partial relief to the CIA through amendments to FOIA.[102] While the Director testified that the partial relief bills which had been introduced "would all be most helpful" in reducing the burdens posed by FOIA, he advocated total exclusion for CIA, NSA, and the Defense Intelligence Agency as the only way to eliminate the perception of sources of information that the United States could not assure the confidentiality of their identities.[103] Neither S. 1273 nor S. 1235 were reported out of committee.

The first bill introduced in the 98th Congress was S. 1324, the "Intelligence Information Act of 1983," introduced in May 1983. S. 1324 clearly flowed from the concepts of S. 1273 and its predecessors. However, DCI designation of files was limited to certain operational files of three CIA components. Given the adverse public reaction and congressional inaction in response to the total exclusion proposal in the 97th Congress, CIA Deputy Director John N. McMahon testified in total support of S. 1324 before the Senate Intelligence Committee in July.[104] In his testimony, Deputy Director McMahon made it clear that the CIA still preferred total exclusion but was prepared to accept this proposed legislation as an acceptable compromise given the difficulties the Agency was experiencing with FOIA.[105] It was also made clear in the subsequent question and answer session that the CIA would not seek an expansion of the relief given in this bill in the near future.[106]

The questions and issues raised during the two days of hearings resulted in lengthy negotiations between Senate Intelligence Committee members and staff, representatives of the CIA, and various public interest group members. This process produced an amendment in the nature of a substitute that was unanimously approved by the Committee in October.[107] S. 1324, as reported out of Committee, then passed the Senate by unanimous consent late in November 1983.[108]

1751).

101. *Id.* at 14-18.

102. The Senate Judiciary Committee had jurisdiction over S. 1235 because it proposed amendments to FOIA itself, rather than to the CIA Act of 1949 over which the Senate Intelligence Committee had jurisdiction.

103. *FOIA Hearing*, *supra* note 102, at 578.

104. *See Senate Intelligence Comm. Hearing*, *supra* note 91, at 5-31.

105. *Id.* at 20, 24.

106. *Id.* at 25.

107. *Id.* at 111-29.

108. *See* 129 CONG. REC. S16742-46 (daily ed. Nov. 17, 1983).

In June, legislation had been introduced in the House. H.R. 3460, the "Intelligence Information Act of 1983," exempted certain operational files of the CIA but differed from S. 1324 in several respects.[109] It did not use a DCI designation process as the previous bills had, it contained a definition of "operational files", and it added another exception to the exemption for operational files. In November 1983, H.R. 4431 was introduced, which was a companion bill to S. 1324 as reported by the Senate Intelligence Committee.

Early in the second session, the Subcommittee on Legislation of the House Intelligence Committee held a hearing on these two bills and S. 1324 as passed by the Senate. Deputy Director McMahon again testified on behalf of the CIA. During the course of his testimony, some of the differences between the bills were explored, as well as a judicial review provision that had been added by the Senate Intelligence Committee.[110] The testimony did not indicate a clear preference for one bill over the others. The Deputy Director did state that S. 1324, as reported by the Senate Intelligence Committee, contained amendments "achieved through good faith negotiations and compromise on the part of all parties involved."[111] The hearing made it clear that there were still unresolved issues and differences of opinion concerning all three bills.[112]

Following the hearing, further negotiations took place between House Intelligence Committee members and staff, the CIA, and interested non-governmental organizations. In March, the bipartisan introduction of H.R. 5164 represented a blending of S. 1324 and H.R. 3460, with numerous additional changes that reflected the status of the negotiations at that point.[113] The DCI designation process was included,[114] and the judicial review provisions had been expanded. For the first time there was a requirement that the DCI review the file exemptions made under the legislation (now entitled the "Central Intelligence Agency Information Act") at least once every ten years to determine whether any exemptions could be removed. Furthermore, the retroactivity provision in the

---

109. *House Intelligence Comm. Hearing, supra* note 88, at 91-94.

110. *See id.* at 4-29.

111. *Id.* at 15.

112. *See, e.g., id.* at 46-65 (testimony of Mark H. Lynch, Counsel, Americal Civil Liberties Union).

113. H.R. 5164, 98th Cong., 2d Sess. (1984), *reprinted in Government Operations Hearing, supra* note 88, at 2-9.

114. This authority of the DCI was no longer phrased in terms of authority to "designate" files, but was now an authority to "exempt" operational files.

bill[115] was now limited, in the area of FOIA litigation against the CIA, to cases filed on or after February 7, 1984.[116] The negotiations continued and on April 11, 1984, the full House Intelligence Committee unanimously adopted an amendment in the nature of a substitute bill and favorably reported H.R. 5164 as amended.[117] The further changes incorporated into the substitute bill pertained to the judicial review provisions.

H.R. 5164, as reported, was now the product of a lengthy legislative process involving both intelligence oversight committees. However, unlike the Senate, there was a second committee with primary jurisdiction over the bill in the House. In May 1984, the Subcommittee on Government Information, Justice, and Agriculture of the Committee on Government Operations held a hearing on H.R. 5164.[118] CIA Executive Director Charles A. Briggs testified in support of the bill[119] and for the first time the American Civil Liberties Union (ACLU) testified in total support of the legislation, urging enactment of H.R. 5164 as reported by the House Intelligence Committee without further amendment. The Subcommittee did, however, amend the reported bill to include an additional reporting requirement for the CIA and, more importantly, an amendment to the Privacy Act to prevent use of the Privacy Act as a (b)(3) withholding statute under FOIA.[120] The bill as amended by the Subcommittee was adopted by the full Government Operations Committee and, with one dissenting vote, was ordered reported on July 31, 1984.[121]

On September 17, 1984, the House debated H.R. 5164, as reported by the Government Operations Committee, under suspen-

---

115. H.R. 5164, 98th Cong., 2d Sess. § 4 (1984), *reprinted in Government Operations Hearing, supra* note 88, at 2-9.

116. Prior to this, the House and Senate bills in the 98th Congress had provided for the legislation to be effective upon enactment and to apply to all pending FOIA requests and civil actions.

117. For the bill as reported, see *House Intelligence Comm. Report, supra* note 88, at 2-4.

118. *See Government Operations Hearing, supra* note 88.

119. *Id.* at 11-37.

120. The amendment to the Privacy Act had been previously introduced in the House as H.R. 4696. The CIA did not use the Privacy Act as a (b)(3) withholding statute under FOIA so the amendment would have no impact on CIA processing of FOIA requests. For this reason, there will be no further discussion of this provision in the legislation. For an explanation as to the reason for the amendment, see *Government Operations Report, supra* note 88, at 12-17.

121. For H.R. 5164 as reported, see *Government Operations Report, supra* note 88, at 1-4.

sion of the rules.[122] Two days later the House overwhelmingly passed H.R. 5164 as reported by a vote of 369 to 36.[123] Since the House-passed version of the legislation contained in H.R. 5164 differed from the Senate-passed version in S. 1324, H.R. 5164 had to be referred to the Senate. On September 28, the Senate voted unanimously to pass H.R. 5164,[124] and on October 15, President Reagan signed it into law.

C. *Major Provisions*

1. Exemption of Certain Operational Files and Subsection 701(c) Exceptions

The new subsections 701(a) and (b) of the National Security Act of 1947 give the Director of Central Intelligence authority to exempt certain categories of files from the requirements of FOIA. As mentioned earlier, this concept is not a new one. The main variable over the years has been whether the legislation would exempt files located in all the intelligence agencies or only in certain ones. Once the conclusion was reached that a total exclusion from FOIA for any intelligence agency was not politically feasible, the focus was once again on the partial relief approach contained in the earlier bills. The question then became whether these approaches were still adequate and, if so, for which agencies.

There was little doubt that FOIA was posing problems for all the intelligence agencies. However, in time, two other factors became clear. First, the CIA had the largest volume of requests and a tremendous backlog. Whenever a FOIA request involved search and review by the Directorate of Operations within the CIA, a final response was two to three years in coming. Second, the CIA's strictly compartmentalized records system made it possible to identify most readily those files that would fall within the proposed categories for exemption. Therefore, the decision was made within the Reagan Administration to support legislation that would grant partial relief only to the CIA.[125]

The decision to limit the legislation to the CIA was discussed during the Senate Intelligence Committee hearing on S. 1324. In

---

122. *See* 130 CONG. REC. H9621-31 (daily ed. Sept. 17, 1984).
123. *See* 130 CONG. REC. H9817-18 (daily ed. Sept. 19, 1984).
124. *See* 130 CONG. REC. S12395-97 (daily ed. Sept. 28, 1984).
125. *See Senate Intelligence Comm. Hearing, supra* note 88, at 26 (statement of Chairman Goldwater).

one exchange, Deputy Director McMahon was asked whether S. 1324 was "a camel's nose under the tent" and whether the White House would be seeking further amendments to achieve relief for other agencies in the intelligence community.[126] Deputy Director McMahon replied that the White House would not seek them, and if such efforts were made, they "would not be sanctioned."[127] As a result of confining the relief to the CIA, the previous DCI exemption authority was refined so as to be limited to certain operational files located in three separate components of the CIA. Subsection 701(a) of the new Title VII gives the DCI the authority to exempt operational files of the CIA from the search, review, publication, and disclosure requirements of FOIA. Subsection 701(b) then defines "operational files" for the purposes of Title VII. The three-part definition spells out which categories of files may be exempted within each component. The exemptions are to be based on the function of the files rather than on the files' specific contents. Paragraph 701(b)(1) allows only those files belonging to the Directorate of Operations "which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services" to be exempted. Paragraph 701(b)(2) defines operational files within the Directorate for Science and Technology to mean those files "which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems." Paragraph 701(b)(3) defines operational files within the Office of Security to be those "which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources."

What do these definitions allow to be exempted and what do they leave fully subject to FOIA? The intent of these definitions is to allow files that document intelligence sources and methods to be exempt. Information detailing foreign intelligence activities or counterintelligence activities has proven to be the most difficult and time-consuming information to review, and after two to three years of processing most, if not all, of the information can be withheld under the exemptions afforded in FOIA. Which foreign governments or foreign intelligence or security services cooperate with

126. *Senate Intelligence Comm. Hearing, supra* note 88, at 25; *see also House Intelligence Comm. Report, supra* note 88, at 8.

127. *Senate Intelligence Comm. Hearing, supra* note 88, at 25.

the United States is information that must be, and has been, protected under FOIA. Information detailing scientific and technical systems available for the collection of foreign intelligence or counterintelligence, and how and where they are used, is as sensitive as any information the CIA has, and is clearly withholdable under the exemptions in FOIA. In all of these areas, security investigations must be performed to support these activities. Information documenting an investigation undertaken to determine whether potential sources are suitable for either foreign intelligence or counterintelligence purposes is information relevant to the activities themselves and, as such, is withholdable under FOIA. Therefore, exempting operational files that "concern the intelligence process"[128] will not result in the loss of information to the public.[129] It will, however, relieve the CIA of the burden of requiring trained intelligence officers to take time away from their assigned intelligence duties to review documents word for word that ultimately cannot be released.

If information regarding the conduct and management of intelligence activities, as set forth in the definition of operational files, is to be exempted, what type of information remains accessible? An important distinction was made between files documenting the intelligence process and files documenting the intelligence product, with the function of the latter being "to store the intelligence gathered from human and technical sources."[130] This distinction came about as a result of the debate questioning what type of information belonging to the CIA does the public have a legitimate interest in having access to for purposes of search and review and possible release. Agreement was reached on the need to withhold information detailing the intelligence process. On the other hand, information gathered through the intelligence process, i.e., the intelligence product, is information of greater value to the public. It is the intelligence product that is shared with the President, the National Security Council, other Executive Branch agencies and Congress for their use in making decisions affecting the national security and foreign policy of the United States. After close congressional scrutiny, it was accepted that the filing systems and filing practices of the CIA made it possible to exempt operational files docu-

128. *House Intelligence Comm. Report*, *supra* note 88, at 20.

129. *Id.* at 17-18; *see also House Intelligence Comm. Hearing*, *supra* note 88, at 13 (testimony of Deputy Director McMahon).

130. *House Intelligence Comm. Report*, *supra* note 88, at 21.

menting the intelligence process while leaving the intelligence product accessible to the public through FOIA.

To understand why this is so, it is necessary to explain the two types of intelligence information and how they are handled by the CIA. Information coming to the CIA from the field is known as "raw intelligence." It is information gathered from a CIA source. Usually it can be written so as to protect the source's identity. This raw intelligence is included in the appropriate operational file, a file that will be exempted under the Act. The fact that copies of raw intelligence reports are also disseminated to and retained by the analysts in the Directorate of Intelligence for their use in preparing "finished intelligence" is critical here. Finished intelligence is comprised of a variety of reports, studies, and publications and it is routinely the finished intelligence product that is utilized by our policymakers. The files of the Directorate of Intelligence cannot be exempted under the new Act. Therefore, both raw and finished intelligence remain accessible to the public through the files of the Directorate of Intelligence. As pointed out in the House Intelligence Committee Report:

> [I]n this case the crucial feature of the CIA filing system is the practice of disseminating copies of raw intelligence reports for storage in the files of the Directorate of Intelligence; the Committee expects the CIA to continue this practice. This practice is, of course, essential to the very mission of the CIA; it would be useless to collect information and then fail to share it with analysts and policymakers. CIA dissemination practices thus ensure continued availability of raw intelligence.[131]

Another area identified for continued accessibility by the public was information concerning policy issues, including operational policy matters, considered at the executive levels of the CIA. Again, a close inspection of the CIA's filing practices showed that it was possible for this type of information to remain accessible. First of all, decisions at the executive level would involve one or more of the following: the Director or Deputy Director, Executive Director, General Counsel, Comptroller, Deputy Director for Administration, Deputy Director for Intelligence, Deputy Director for Operations, Deputy Director for Science and Technology, as well as other senior CIA officials. Any documents given to the Director,

131. *Id.* at 18-19.

Deputy Director, or Executive Director by other Agency officers on any matter are filed in the CIA's Executive Registry, which remains subject to search and review under the Act. Thus, all documents on policy issues considered at the executive level will be accessible through the Executive Registry. Of course, all the CIA files not falling within the definition of operational files remain subject to search and review and any policy documents in these files remain accessible to the extent permitted by FOIA. In the event that a document is so sensitive that it is returned to an exempted operational file after it has been seen by the Director or Deputy Director, that document will still be accessible through the Executive Registry. Internal regulations require the Executive Registry to maintain a reference for any such document with sufficient information to indicate where the document is being stored, thus ensuring its future retrievability for any purpose, including FOIA. As stated in the House Intelligence Committee Report:

> The fact that raw intelligence reports and policy documents are accessible through index and retrieval systems located in the Directorate of Intelligence and the Office of the Director and Deputy Director has made it possible to refine the standards for exemption of CIA operational files in the bill to ensure that enactment of the bill will preserve the availability to the public of CIA information currently releasable to the public.[132]

The definition of operational files contains an exception after paragraph 701(b)(3) which states that "files which are the sole repository of disseminated intelligence are not operational files." Again, this provision is designed to correspond to unique CIA filing practices. The intent of the definitional exception is to preclude the exemption of files containing extremely sensitive intelligence disseminations which are stored solely in the Directorate of Operations after having been read by the appropriate senior officials. These intelligence disseminations are the exception rather than the rule. However, since the intent of the legislation is to continue public accessibility to the intelligence product, this limited group of files is specifically excluded from the definition of operational files to ensure that they remain subject to FOIA search and review.[133]

---

132. *Id.* at 19.
133. *See id.* at 22-23.

There exist three exceptions to the overall exemption of operational files from search and review for information in response to a FOIA request. These exceptions, found in subsection 701(c), define three types of requests that can trigger the search and review of all CIA files, regardless of exemption by the DCI under subsection 701(a).

The first exception, provided in paragraph 701(c)(1), was contained in all the Senate and House versions of the legislation. It states that, notwithstanding the exemption for operational files contained in subsection 701(a), the CIA must continue to search and review exempted operational files for information that concerns:

> (1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of title 5, United States Code (Freedom of Information Act), or section 552a of title 5, United States Code (Privacy Act of 1974).

For several years, the stated policy of the CIA has been to search all of its files upon request by United States citizens or permanent resident aliens for information about themselves. For example, in 1979 CIA Deputy Director Carlucci testified before the House Intelligence Committee:

> At the same time we are also conscious of the competing needs of our U.S. citizens whose support and confidence we must maintain. It is for this reason that we believe that our files should continue to be accessible to American citizens and permanent resident aliens, subject to existing FOIA exemptions, to the extent that information concerning such persons may be contained in our files.[134]

When Director Casey testified in 1981 in support of a total exclusion for CIA, NSA, and DIA from FOIA, he ended his testimiony by stating:

> Mr. Chairman, I would simply like to add this morning that nothing which I have said would indicate any lessening in our belief that individual Americans should continue to be able to determine whether or not an intelligence agency holds information on them

134. *FOIA Impact Hearing, supra* note 94, at 7.

> and to obtain this information when security considerations permit. I wish to state categorically that the intelligence community would continue full compliance with the Privacy Act, even if totally exempted from the Freedom of Information Act.[135]

This exception is the easiest of the three exceptions to understand. Whenever the CIA receives a request from a United States citizen or a permanent resident alien, a search will be made of all CIA files and a review will be made of all, if any, responsive information without exception.[136] Such an exception reflected not only the CIA's position, but also the political reality that Congress would never seriously consider cutting off an individual's ability to request information about himself or herself from the CIA or any other intelligence agency.

The second exception, paragraph 701(c)(2), requires that all files continue to be searched and reviewed for information concerning "any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5, United States Code (Freedom of Information Act)." This exception was contained in S. 1324 as introduced and reported and the CIA testified in support of the provision at all three hearings.[137] The Act does not contain a definition of "special activity." However, the House Intelligence Committee Report defines the term for purposes of paragraph 701(c)(2) to mean "any activity of the United States Government, other than an activity intended solely for obtaining necessary intelligence, which is planned and executed so that the role of the United States is not apparent or acknowledged publicly, and functions in support of any such activity, but not including diplomatic activities."[138]

The second exception recognizes that there are occasions when the CIA cannot properly use the Glomar response. When the fact of the existence or non-existence of a special activity is no longer properly classifiable, the CIA must undertake a search for any re-

---

135. *FOIA Hearing*, *supra* note 99, at 581.

136. *House Intelligence Comm. Hearing*, *supra* note 88, at 13; *Senate Intelligence Comm. Hearing*, *supra* note 88, at 14; *see also House Intelligence Comm. Report*, *supra* note 88, at 23.

137. *Government Operations Hearing*, *supra* note 88, at 22-23; *Senate Intelligence Comm. Hearing*, *supra* note 88, at 14; *House Intelligence Comm. Report*, *supra* note 88, at 13; *see also Senate Intelligence Comm. Hearing*, *supra* note 88, at 24-25.

138. *House Intelligence Comm. Report*, *supra* note 88, at 28. This definition followed the Senate Intelligence Committee Report definition found on page 25.

sponsive records and then report either that it has no responsive records or that it is reviewing responsive records for possible release. When the CIA undertakes such a search, this exception ensures that all CIA files, even exempted operational files, will be subject to the search.[139]

It is important to understand that this exception is not meant to have any impact on what constitutes an acknowledgement of the fact of the existence or non-existence of a special activity. As stated in the House Intelligence Committee Report, "[t]he Committee emphasizes that nothing in paragraph 701(c)(2) in any way changes the statutory and case law concerning whether the existence of a special activity is exempt from disclosure under the FOIA."[140]

The third exception differs from the previous two exceptions in that it was not contained in the original version of the legislation considered in the 98th Congress, i.e., S. 1324 as introduced. Paragraph 701(c)(3) requires continued search and review of exempted operational files for information concerning:

> the specific subject matter of an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence, or the office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.[141]

The issue of continued public access to information concerning alleged intelligence abuses and improprieties was raised several times during the two days of hearings before the Senate Intelligence Committee. In his testimony before the committee, Deputy Director McMahon stated that should there be an investigation of an alleged illegality or impropriety relating to the conduct of an intelligence activity, the

> information relevant to the subject matter of the investigation

---

139. For the Intelligence Committee discussions of the exception, see *Senate Intelligence Comm. Report*, *supra* note 88, at 24-25, and *House Intelligence Comm. Report*, *supra* note 88, at 27-28.

140. *House Intelligence Comm. Report*, *supra* note 88, at 28.

141. 50 U.S.C. § 431(c)(3)(Supp. III 1985).

> would be subject to search and review in response to an FOIA request because this information would be contained in files belonging to the Inspector General's Office, for example, and these files cannot be designated under the terms of this bill. The same would be true for similar reasons, Mr. Chairman, if under the Congressional Oversight Act a senior intelligence community official reports an illegal intelligence activity to this Committee or to the House Intelligence Committee.[142]

Later in the hearing, Chairman Barry Goldwater asked whether the CIA would

> support an amendment which would make it clear that designated files will be subject to search and review if they concern any intelligence activity which the DCI, the Inspector General, or General Counsel of the Agency has reason to believe may be unlawful or contrary to Executive order or Presidential directive.[143]

Deputy General Counsel Ernest Mayerfeld replied that in his view

> such a specific item to be legislated would be unnecessary by the very definition. If the Inspector General or the General Counsel or the Director's office has reason to believe that something may be unlawful, there is documentation on this particular matter located in those files, and they are not in designated files.[144]

On the second day of hearings, Senator Daniel K. Inouye raised the issue again. In his prepared statement, he reiterated CIA assurances that information concerning intelligence abuses would be available in non-designated files. However, he went on to state:

> Yet there is some ambiguity about this explanation, since the files maintained by these offices might not contain all the details of the activities in question, but simply the procedural records of the investigating office. We may wish to specify, in the bill, therefore, that no records on intelligence abuses could be exempted.[145]

In his testimony on behalf of the ACLU, Mark Lynch indicated that this was one of two areas where they were urging amendment.

---

142. *Senate Intelligence Comm. Hearing, supra* note 88, at 15.
143. *Id.* at 29-30.
144. *Id.* at 30.
145. *Id.* at 55.

The concern was that in doing the investigation, the Inspector General or the Office of General Counsel might send a representative to the component involved to conduct the review. Therefore, relevant documents in exempted operational files might not be copied and available through the Inspector General or Office of General Counsel files. To avoid this, the ACLU proposed a third proviso, i.e., an exception, to "trigger a search of the underlying relevant documents, wherever they may be located in the Agency."[146] When later asked by Senator Patrick Leahy whether the ACLU felt the concerns regarding access to information concerning alleged intelligence abuses or improprieties could be met "with clear language in the legislative history," Mr. Lynch responded:

> I think it would be preferable to spell it out in the legislation. I think there should be another proviso as there is for information responsive to first party requests, information about covert operations the existence of which is no longer classified. There ought to be a further provision in there, information concerning the subject of an investigation for impropriety or illegality. Something along those lines I think is essential.[147]

The Committee agreed and amended the bill. S. 1324 was structured so that the exception for special activities was contained in a proviso to the designation authority in subsection 701(a). The committee amended the proviso to also require continued search and review of designated files

> for information reviewed and relied upon in an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Office of General Counsel of the Central Intelligence Agency, or the Office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive in the conduct of an intelligence activity.[148]

In the Senate Intelligence Committee Report it was made clear that this provision was intended to ensure "that all materials relevant to the subject matter of the investigation which were reviewed and relied upon by those who conducted the investigation will be

146. *Id.* at 69.
147. *Id.* at 77.
148. S. 1324, 98th Cong., 1st Sess., 129 CONG. REC. S16742 (daily ed. Nov. 17, 1983).

subject to search and review, even if stored solely in designated files."[149] The report went into detail concerning how allegations of abuse or impropriety made by an employee or by a person outside the Agency are handled within the CIA.[150] It is evident from the language of the proviso itself, as well as the report language, that the committee was trying to address the concerns that had been raised in a way that would not seriously detract from the relief given in the bill. The sectional analysis of the proviso ended by stating the following:

> However, the proviso is not intended to open up all designated files or even an entire file because portions contain information relevant to an activity that was the subject of an investigation. The Committee's intent is rather that only those directly relevant files or portions of files shall be reviewed.[151]

It became apparent during the hearing before the House Intelligence Committee the following February that the Senate-passed language in the proviso was a matter of concern. Deputy Director McMahon again stressed in his testimony the availability of information concerning an alleged impropriety or illegality through the files of the Director's office, the Inspector General's office or the Office of General Counsel. In an apparent reference to the language in S. 1324 and the identical language in H.R. 4431, Deputy Director McMahon testified that "any information found relevant by the investigating office but still contained in exempted operational files would be subject to search and review in response to an FOIA request."[152]

The day after the Senate Intelligence Committee hearings concluded, Representative Romano Mazzoli, Chairman of the Subcommittee on Legislation of the House Intelligence Committee, introduced H.R. 3460.[153] Instead of requiring continued search and review of exempted operational files for information "reviewed and relied upon" in an investigation, the Mazzoli bill exception required search and review for information concerning "the subject of an investigation." All three bills, however, listed the same group

149. *Senate Intelligence Comm. Report*, *supra* note 88, at 26.
150. *See id.* at 26-27.
151. *Id.* at 28.
152. *House Intelligence Comm. Report*, *supra* note 88, at 14.
153. *See supra* note 114 and accompanying text.

of investigating bodies. During the testimony of Mary C. Lawton, Counsel for Intelligence Policy for the Department of Justice, Rep. Mazzoli noted that the list did not specifically include the Department of Justice, and he asked whether she believed the list should be extended to include them.[154] Ms. Lawton replied that she did not think that the practical effect would be very different since "normally CIA could investigate internally before referring it to us for further investigation," although she did state that it appeared "rather odd that the law enforcement branch is excluded."[155] As a result of this exchange, the Department of Justice was included in H.R. 5164 when it was introduced in March. It remained in the bill as reported by the House Intelligence Committee and subsequently enacted. The House Intelligence Committee Report discusses the investigative responsibilities of the Department of Justice as they relate to the Intelligence Community agencies and states that all files of the CIA "will remain subject to FOIA search and review for information concerning the specific subject matter of such investigations for impropriety or illegality in the conduct of intelligence activities."[156]

While the CIA officials did not indicate in their testimony a strong preference for one bill over another in connection with the language concerning the investigations exception, the ACLU did. Mark Lynch testified that the Mazzoli language was "quite superior" to that contained in the Senate bill.[157] He explained the reasoning for their strong preference as follows:

> Now, the difference is that if an investigator happens to overlook a document, he has not reviewed or relied upon it, and it would not be covered by the Senate bill, whereas the Mazzoli bill will cover all documents which concern the subject of the investigation, irrespective of whether it has been actually looked at or overlooked through inadvertence or whatever other reason.[158]

Subsequently Rep. Mazzoli returned to this exchange and asked Mr. Lynch whether the difference in language between the bills was really "worth fighting over."[159] Rep. Mazzoli opined that " 're-

154. *House Intelligence Comm. Hearing, supra* note 88, at 31.
155. *Id.*
156. *House Intelligence Comm. Report, supra* note 88, at 30.
157. *House Intelligence Comm. Hearing, supra* note 88, at 49.
158. *Id.*
159. *Id.* at 58.

lied upon' may be too narrow [but] 'concerning the subject' is as broad as the universe."[160] After Mr. Lynch reiterated his concern that the investigators might overlook relevant information, Rep. Mazzoli stated that he felt that the language in his bill (H.R. 3460) "seems to be just a little bit murky and amorphous, and it may lead to more problems."[161]

Rep. Mazzoli's concerns led to further negotiations following the hearing. The goal was to craft the exception to include any information that might have been overlooked and yet preclude an expansive interpretation as to which exempted operational files would have to be searched and reviewed under the exception. The language finally agreed upon was incorporated into H.R. 5164 and, as cited above, required continued search and review of exempted operational files for information concerning "the specific subject matter of an investigation." The House Intelligence Committee Report again outlined the procedures within the CIA for investigating an alleged impropriety or illegality in connection with an intelligence activity.[162] In discussing the intent behind the revised language, the House Intelligence Committee Report stresses that "[t]he key requirement is that information concern the specific subject matter of the investigation, not that the information surfaced in the course of the investigation."[163] The report then goes on to state:

> The specificity requirement in the phrase 'specific subject matter of the investigation' tailors the scope of information remaining subject to the FOIA process to the scope of the specific subject matter of the investigation. This tailoring was intended to avoid the possibility of an unreasonably expansive interpretation of paragraph 701(c)(3) to include as subject to search and review information wholly unrelated to any question of illegality or impropriety.[164]

There is a second and equally important phrase contained in the exception that should be noted. For the exception to apply, the investigation must concern a possible impropriety or illegality "in the conduct of an intelligence activity." The intent was to exclude investigations of possible criminal conduct by CIA employees, such

160. *Id.*
161. *Id.*
162. *House Intelligence Comm. Report*, *supra* note 88, at 28-29.
163. *Id.* at 30-31.
164. *Id.* at 31.

as stealing office equipment, which has no relationship to an intelligence activity. The phrase is intended to make it "clear that the continued obligation to search and review exempted operational files for information concerning an investigation for impropriety or illegality extends only with respect to an impropriety or illegality that has a nexus to an intelligence activity."[165]

Occasionally, in the context of a FOIA lawsuit, the issue arises as to whether certain documents are agency records or congressional documents.[166] This is an important distinction since congressional documents are not subject to FOIA. The House Report specifically addresses this issue in connection with the investigations exception since it covers investigations by the intelligence committees of the Congress. The committee's views are set forth in the following statement:

> The Committee emphasizes that nothing in paragraph 701(c)(3) is intended to affect the definition of agency records subject to request under the FOIA, as distinguished from congressional documents not subject to request under the FOIA, or to waive in any way the prerogatives of the House of Representatives and the Senate to maintain control over, and confidentiality of, documents generated in the course of congressional activities.[167]

2. Internal Dissemination of Information Within the CIA

Subsection 701(d) contains three paragraphs designed to address the internal dissemination of information that has been transferred from exempted to nonexempted operational files. The provisions in paragraphs 701(d)(1) and (2) were contained in some manner in all of the House and Senate bills. Paragraph 701(d)(1) states that nonexempt files "which contain information derived or disseminated from exempted operational files" will continue to be subject to search and review. The intent of the paragraph is to ensure that "the status of a file which is not exempted does not change by the addition to it of information from an exempted operational file; the receiving nonexempted file remains subject to search and re-

165. *Id.*

166. *See, e.g.*, Paisley v. CIA, 712 F.2d 686 (D.C. Cir. 1983), *modified*, 724 F.2d 201 (D.C. Cir. 1984); Holy Spirit Ass'n for Unification of World Christianity v. CIA, 636 F.2d 838 (D.C. Cir. 1980), *vacated in part*, 455 U.S. 997 (1982); Goland v. CIA, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

167. *House Intelligence Comm. Report*, *supra* note 88, at 29-30.

view."[168] On the other hand, it was equally important to protect the exempted status of the operational file from which the information was derived or disseminated. In order to do so, paragraph 701(d)(2) was written to provide that the dissemination of information from an exempted operational file to a nonexempted file does not change in any way the exempted status of the originating operational file. "Therefore, under paragraphs 701(d)(1) and (2), the flow of records and information from a file which is exempted to a file which is not exempted has no effect on the exempted/nonexempted status of the two files."[169]

Paragraph 701(d)(3) was not included as a separate provision in the legislation until the introduction of H.R. 5164. It addresses a particular internal record-keeping practice of the CIA that was discussed during the Senate and House Intelligence Committee hearings and touched upon earlier. On rare occasions, information is shown to the Executive Director, Deputy Director and/or Director that is of such a sensitive nature that the documents themselves are not maintained in the Executive Registry but taken back to operational files for retention. In such cases, the CIA requires that a "dummy copy" of the document be filed in the Executive Registry in lieu of the document itself.[170] The "dummy copy" is a reference page that contains sufficient information concerning the subject matter, author, and location of the document so as to make it retrievable. The Executive Registry remains subject to FOIA search and review under the Act and the Senate Intelligence Committee Report, in discussing the referencing requirement, states that "under H.R. 5164 all records contained in the Executive Registry, and all records referenced in the Executive Registry by marker references, will remain subject to FOIA search and review requirements. All documents referenced in the Executive Registry will be subject to search and review."[171]

Language in the legislative history, however, was felt to be inadequate. In testifying before the House Intelligence Committee for the ACLU, Mark Lynch noted the clear legislative intent in the Senate Intelligence Committee Report, but went on to state: "We think this issue is sufficiently important that it should be elevated from the level of being dealt with in report language and should be

168. *Id.* at 31.
169. *Id.* at 32.
170. *See Senate Intelligence Comm. Hearing, supra* note 88, at 30-31.
171. *Senate Intelligence Comm. Report, supra* note 88, at 14.

dealt with in statutory language, which should not be too difficult to draft."[172] And so it was. The paragraph reads:

> (3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.[173]

Language in the House Intelligence Committee Report clearly sets forth the intent of the paragraph:

> As a result of this provision, when the CIA is searching a non-exempted file for records responsive to a FOIA request and locates a marker reference which substitutes for a record in an exempted operational file which may be responsive, the CIA must retrieve the record from the exempted operational file and process it in response to the FOIA request.
>
> The market [sic] reference practice is of particular importance given its use in some circumstances in the Executive Registry of the CIA, which serves the Director of Central Intelligence, the Deputy Director of Central Intelligence and the CIA Executive Director. Under H.R. 5164 all records contained in the Executive Registry, and all records referenced in the Executive Registry by marker references, will remain subject to the FOIA search and review requirements.[174]

3. Judicial Review

Judicial review was by far the most difficult and complex issue that had to be dealt with by the legislation. Interestingly enough, the subject of judicial review was not really addressed by those concerned with the legislation until after the hearing before the Senate Intelligence Committee. During this hearing, it became clear that there were widely divergent opinions as to whether there would be any judicial review at all of the actions taken by the CIA pursuant to the legislation. The Senate Intelligence Committee decided that there should be, and added judicial review provisions. Further concerns were expressed in the hearings before the House

---

172. *House Intelligence Comm.. Hearing, supra* note 88, at 50.
173. 50 U.S.C. § 431(d)(3) (Supp. II 1985).
174. *House Intelligence Comm. Hearing, supra* note 88, at 32.

Intelligence Committee and the provisions were revised. Some of the remarks and exchanges made during these hearings are important in understanding how Congress finally decided upon the judicial review provisions in the Act.

As judicial review was not mentioned in Deputy Director McMahon's prepared testimony for the Senate Intelligence Committee hearing, the issue first arose during an exchange between Senator Walter Huddleston and Deputy Director McMahon and Deputy General Counsel Mayerfeld.[175] Senator Huddleston asked them whether they agreed with his assumption "that the courts would be able to review the determination that a particular file or set of files is exempt from search and review."[176] They did not agree, and Mr. Mayerfeld responded that he understood "the designation by the DCI would not be judicially reviewable and that this bill would delegate that authority to the DCI."[177] He then added that "any other interpretation I think would turn this legislation on its head, because if every time the designation by the DCI were challenged in court, we would be right where we started."[178] It was clear from further questioning that the CIA felt any kind of judicial review would defeat the relief sought by the legislation.[179]

The concern over judicial review began to crystallize during the second day of hearings before the Senate Intelligence Committee.[180] The prepared statement and oral remarks of Mark Lynch best illustrate the lack of exchange and opposing assumptions that had existed concerning judicial review during the previous months

---

175. *Senate Intelligence Comm. Hearing*, *supra* note 88, at 23.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. In his opening statement, Senator David Durenberger listed the lack of judicial review as one of the problems he had with the bill. *Id.* at 45. Senator Daniel Inouye made it clear in his prepared statement that he felt judicial review would apply, just as it does under the current FOIA. *Id.* at 54. Chairman Barry Goldwater asked Mary Lawton from the Department of Justice whether she thought the DCI designations should be subject to judicial review. Ms. Lawton replied that she believed "it would be very difficult . . . for a court which has no knowledge of or experience with the CIA filing system to second-guess the Director on a description of whether the files fit the statutory definition." *Id.* at 47. In a subsequent exchange with Senator Patrick Leahy, Ms. Lawton indicated her belief that S. 1324 did not provide for judicial review, and that if the legislation remained silent on the issue of judicial review, case law would allow the Department of Justice the option of arguing that judicial review of the designations was precluded. *Id.* at 51. If some form of judicial review were included, Ms. Lawton made it clear that the Department of Justice would press the courts to give great deference to the designation decision of the DCI. *Id.*

of discussion. In summarizing his statement for the Committee, Mr. Lynch expressed "surprise" at the CIA's testimony on judicial review and expressed the ACLU's position that judicial review was "absolutely essential."[181] His prepared statement indicated the ACLU's belief that the bill's silence on judicial review meant that the courts would have the authority to conduct de novo judicial review of the operational file designations and went on to press the committee to have the bill and the legislative history clearly provide for such a review. In his view, de novo judicial review would not result in the document-by-document review feared by the CIA. To resolve any question about the availability of judicial review, Mr. Lynch proposed that the designation authority of the DCI be struck and the bill structured so that Congress determined which operational files could be designated.[182] He felt that such a congressional determination, along with the necessary legislative history, "would make it clear that this action, like all other actions under the act, are subject to judicial review" and would preclude the Justice Department from arguing that the standard of review was other than de novo.[183]

Subsequent witnesses differed in their views on judicial review of the file designations. There was testimony from representatives of the American Newspaper Publishers Association,[184] the Society of Professional Journalists,[185] the ABA Standing Committee on Law and National Security,[186] and the Center for Law and National Security.[187] The two-day hearing impressed everyone with the impor-

181. *Id.* at 68.

182. *Id.* at 71, 73-74.

183. *Id.* at 76.

184. Charles S. Rowe, testifying on behalf of the American Newspaper Publishers Association, stated that the absence of judicial review was "of primary concern" to his association. *Id.* at 79. He went on to state that the de novo review provision of the FOIA "put teeth into the law and helped make it an effective tool for the public." *Id.* at 80.

185. Steven Dornfeld, National President of the Society of Professional Journalists, questioned whether "the lack of review [would] increase the likelihood of abuses by the Agency." *Id.* at 85.

186. John Shenefield, a member of the ABA Standing Committee on Law and National Security, appearing in his personal capacity, testified that the bill's silence on judicial review would reasonably allow for the conclusion that it was not available, which he believed was "appropriate." *Id.* at 98. As for the proper standard of judicial review should the Congress provide for it, he stated his belief "that de novo review in this area is absolutely inappropriate." *Id.* at 99.

187. The last remarks made on the issue of judicial review came from John Norton Moore. Mr. Moore, Director of the Center for Law and National Security, University of Virginia Law School, and Chairman of the ABA Standing Committee on Law and National Security, had also testified in his personal capacity. In responding to a question concerning

tance of the judicial review issue and the necessity for the Senate Intelligence Committee to clearly express its intentions through statutory language, legislative history, or both. It soon became evident that if the legislation was to survive politically, some kind of statutory judicial review provision had to be crafted. Over the next three months, intensive and tedious negotiations took place in an effort to reach agreement on provisions to govern judicial review. With the CIA having testified against any judicial review and the ACLU and press groups insisting on de novo judicial review, it was difficult, to say the least, and required give and take on all sides.

Agreement was finally achieved, however, and on October 4, 1983 the Senate Intelligence Committee met to mark up S. 1324. All Committee members who addressed the judicial review amendment, contained in a new subsection 701(e) and incorporated into the substitute bill, expressed their support for it. The CIA was commended for moving from its position of no judicial review.[188] Senator Leahy discussed one of the major areas of concern that had been identified in the negotiations on a judicial review provision:

> In our discussions, it became clear that the Agency's central concern was not judicial review per se, but a fear that plaintiffs might be able to use the discovery process to circumvent the Bill's intent and uncover sensitive aspects of CIA operational file systems. As a member of this Committee, I understand and share the CIA's concern in this respect. For this reason, I agree with draft Report language which states that '[t]he Committee does not intend that this amendment will require CIA to expose through litigation, via discovery or other means, the make up and contents of sensitive file systems of the Agency to plaintiffs.'[189]

The new subsection 701(e), consisting of two paragraphs, was intended "to provide for judicial review in certain circumstances."[190]

---

judicial review, Mr. Moore testified emphatically that there should be no judicial review of the designations; furthermore, he had no doubt that under the language of S. 1324 the designations by the DCI would not in fact be reviewable. *Id.* at 103-04.

188. *See id.* at 122-24 (remarks of Senator Patrick Leahy); *see also id.* at 113 (remarks of Senator Daniel Inouye); *id.* at 116 (remarks of Senator Walter Huddleston). For text of new subsection 701(e), see S. 1324 as reported, *reprinted in* 129 CONG. REC. S16742-43 (daily ed. Nov. 17, 1983).

189. *Senate Intelligence Comm. Hearing, supra* note 88, at 124. Draft report language cited included in final Senate Intelligence Committee Report at 19.

190. *Senate Intelligence Comm. Report, supra* note 88, at 19.